LABOUR COURT

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR729/16

In the matter between:

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION — **First Applicant**

BC MASHOLOGO — **Second Applicant**

and

THE METAL AND ENGINEERING BARGAINING COUNCIL — **First Respondent**

D MASENYE *N.O.* — **Second Respondent**

MURRAY AND ROBERTS POWER AND ENERGY — **Third Respondent**

Heard: **21 November 2018**

Delivered: **13 December 2018**

Summary: **Section 186(2) – sanction short of dismissal for participating in an unprotected strike – it is incumbent upon each employee to dissociate him/herself from the striking employees and communicate that decision to the employer in no uncertain terms.**

JUDGMENT

Nkutha-Nkontwana. J

Introduction

[1] The first applicant, Association of Mineworkers and Construction Union (AMCU), acting on behalf of the second applicant, Mr BC Mashologo (Mr Mashologo), seeks an order reviewing and setting aside the arbitration award issued by the second respondent, Mr D Masenye (arbitrator), under case number CDR/MM15/186 dated 8 March 2016. The arbitrator found that the third respondent, Murray & Roberts Power and Energy (Murray & Roberts), did not commit an unfair labour practice and that the sanction of final written warning and peace agreement issued against Mr Mashologo was fair.

[2] The application is only opposed by Murray & Roberts which raised a point *in limine* to the effect that the matter has since become moot.

Is the matter moot?

[3] Mr Pretorius, Murray & Roberts' attorney, submitted that Mr Mashologo is no longer in the employ of Murray & Roberts consequent to a retrenchment. Also, that the final written warning lapsed after a year from the date which it was issued and that Mr Mashologo never signed the Peace Agreement.

[4] AMCU, on the other hand, is adamant that the dispute is not moot as Mr Mashologo's employment record has been tainted by a finding of guilty for participating in an unprotected strike and that he was never paid for the days he was not at work.

[5] In *South African Transport and Allied Workers Union v ADT Security* (Pty) Ltd,[1] confronted with the question of mootness of the matter, the Labour Appeal Court s (LAC) stated that:

LABOUR COURT

[1] *South African Transport and Allied Workers Union v ADT Security* (Pty) Ltd [2011] 9 BLLR 869 (LAC); (2011) 32 ILJ 2112 (LAC) at paras 4 - 5. *National Employers Association of South Africa*

'[4] The principles relating to mootness have been well established in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (1) BCLR 39 (CC) in which the Constitutional Court said:

"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." (At 54 footnote 18).

[5] In *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC), the Constitutional Court held that, where there was no live controversy between the parties, and, in the absence of any suggestion that any order might have an impact on the parties, the disputes between the parties were moot especially since future cases inevitably presented different factual matrixes and hence no purpose would be served in resolving the dispute. See also *Radio Pretoria v Chairman of the Independent Communication Authority of South Africa and Another* 2005 (3) BCLR 231 (CC).'

[6] In the present case, it is evident that there is still a live controversy between the parties. Even though Mr Mashologo has since been retrenched, he seems to be of the view that if he is successful in this application, he will be entitled to monetary relief and reimbursement monies deducted as a result of Murray & Roberts enforcing a principle 'no work no pay'.

[7] Accordingly, the point *in limine* is untenable.

Factual background

[8] Murray & Roberts is a construction and/or a subcontractor in relation to construction and engineering works performed at the Medupi Power Station Project (Medupi Project) in the area of Lephalale in the Limpopo Province. It is one of many contractors and sub-contractors engaged by Eskom to build the power station at the Medupi Project.

(NEASA) v Metal and Engineering Industries Bargaining Council (MEIBC) and Others [2015] ZALAC 11; (2015) 36 ILJ 2032 (LAC) at paras 6 - 7.

LABOUR COURT

[9] There are two collective agreements that were concluded in respect of the Medupi Project pertinent in this matter, firstly, the Project Labour Agreement (PLA) and the Final Partnership Agreement (FPA). These collective agreements were intended to create consistency of approach with regard to labour management matters at the Medupi Project. The parties to the collective agreement committed themselves to the promotion of co-operation, industrial peace and harmony and to ensure that fair and proper channels, practices and policies and procedures are followed proactively to resolve differences between and amongst all of them. The collective agreements accord with section 213 read with section 23 of the Labour Relations Act[2] (LRA).

[10] The collective agreements regulate, *inter alia*, the site specific terms and conditions of employment, including the minimum wages to be paid to the employees working at the Medupi Project; the Industrial Relations Procedures and Practices which are to be adhered to; the reciprocal rights and obligations of the trade unions, employees and contractors, and the dispute resolution to be followed in respect of disputes arising at the Medupi Project.

[11] On 25 March 2015, there was an unprotected strike in support of the following demands:

11.1. Unit six uncompleted bonus;

11.2. Removal of expatriates;

11.3. Abolishment of hostels; and

11.4. A food allowance.

[12] AMCU asserts that it was not part of the unprotected strike and was, in any event, not a recognised trade union and/or a signatory to the collective agreements. The employees were not required to be at work at 12h00 on 28

[2] Act 66 of 1995 as amended.

LABOUR COURT

March 2015 to 7 April 2015. When the employees resumed work on 8 April 2015 they continued with the unprotected strike. On 9 April 2015, there was violence and intimidation and the route leading to the workplace was blockaded. The buses that transport employees to work were forced to turn back with employees.

[13] Murray & Roberts used Short Message Service (SMS) to communicate with its employees. On 9 April 2015, it sent an SMS stating that the bus services would not run due to continued intimidation and violence. On 17 April 2015, the contractors and subcontractors at the Medupi Project approached this Court for an urgent interdict as their employees were involved in the unprotected strike. The interdict was granted. Murray & Roberts sent its employees, including Mr Mashologo, SMS informing them of the court order and where the copies could be accessed. The order had little effect as no one returned to work.

[14] Murray & Roberts issued SMS ultimatums to employees, including Mr Mashologo, to report for induction between 22 and 28 April 2015. The buses were arranged to pick up employees from the hostels. Mr Mashologo did not attend the induction.

[15] Murray & Roberts decided to take disciplinary action against all employees who were involved in the unprotected strike and/or committed acts of misconduct, intimidation and violence. The employees were grouped into the following categories:

15.1. Group A comprised of the employees who allegedly reported for duty for the whole period of the unprotected strike;

15.2. Group B comprised of employees who allegedly committed minor offences and were offered as a settlement a Peace Agreement, which, by accepting its terms, they almost immediately returned to work. The terms of Peace Agreement are as follows:

LABOUR COURT

‘As a result of unprotected and unlawful strike action that occurred at the Employers’ Medupi Power Project… which commenced on 25 March 2015 and the resultant Court interdict obtained on 17 April 2015, the **Employer has set the following terms for allowing employees to return to work as below**:

1. **The Employee will return to work <u>as per the notification by the employer</u>.**

2. The employee confirms that he understands and accepts, without exception, the terms of his/her return to work as requested by the Employer as follows:

   2.1 the Employee unconditionally agrees and undertakes to return to work when requested by the Employer, and tenders his/her services in accordance with his/her contract of employment and the terms of applicable clauses of the Partnership Agreement (PA), the Site Specific Agreement (SSA) and Project Labour Agreement (PLA).

   2.2 The Employee agrees and accepts that the principle of NO WORK NO PAY will apply for the period from 27 March 2015 until the return of the Employee to the site.

   2.3 The Employee further agrees and accepts that all of the accused Project Bonus from December 2014 to the date of return to the site has been forfeited and lost due to his participating in an unprotected, un-procedural, unlawful and violent strike action.

   2.4 Subject to paragraph 4 below, as a result of unprotected, un-procedural, unlawful and violent strike action which commenced on 25 March 2015, the Employer reserves the right to implement disciplinary action against those Employees who participated in such strike action and can be identified as having participated in misconduct which included but not

LABOUR COURT

limited to, acts of intimidation, violence and damages to property.

3. The employee confirms that the applicable clauses of the PLA, PA and SSA applies to both the Employer and Employee and that all future grievances will be addressed in terms of the Grievance and/or Dispute Resolution Procedures and/or any amendments that may arise thereto.

4. The Employee acknowledges that any further unprocedural, unprotected and unlawful strike action would constitute a breach of contract of employment and the provisions of the PA, PLA and SSA. By signing this agreement, the Employee accepts a Final Written Warning as a result of his/her participating in an unprotected strike action and/or failure to adhere to the stipulation of the Court Interdict. The Employees further accepts his/her services being legally terminated (by following procedures as per the PA, PLA and SSA), SHOULD he/she participate in any form of work stoppage, sit down or unprotected strike action during the duration of the project.

5. The Employee further accepts and confirms that the employer will not tolerate circumstances where employees does not follow procedures and engages in breaches of his/her conditions of employment, PLA, PA, SSA and the Labour Relations Act.

6. This is the full and final agreement between the parties and no alterations, variations or additions will be of any force or effect unless reduced to writing and signed by both parties.'

[16] Group B included the employees who refused to accept the terms of the Peace Agreement and were subjected to a disciplinary enquiry before they were allowed back to resume work. Whether they were found guilty or not, they had to sign the Peace Agreement.

[17] Mr Mashologo was one of the Group B employees. They were charged as follows:

LABOUR COURT

'Count 1: Participating in an unprotected strike action

'It will be alleged that your members who are in the employ of MRPE on the list have participated in an unprotected industrial action and have failed to render their services in accordance with their Contract of Employment of the period 25 March 2015 to 17 April 2015.'

Count 2: Participating in an unprotected strike action and failure to comply with the Labour Court Order served on 17 April 2016.

'It will be alleged that your members who are in the employ of MRPE have failed to comply with the Labour Court Order served on your union and its members who are in the employ of MRPE on 17 April 2015 in that your members who are in the employ of MRPE have continued to participate I an unprotected industrial action and have failed to render their services in accordance with their Conditions of Employment from 17 April 2015 to date.'

Count 3: Continued refusal to follow a direct and lawful instruction

'It will be alleged that your members who are in the employ of MRPE have ignored the ultimatum issued on your union and the members who are in the employ pf MRPE on 23 April 2015 and again on 25 April 2015 in that your members failed to present themselves for duty to render their services on 28 April 2015, despite a final ultimatum being issued to your union and its members who are in the employ of MRPE instructing them to report for duty.'

[18] Mr Mashologo was one of the two employees' representatives during the disciplinary proceedings. They were found guilty as charged and a sanction of a final written warning and Peace Agreement was mitted out to them. AMCU referred a dispute to the first respondent, the Metal and Engineering Industries Bargaining Council (MEIBC), challenging both the finding of guilty and the sanction. The arbitrator found in favour of Murray & Roberts.

Evaluation

[19] Tritely, failure by a commissioner to apply his or her mind to issues which are material to the determination of a case constitutes a reviewable irregularity. But, to result in the setting aside of the award, it must, in

LABOUR COURT

addition, reveal a misconception of the true enquiry and/or result in an unreasonable outcome.[3]

[20] There is an obsession by the litigants to deal with the adequacy of reasons as in a manner that seem to advocate that a reviewing court must undertake two separate analysis, one for the reasons and another one for the result. In my view, the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within the range of reasonable outcomes. To me, this accords with the review test professed in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[4] and succinctly expounded in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others.*[5]

[21] It was Murray & Roberts' undisputed evidence that the demands that were the subject matter of the unprotected strike pertained to all employees at the Medupi Project. Even though, Mr Mashologo was at work on 25,27 and 28 March 2015 and 8 April 2015, he never reported for duty from 9 to 17 April 2015. It is instructive that, despite his defence that there was no transport to go to work as the bus services had been suspended, he conceded that there were employees who did report for duty using other means, including their own motor vehicles.

[22] Mr Mashologo, further conceded that he never attempted to get to work after receiving the SMS that the bus services were suspended due to violence and intimidation even though he did not experience any intimidation or violence himself. It was his evidence that his fright was informed by what he was told by the employer and other people. As a result, he ignored the SMS's informing him about this Court's interdictory order and the ultimatum to attend the statutory induction for purposes of returning to work.

LABOUR COURT

---

[3] See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC)*; Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia) [2013] 11 BLLR 1074 (SCA); Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at paras 14 to 16 and *Department of Education v Mofokeng Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC).

[4] *Sidumo, supra.*

[5] *Goldfield, supra.*

[23] Mr Mashologo's defence, like a proverbial goal post, kept on shifting. He testified that the buses did not arrive to pick up the employees to the induction venue. Nonetheless, he would not have used the buses as he was afraid to wear his PPE and, in any case, he did not now the venue. Murray & Roberts led evidence that the buses were available and even though the employees had to wear their PPE as they were going to resume with duties after the induction, some employees came in private clothes in order not to be easily identifiable. The venue was not disclosed for security reasons. This evidence was not seriously controverted.

[24] To my mind, if indeed Mr Mashologo was not involved in the unprotected strike and did not report for duty simply because there was no transport, he ought to have been the first one to avail himself to the resumed bus services and attended the induction.

[25] It will be an arduous burden to expect employers faced with an unprotected strike to deal with minute details of each employee who did not report for duty. It is incumbent upon an individual employee to dissociate him/herself from the striking employees and communicate that decision to the employer in no uncertain terms. In the present case, the arbitrator correctly found that Mr Mashologo failed to demonstrate an intention to return to work.

[26] I now deal with the sanction. AMCU's qualm with the sanction is mainly the Peace Agreement. Ms Collet, counsel for AMCU, submitted that it was unfair to force employees to admit to being part of an unprotected strike and to, *inter alia*, concede to matters of mutual interest on a full and final basis. There is no merit in this submission.

[27] Mr Van Wyk testified that employees who made attempts to come to work, contacted their supervisors and attended the induction when instructed to do so, were also offered the Peace Agreement instead of dismissal. In fact, even in instances where employees were found not guilty of participating in an unprotected strike because their superiors vouched for them, they still had to accept the Peace Agreement.

LABOUR COURT

[28] Most essentially, there is nothing fractious about the Peace Agreement. Mr Mashologo had already been found guilty of participating in an unprotected strike. I accept Murray & Roberts submission that the Peace Agreement was a condition imposed by Eskom which sought to ensure a commitment from employees to comply with the terms of their employment contracts and the relevant collective agreements that were also binding to the members of AMCU even though it was not a recognised trade union. Also, the principle of 'no work no pay' in the context of a strike situation is a fathomable reality that need no validation.

[29] In my view, the arbitrator is not required to make an explicit finding on each constituent element, however subordinate, leading to his/her final conclusion. Put differently, if the reasons provided enables the Court to understand why the arbitrator made his/her decision and to determine whether the conclusion is within the range of reasonable outcomes, the *Sidumo* test is met.

Conclusion

[30] In all the circumstances, I am satisfied that the award is reasonable and therefore irrefutable. The application stands to be dismissed.

Costs

[31] AMCU was flagrantly ill-considered in launching this application. Mr Mashologo, like all other employees of Murray & Roberts who were found guilty of participating in an unprotected strike, some of whom were AMCU members, was treated in an indulgent and objective manner. It is, therefore, equitable that costs should follow the result.

[32] In the premises, I make the following order:

Order

LABOUR COURT

1. The review application is dismissed with costs.

____

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the applicants:	Advocate S Collet
Instructed by:	Larry Dave Incorporated
For the second respondent:	Mr D Pretorius
From:	Fluxmans Incorporated

LABOUR COURT