THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable
Case no: 442/2011

In the matter between:

ETHEKWINI MUNICIPALITY **Appellant**

and

THE SOUTH AFRICAN MUNICIPAL WORKERS UNION **First Respondent**

THE INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION **Second Respondent**

THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **Third Respondent**

Neutral citation: *Ethekwini Municipality v SAMWU* (442/11) [2013] ZASCA 135 (27 September 2013)

Bench: **PONNAN, CACHALIA, LEACH, MAJIEDT and WILLIS JJA**

Heard: **17 SEPTEMBER 2013**

Delivered: **27 SEPTEMBER 2013**

Summary: **Appeal – s 21A(1) of the Supreme Court Act 59 of 1959 – power of court to dismiss appeal where judgment or order sought would have no practical effect or result.**

ORDER

On appeal from: Labour Appeal Court (Jappie JA (Davis and Revelas JJA concurring)):

The appeal is dismissed in terms of s 21A of the Supreme Court Act 59 of 1959 and each party is ordered to pay its own costs.

JUDGMENT

PONNAN JA (CACHALIA, LEACH, MAJIEDT and WILLIS JJA concurring):

[1] In this appeal counsel were, at the outset of the hearing, required to address argument on the preliminary question of whether the appeal and any order made thereon would, within the meaning of Section 21A of the Supreme Court Act 59 of 1959 (the Act), have any practical effect or result. After hearing argument on this issue the appeal was dismissed on 17 September 2013 in terms of that section and each party was ordered to pay its own costs of the appeal. It was intimated then that reasons would follow. These are those reasons.

[2] Courts should and ought not to decide issues of academic interest only. That much is trite. In *Radio Pretoria v Chairman, Independent Communications Authority of South Africa & another* 2005 (1) SA 47 (SCA), this court expressed its concern about the proliferation of appeals that had no prospect of being heard on the merits as the order sought would have no practical effect. It referred to *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA) para 26 where the following was said:

'The present case is a good example of this Court's experience in the recent past, including unreported cases, that there is a growing misperception that there has been a relaxation or dilution of the fundamental principle . . . that Courts will not make determinations that will have no practical effect.'

[3] Section 21A(1) of the Supreme Court Act 59 of 1959 provides:

'When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

Of s 21A, this court stated in *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & others* 2001 (2) SA 872 (SCA) para 7:

'The purpose and effect of s 21A has been explained in the judgment of Olivier JA in the case of *Premier, Provinsie Mpumalanga, en 'n Ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA). As is there stated the section is a reformulation of principles previously adopted in our Courts in relation to appeals involving what were called abstract, academic or hypothetical questions. The principle is one of long standing.'

[4] The primary question therefore, one to which I now turn, was whether the judgment sought in this appeal would have any practical effect or result. It arises against the backdrop of the following facts. On 29 May 2007 the appellant, the Ethekwini Municipality (the Municipality), concluded a collective agreement styled 'Divisional Conditions of Service' (the agreement) with the South African Municipal Workers Union (SAMWU) and the Independent Municipal and Allied Trade Union (IMATU), the first and second respondents, respectively. The agreement was concluded within the South African Local Government Bargaining Council (SALGBC). Although cited as a party SALGBC took no part in the proceedings either in the courts below or in this one.

[5] On 18 July 2007 SAMWU lodged an urgent application in the Labour Court (LC). It sought the following relief:

'1. (a) That it be and it is hereby declared that the document described as the Collective Agreement on Divisional Conditions of Service . . . is void and of no legal effect;

(b) That the First Respondent [the Municipality] be and it is hereby interdicted and restrained from implementing the terms of the Divisional Agreement;

(c) That the First Respondent pay the costs of this application.

2. That the interdict in paragraph 1 (b) above operate with immediate effect pending the final determination of this application.'

[6] In support of that application SAMWU alleged:

'11.

As appears from [SALGBC's] Constitution a distinction is made between the Central Council of [SALBBC] and Divisions of the Council. The distinction between the Central Council and the Divisions of the Council is pivotal to the validity of collective agreements concluded in the council. This is because a distinction is drawn between matters of national competence and matters of divisional competence in relation to the powers to conclude collective agreements dealing with those topics. The matter was dealt with in a collective agreement which was published in the Government Gazette dated 18 June 2004 under Notice R716. A copy of that agreement is annexed hereto marked "C". The agreement although expressed to remain in force until 30 June 2005 has continued to remain in force and the levels of bargaining set out in that agreement continue to bind the parties to [SALGBC]. The [municipality] is a member of SALGA, which is a party to the council and the [municipality] is accordingly bound by the Constitution and Collective Agreement of the [SALGBC].

12.

Section 4 of the published agreement specifically directs that certain matters may be bargained collectively at a national level only. Other matters are to be bargained at a divisional level only . . .

13.

It follows from the aforegoing that the eThekwini division has no jurisdiction to bargain with regard to matters falling within a national competency. These have to be bargained in the Central Council . . .

14.

The Divisional Agreement deals with a whole host of matters that fall within national competency and beyond the jurisdiction or competency of the eThekwini Division . . .

. . . .

17.

In those circumstances I am advised that the Divisional Agreement covering matters that are beyond its competence, is void and of no legal effect.

18.

The Applicant has sought to take this matter up through the [SALGBC]. It referred the matter to the [SALGBC] by letter date 14 June 2007 . . .

19.

I indicated in the letter that in the light of these defects which go to the heart of the collective agreement that [SAMWU] asked for the agreement to be set aside in its entirety to enable the parties to recommence negotiations in accordance with the relevant resolution of the [SALGBC's] Executive Committee.'

[7] On 8 August 2007 IMATU launched a separate application in the LC. It sought relief that was to all intents and purposes identical to that sought by SAMWU. In due course there was a consolidation of those two applications and both matters came to be argued before the LC on 14 September 2007.

[8] In the meanwhile, by circular dated 30 March 2007, the City Manager of the Municipality notified its employees that it was implementing the agreement with effect from 1 April 2007. Thus by the time the application came to be heard by the LC the interim relief sought had been rendered academic.

[9] On 26 September 2007 the LC (per Moshoana AJ) issued the following order:

'1. The collective agreement on Divisional conditions of service dated 29 March 2007 is hereby declared null and void and of legal force and effect.

2. No order as to costs.'

[10] With the leave of the LC the Municipality appealed to the Labour Appeal Court (LAC). The LAC dismissed the appeal with costs. Jappie JA (Davis and Revelas JJA concurring) reasoned:

'[36] It is common cause that the Division Agreement in clauses 8 and 9 deal with annual leave and the conversion of vacation leave to sick leave, which are matters reserved to be bargained for at national level. Similarly clauses 15 and 17 of the Divisional Agreement in

respect of medical aid and pension fund membership are in conflict with clauses 4.2.1 and 4.2.3 of the National Collective Agreement.

. . . .

[38] . . . In the present matter the parties were bound by the National Collective Agreement. Clauses 4.2 and 4.3 of the National Collective Agreement expressly reserved certain matters that are to be bargained for at national level only. It is apparent that the parties, when concluding the Divisional Agreement, bargained for matters beyond their competence and which fell exclusively within the ambit of the National Collective Agreement. The parties, therefore, bargained and contracted beyond their contractual capacity.

[39] The question of severability although raised by the parties, seemed not to have been considered by the *court a quo*. However, this does not assist the Appellant. The Appellant contended that those parts of the Divisional Agreement that are in conflict with the Constitution of SALBGC and the National Collective Agreement should be severed. It seems to me that matters such as medical aid, leave pay and membership of a pension fund form an integral part of the Divisional Agreement and the parties had spent a great deal of time in negotiating these matters. To sever these provisions from the Divisional Agreement would create doubt as to whether the parties would have reached consensus when concluding the Divisional Agreement.'

[11] Clause 2 of the divisional agreement headed 'Period of Operation', reads:

'This agreement shall come into operation in respect of the parties to the Agreement, on 1 [April] 2007 and shall remain in force until 31 March 2012.'

As the agreement had already run its course, the registrar of this court was directed to enquire of the parties whether the appeal was being persisted in and inform them that at the outset of the hearing of the appeal they would be required to address argument on the preliminary question of whether the appeal and any order made thereon would within the meaning of s 21A have any practical effect or result. In the further heads of argument filed on behalf of the parties to address the preliminary point raised, as also from the bar in this court, it was urged upon us that we should proceed to a consideration of the appeal on the merits.

[12] In supplementary heads of argument filed on its behalf, the Municipality alludes to the ramifications for it, were it to reverse the implementation of the divisional

agreement. But none of that is new. As long ago as 11 September 2007 the Municipality asserted in a supplementary affidavit deposed to by Mr David Vincent Cloete, its human resource manager, that:

'[A] total of 5,656 employees from the former North, South, Inner West, Outer West and Umkomaas entities had their salaries increased from 1 April 2007 as a result of the pay parity clause in the collective agreement (see clause 35). The annualised cost to the first respondent of these increases amounts to R11.3m.'

Mr Cloete then proceeded to describe in some detail what the reversal of pay parity would entail for the Municipality. Of necessity, so he stated, a re-calculation would have to be undertaken by the Municipality of, inter alia, income tax, pension fund contributions, overtime, UIF contributions, responsibility and stand-by allowances that had already been paid by the Municipality to its employees.

[13] On 16 July 2007 and prior to deposing to that affidavit, Mr Cloete wrote in response to a letter from SALGBC:

'We refer to your fax dated 2nd July 2007 received by ourselves on 3rd July.

We note that your General Secretary has been mandated to conduct an investigation into the Collective Agreement on Divisional Conditions of Service.

. . . .

Further confusion has been created in this matter in that SAMWU have instructed Shanta Reddy Attorney to threaten urgent litigation in the Labour Court. This threat is inappropriate and premature given that you are in the process of investigating the very same subject. Please confirm from Samwu that the investigation will not be hampered by litigation. It is submitted that until your investigation is complete, threats of litigation are premature and made in bad faith.'

[14] And so after initially asserting that an application to court would be premature, the Municipality took thereafter to contending that it would work grave hardship on it were it to be ordered to reverse the implementation of the agreement. That latter contention was in any event at odds with the Municipality's stance in the SAMWU application. In disputing SAMWU's assertion that the matter was urgent, Mr Cloete in his answering affidavit dated 23 July 2007 stated:

‘In the extraordinarily unlikely event that [SALGBC] decides that the entire divisional agreement is invalid, any financial prejudice to any employee resulting therefrom can be easily redressed.'

[15] I may add that leave to appeal was granted to the Municipality by this court on 8 June 2011. The LC had disposed of the matter fairly promptly. Thereafter, for reasons that do not emerge from the record, it took in excess of three years for the matter to be finalised before the LAC. Having obtained leave from this court on 8 June 2011, the Municipality was obliged in terms of the rules of this court to lodge the record of the proceedings with the registrar of this court on or before 7 October 2011. It, however, initially sought an extension until 7 February 2012 because as it was put 'a possible settlement is being negotiated'. Thereafter, a further three extensions were sought for the filing of the record and the record only came to be lodged with this court on 30 November 2012.

[16] Thus, notwithstanding the passage of some six years since the commencement of the matter and what at times can only be described as the Municipality's desultory approach to the prosecution of the appeal, it is now being urged upon us that the appeal still presents live issues. In my view it does not. The thrust of counsel’s argument from the bar in this court was that in all likelihood there will be further litigation between the parties flowing from the implementation of the agreement, which has since been held to be ‘void and of no legal effect’. Precisely what disputes will form the subject of that litigation and in which fora those disputes will be pursued was the subject of some speculation before us. In *Clear Enterprises (Pty) Ltd V Commissioner for South African Revenue Services & others* (757/10) [2011] ZASCA 164 (29 September 2011) a similar contention was dealt with in these terms:

‘[17] Simply put, whatever issues do arise in the pending matters none of them are yet "ripe" for adjudication by this court. To borrow from Kriegler J in *Ferreira v Levin NO & others*; *Vryenhoek v Powell NO & others* 1996 (1) SA 984 (CC) para 199:

"The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally the Canadians call it, "ripeness". That term has a particular connotation in the constitutional jurisprudence of those countries which need not be analysed now. Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a

court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor *Sharpe* points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. And the present cases seem to me, as I have tried to show in the parody above, to be pre-eminent examples of speculative cases. The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered."

[18] Although expressed somewhat differently and in the different context of constitutional adjudication where 'ripeness' has taken on a particular meaning, both the principles and policy considerations articulated by Kriegler J resonate with the jurisprudence of this court. Thus in *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & others . . .* 2001 (2) SA 872 (SCA) para 9, Plewman JA quoted with approval from the speech of Lord Bridge of Harwich in the case of *Ainsbury v Millington* [1987] 1 All ER 929 (HL), which concluded at 930*g*:

"It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved".

In a similar vein, in *Western Cape Education Department v George* . . . 1998 (3) SA 77 (SCA) at 84E, Howie JA stated:

"Finally, it is desirable that any judgment of this Court be the product of thorough consideration of, *inter alia*, forensically tested argument from both sides on questions that are necessary for the decision of the case."

And in *Radio Pretoria* (para 44), Navsa JA said:

"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 paragraph [7] (875A-D)). Furthermore, statutory enactments are to be applied to or interpreted against particular facts and disputes and not in isolation."

[19] In effect what the parties are seeking is legal advice from this court. But as Innes CJ observed in *Geldenhuys & Neethling v Beuthin* 1918 AD 426 at 441:

"After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important."

In *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 21 footnote 18, the Constitutional Court echoed what the learned Chief Justice had stated over eight decades earlier when it said:

"A case is moot and therefore not justifiable 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] There is a further obstacle in the path of the Municipality. In *National Union of Mineworkers & another v Samancor Ltd (Tubatse Ferrochrome) & others* (2011) 32 *ILJ* 1618 (SCA), Nugent JA expressed it thus:

'[14] But that is not the end of the matter. The basis for the decision of this court in *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd* [2005 (5) SA 433 (SCA)] was that it will not interfere with a decision of the Labour Appeal Court only because it considers it to be wrong: what is required in addition are special circumstances that take it out of the ordinary. It is because of that approach that this court takes to appeals from the Labour Appeal Court that leave to appeal will not be granted in cases that do not fall within that category. As it was expressed in that case:

"No doubt every appeal is of great importance to one or both parties, but this court must be satisfied, notwithstanding that there has already been an appeal to a specialist tribunal, and that the public interest demands that labour disputes be resolved speedily, that the matter is objectively of such importance to the parties or the public that special leave should be granted. We emphasize that the fact that applicants have already enjoyed a full appeal before the LAC will normally weigh heavily against the grant of leave. And the demands of expedition in the labour field will add further weight to that."

That is consistent with the observation by the Constitutional Court in *Dudley v City of Cape Town* [2005 (5) SA 429 (CC) para 9] that -

"[t]he LAC is a specialised appellate court that functions in the area of labour law. Both the LAC and the Labour Court were established to administer labour legislation. They are charged with the responsibility for overseeing the ongoing interpretation and application of labour laws and the development of labour jurisprudence".'

[18] Nugent JA added (para 15), '[t]he fact that leave to appeal has been granted upon application to the President of this court is not decisive of whether a case meets the criteria laid down in *Fry's Metals*. That question is one that is ultimately to be answered by the court itself upon consideration of an appeal'. Here, one searches in vain for 'special circumstances that take this case out of the ordinary'.

[19] The cumulative consequence of all the factors that I have alluded to is that no practical effect or result can be achieved in this case. For the aforegoing reasons the appeal was dismissed.

[20] That leaves costs: On 7 July 2011 the registrar of this court directed the attention of both parties to the provisions of s 21A and enquired whether the appeal was being persisted in. Both parties intimated that the appeal was being persisted in. That was the stance adopted before us in argument as well. Neither was an unwilling participant in the appeal. Moreover, the point which was held to be decisive of the matter was raised by the court and not one of the parties. In those circumstances it was deemed appropriate that each party be ordered to pay its own costs.

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V PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	G O van Niekerk SC (with P N Schumann) Instructed by: Shepstone & Wylie, Durban Webbers Attorneys, Bloemfontein
For 1st Respondent:	M Pillemer SC Instructed by: Tomlinson Mnguni James Attorneys, Umhlanga Rocks Honey Attorneys, Bloemfontein
For 2nd Respondent:	M Pillemer SC Instructed by: Futcher Attorneys, Umhlanga Honey Attorneys, Bloemfontein
For 3rd Respondent:	Abides the Decision of the Court Instructed by: South African Local Government Bargaining Council, Durban