REPUBLIC OF SOUTH AFRICA

INTHE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

Case no: P 337/12

In the matter between -

ALGOA BUS COMPANY (PTY) LTD **Applicant**

and

SOUTH AFRICAN TRANSPORT & ALLIED WORKERS UNION (SATAWU) **First Respondent**

TRANSPORT, ACTION, RETAIL& GENERAL WORKERS UNION (THOR) **Second Respondent**

TRANPORT AND ALLIED WOKERS UNION OF SOUTH AFRICA (TAWUSA) **Third Respondent**

THE PERSONS REFERRED TO IN ANNEXURE "A" TO THE NOTICE OF APPLICATION **Fourth Respondent**

Heard: 11 February 2014

Delivered: 15 May 2014

Summary: Application to dismiss the claim for damages on the basis of dispute of facts in motion proceedings. Claim for damaged may be dismissed if there are material disputes of facts in a matter launched by way of motion proceedings.

Insufficient evidence to determine the requirement of section 68 of the LRA were satisfied.

JUDGMENT

MOLAHLEHI, J

Introduction

[1] The applicant instituted a claim for damages in the amount of R13 55095.00, against the first respondents and more specifically for the purpose of this judgment from the first respondent arising from an unprotected strike which took place during 2011.

[2] The first respondent (SATAWU) has filed an application seeking to dismiss the applicant's main claim alternatively to have the matter referred to oral evidence. The application is brought on an urgent basis and that include an application to rescind the order made by Lallie J granting SATAWU leave to file an application for condonation for the late filing of the answering affidavit.

[3] The applicant's claim arises from the events that occurred during September 2011 when the respondents engage in an unprotected strike action.

[4] SATAWU seeks to have the application to have the applicant's claim dismissed on the grounds that there are disputes of facts and or that it is inappropriate to claim damages through motion proceedings.

The history of the litigation

[5] After receipt of the application in September 2012 the respondents filed a notice to oppose the applicant's claim but did not file an answering affidavit. The answering affidavit was filed a day before the first scheduled hearing on the 10th October 2013.

[6] The following day subsequent to the filing of the answering affidavit, on 11 October 2013, Lallie J postponed the matter and granted the first respondent leave to file

condonation for the late filing of the answering affidavit. The matter was then set down for hearing on 11 February 2014. On 7 February 2014, the first respondents filed the current application. The respondent further requested that the answering affidavit which is not properly before the Court be accepted as part of the founding affidavit in the current application.

[7] The unprotected industrial action of the 22 September 2011 entailed the bus drivers at Motherwell and Bay depots blocking the roads after taking control of the buses allocated to them in terms of their duties and in terms of the scheduled trips.

[8] The applicant contends that as a result of the unprotected strike action in September 2013, it suffered damages. The claim is based on the provisions of section 68 (1) (b) of the Labour Relations Act of 1995 which reads as follows:

> "(1) In the case of any *strike*
>
> Or *lock-out* or any conduct in contemplation or in furtherance of a *strike* or *lock-out*, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction -
>
> (a) . . .
>
> (b) to order the payment of just and equitable compensation for any loss attributable to the *strike* or *lock-out*, or conduct having regard to -
>
> (i) Whether -
>
> (aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;
>
> (bb) the *strike* or *lock-out* or conduct was premeditated;
>
> (cc) the *strike* or *lock-out* or conduct was in response to unjustified conduct by another party to the *dispute*; and
>
> (dd) there was compliance with an order granted in terms of paragraph (a);

(ii) the interests of orderly collective bargaining;

(iii) the duration of the *strike* or *lock-out* or conduct; and

(iv) the financial position of the employer, *trade union* or *employee*s respectively.

SATAWU'S case

[9] In the first instance SATAWU seeks condonation for non-compliance with the time frames as provided for in the rules of this Court. In other words SATAWU seeks to have the Court grant it an indulgence and treat the matter as urgent. The question that immediately arises in this respect is whether SATAWU has complied with the provisions of rule 8 of the Rules of the Court. In terms of Rule 8(2)(a), (b) and (c) of the Rules an applicant who lodges an application on an urgent basis has to provide reasons why the relief is urgent, why the requirements of the Rules were not complied with and why a shorter period of notice should be permitted.

[10] The reason for the urgency is explained by the deponent to the founding affidavit, Mr Niehause who is also the attorney of record for SATAWU in this matter. He states the following at paragraph 23 of the founding affidavit:

> "23. The current application is instituted in terms of Rule 11 of the Rules of this Court. The extent that this Rule envisages an application in accordance with Rule 7 of the Rules of Court this application does not comply with the normal timeframes. I respectfully refer the Honourable Court to the explanation above as to when the First Respondent became aware of the options it had in law, which explains why this application has been instituted only at the present late stage."

[11] The essence of the explanation for launching this application in the manner SATAWU did was according to Mr Niehause because he only discovered the legal point raised in the application during the course of the evening of 25 February 2014, when he was considering SATAWU's "options relevant to the non-filing of the condonation application."

[12] Mr Niehause does not explain why he waited from 11 October 2013 to 25 February 2014 to consider the point raised. It is important to note that the cases which Mr Niehause rely on in support of the point made dates back long before 11 October 2013. The case of *Molefe v Molefe* dates back to May 2002 and that of *Byway Projects 10 CC v Masingita* dates back to 2011. The case of *MEC for Finance and Economic Development v Masifundisane College CC* dates back to September 2013 before the order by Lallie J was made. This cases are discussed in details later in this Judgment

[13] Mr Niehause, in his affidavit somehow concedes that the explanation referred to above is not satisfactory. He however contends that the poor explanation is overshadowed by the irregular step or inappropriate step taken by the applicant in instituting motion proceedings to claim damages. He further contends that it would not serve the interest of justice if consideration was only to be given to the weakness of the condonation application.

[14] In support of its application that the court should dismiss the claim; SATAWU relied on a number of cases dealing with the issue of the dispute of facts arising in motion proceedings. The majority of the cases relied upon are those where the dispute of facts arose consequent to the issues as raised in the answering affidavit.[1]

[15] In *Public Servants Association obo Botha and another v MEC for Health*: *North West Provincial Government and Others*,[2] the applicant sought to have the respondents held in contempt of a court order. In addition to arguing that they were not in contempt of the Court order the respondents contended that the matter stood to be dismissed because the applicant ought to have foreseen a dispute of fact arising when they instituted their claim by way of motion proceedings. It was in this respect that it was held that the applicants should have foreseen that a dispute of facts would arise and therefore ought to have proceeded by way of action and not motion proceedings.

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[1] *Public Servants Association obo Botha and another v MEC for Health: North West Provincial Government and Others* (2013) 34 ILJ 1574 (LC*), Byway Projects CC* 10 v *Masingita Autobody* 2011 ZAGPJHC 54 (14 June 2011) *and Molefe v Molefe* [2002] ZANWHC 16 (16 me 2002) *and MEC for Finance and Economic Development KwaZulu Natal v Masifundisane Training Development* [2013] ZASCA 138 (27 September 2013).

[2] (2013) 34 ILJ 1574 (LC).

[16] In contending that the applicant's case deserve to be dismissed the first respondent relied also on the case of *Sigh v Adam*,[3] where the court per Murphy AJ as he then was, held that:

> "In her answering affidavit the respondent contends that because the applicant not only anticipated but accepted that there was a sharp dispute of fact relating to the central issue she is not entitled to relief, whether interim or otherwise, and that the relief sought in effect is final. Although the applicant does not say as much, I understand her submission to include the assertion that the application ought to be dismissed solely on the ground that it is inappropriate to proceed on notice of motion where the applicant realizes when launching an application that a serious dispute of fact, incapable of resolution on the papers was bound to develop. . ."

In my opinion, an application on this basis amounts to an irregular proceeding. Having anticipated a material dispute of fact that could not be resolved on the papers it was inappropriate for the applicant to seek a final interdict by way of notice of motion."

[17] It is important to note that the dispute of facts arose or was highlighted once the answering affidavit in the above case was filed.

[18] In Public Servants Association, Steenkamp J after quoting the above with approval observed pertinently that:

> "I agree that, in this case, there is a dispute of fact – indeed, it was pertinently raised by the respondents in their answering affidavit. However, I do not agree that the application should be dismissed on that ground alone. The applicant may not have anticipated the dispute of fact before it was raised in the answering affidavit."

[19] Another case which SATAWU relied on his *Bay Projects 10 CC v Masingita Auto Body and Another,*[4] in particular paragraph 11 of the judgment which reads as follows:

> "[24] The appellant sought a final order for the payment by way of motion proceedings. In this regard there are two principles that are relevant. Firstly, it is trite that motion proceedings are not appropriate for resolution of

[3](2006) 27 I LJ 385 (LC) at paragraph 14 and 16.
[4](2011) ZAGPHC (14 June 2011).

> material disputes of facts. Should a factual dispute arise which is incapable of being resolved in the papers there is a risk of dismissal of the application should the court, in the exercise of its discretion, not refer the matter for trial nor direct that oral evidence be heard on specified issues. A court will exercise a discretion to dismiss the application if the applicant ought to have foreseen, or in fact did foresee, when launching his application, that a serious dispute of fact, incapable of resolution on the papers was bound to develop. (Footnotes omitted). "

[20] In the heads of argument and in his submission Mr Niehause, emphasises the principle that where in motion proceedings a dispute of facts ought to have been foreseen by the applicant and those facts cannot be resolved through the papers then the application, as is the case in present matter according to him, should be dismissed. The argument is based on the decision in *MEC For Finance and Economic Development: KwazuluNatal v Masifundisane Development College CC*,[5] where it was held that:

> "The court below accordingly erred in deciding the matter when there was a dispute of facts incapable of resolution on the papers. Masifundisane should have realised this before proceeding by way of application and should have done so way of action."

[21] The same approach was adopted in *Transnet Limited v ERF 152927 Cape Town (Pty) Ltd and others*,[6] where the Supreme Court of Appeal Court quoting with approval what was said in *Room Hire CO (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd,*[7] had the following to say:

> "It is certainly proper that an applicant should commence proceedings by motion with knowledge of the probabilities of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the Court to apply Rule 9 to what is essentially the subject of an ordinary trial action."

[5](2013) ZASCR 133 (27 September 2013).
[6](2011) ZASCA 148 (26 September 2011).
[7](1949) 3 SA 1155 (T).

Rescission application

[22] It has to be noted that the rescission application of the order made on 11 October 2013, is brought on an urgent basis on 7 February 2014. A rescission application is governed by the provisions of section 165 of the LRA which reads as follows:

> "The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order -
>
> (a) erroneously sought or erroneously granted in the absence of any party affected by that judgment or order;
>
> (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
>
> (c) granted as a result of a mistake common to the parties to the proceedings."

[23] Mr Niehause, in his submission on behalf of SATAWU suggested that Lallie J made an error in making the order as she was not aware of the point raised in this matter at the time she made the order. The argument further suggested that had Lallie J been aware of the issues raised in the present application she would not have made the order as she did.

[24] As would appear from the case referred to upon by SATAWU above legal point raised and relied upon by SATAWU in particular those relied in this matter dates back to, 2002 and September 2013 before the order was made. It is for this reason that I am of the view that the proposition that the order which granted the respondent leave to file a condonation application was made in error bears no merit.

[25] The delay from October 2013 to February 2014 is excessive; the explanation as indicated above is unreasonable and unsatisfactory. In addition the application does not satisfy any of the requirements of section 165 of the LRA including principles established in the interpretation of this section.

Evaluation

[26] In addition to what has already stated earlier regarding the urgency and the rescission application SATAWU's case stands to fail even as concerning alleged dispute of facts.

[27] The approach to adopt when dealing with dispute of facts in motion proceedings received a detailed attention in the case of *South African Football Association v Mangope (SAFA)*,[8] where the broad principles regarding the issue of disputes of fact in motion proceedings was stated by Murphy AJA as follows:

> "[10] The inherently limited form and nature of evidence on affidavit means that on occasion an application will not be able to be properly decided on affidavit, because there are factual disputes which cannot or should not be resolved on the papers in the absence of oral evidence. The various provisions of Rule 7 of the Rules of the Labour Court take cognisance of this reality. Rule 7(3) requires the applicant to set out the material facts in the founding affidavit with sufficient particularity to enable the respondent to reply to them, while Rule 7(4) expects the same on the part of the respondent...."

[28] As stated in the SAFA matter there are three ways in which a dispute facts of may manifest itself in motion proceedings and those may be summarized as follows:

1) the respondent in the answering affidavit denies one or more of the material allegations made by the applicant in the founding affidavit and produce evidence to the contrary.

(2) the respondent admits the allegations made in applicant's affidavit but allege other facts which the applicant disputes.

(3) the respondent, while conceding that he has no knowledge of one or more material facts stated by the applicant, may deny them and put the applicant to the proof.

[29] In the SAFA matter, respondent contended that the matter should be referred to oral evidence as concerning a claim for damages for a prospective loss of future

[8] (2013) 34 ILJ 311 (LAC).

salary the Court in SAFA held that because of dispute of facts that arisen from its answering a plaintiff needs to adduce evidence enabling a fair approximation of the loss. Put in another way the plaintiff determination of the question of damages the needs to place before the Court a factual basis upon which the Court can determine the damages. LAC agreed with the coat aquo proceeding to determine merits of the claim for damages despite the claim being instituted on notice of motion and the respondent contending that there existed a dispute of acts

[30] In the unpublished judgment of *Bay Food v Deysel Trust t/a Blue Bay Food v Dayzel Ronelle Lauren and Anothe*r case number P343/13, Lagrange J in dealing with the issue of a claim for contractual damages instituted by motion proceedings had the following to say:

> "Nothing prevents an applicant from launching a claim for contractual damages by way of an application as the judgment in *Mangope (SAFA judgment)* makes clear .

[31] In the present instance it should be noted that, SATAWU contends that there exist dispute of facts without having properly placed before the Court its answering affidavit. It is important to note that from the above authorities it is not every dispute of fact that would warrant a dismissal of the claim or a referral to oral evidence. It is only a material dispute of fact that would warrant the dismissal of a claim instituted by way of motion proceedings.

[32] In failing to ensure that an answering affidavit is properly filed the respondent denied the Court the opportunity to asses in a fair manner whether there exist in this matter a dispute of facts. It is for this reason and others stated earlier that I am of the view that SATAWU's case stands to fail. It therefore

[33] Follows that the version of the applicant as concerning the merits of the claim, remains unchallenged. The question that remains to be answered however is whether the Court would be in a position, on the pleadings and the evidence before it, be able to determine the issue of the quantum of damages.

[34] In *SA Football Association v Mangope* (2013) 34 *ILJ* 311 (LAC**)**, the LAC dealing with the issue of damages had the following to say:

> "It is not competent for a court to embark upon conjecture or guesswork in assessing damages when there is inadequate factual basis in evidence.[9]

[35] In the present instance, while the applicant has pleaded and provided evidence in relation to the cause of action, namely that the damages arose from the unprotected strike actions by the respondents, it has not pleaded all the other aspects of section 68 of the LRA dealing specifically with the issue of quantum of damages. It is therefore my view that in order to ensure that justice is done the matter must be referred to oral evidence as concerning matters referred to in section 68(1) (b) (i), (ii), (iii) and (iv) of the LRA. I see no reason in law and the circumstances of this case why costs should not follow the results.

[36] In the premises, the following order is made:

1. The First Respondent's (Applicant in the present matter) is dismissed with costs.

2. The matter is referred to oral evidence for consideration of matters referred to in section 68(1) (b) (i), (ii), (iii) and (iv) of the LRA.

3. The parties are directed to hold a pre-trial conference within 14 days of date of this order and file same accordingly.

E Molahlehi

Judge of the Labour Court of South Africa

[9] At 333 para [44] Footnote omitted.

APPEARANCES:

For the Applicant: Adv JE Grogan

Instructed by: Joubert Galpin & Searle

For the Respondent: Attorney Minnaar Niehause

Instructed by: TAWUSA