



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 965/18

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS

UNION ("SAMWU")

Applicant

and

MXOLISI QINA

First Respondent

MILTON MYOLWA

Second Respondent

SIVIWE MALI

Third Respondent

Heard: 10 May 2018

Delivered: 25 May 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

- [1] The applicant (SAMWU), seeks an order on an urgent basis, that the operation and execution of the principal order of this Court issued on 11 April 2018 by Steenkamp J under the present case number is not suspended pending the final determination of the application for leave to appeal and/or any subsequent appeal proceedings that may follow.

- [2] SAMWU further seeks an order that pending the finalisation of any such appeals, and or the finalisation of the unfair dismissal dispute launched by the second respondent in the Commission for Conciliation Mediation and Arbitration (CCMA), the second respondent be interdicted and restrained from;
- a) Holding himself out as the provincial Secretary of SAMWU, office bearer or its official;
 - b) Dealing, communicating or addressing any members, official or constitutional structure of SAMWU;
 - c) Convening meetings, arranging protests, organising campaigns and or arranging gatherings, in the name of SAMWU with members of the public, municipalities or SAMWU members; and
 - d) Utilising SAMWU's letterhead, logo and trademark for any purpose whatsoever.
- [3] The application is premised on the provisions of section 18(1) and (3) of the Superior Courts Act.¹ The first, second and third respondents opposed the application on various grounds including urgency, and they further contend that the Superior Courts Act does not find application in proceedings before the Labour Court and thus, this Court lacks jurisdiction to hear this matter.

Background:

- [4] The applicant, the South African Municipal Workers' Union ("SAMWU") is a trade union registered in terms of Labour Relations Act (LRA)² and it organises employees who are employed directly or indirectly in municipalities and similar authorities, which may be in the public or private sector.³ Its constitutional structures include *inter alia*, provincial, regional and local (shop steward) committees/councils.

¹ Act 10 of 2013

² Act 66 of 1995, as amended

³ Page 41 of the paginated papers

- [5] The provincial arm(s) of the SAMWU are expected to hold provincial elective conferences known as the Provincial Congress at the expiry of a three-year period after the previous Provincial Congress. The delegates of the Provincial Congress are *inter alia* mandated with the election of provincial office bearers, namely, the Chairperson, Deputy Chairperson, Provincial Secretary and Deputy Provincial Secretary and the Treasurer.
- [6] The first respondent, Mr Mxolisi Qina is the Provincial Chairperson of SAMWU: Eastern Cape. The second respondent, Mr Milton Myolwa is the (former)⁴ Provincial Secretary of SAMWU: Eastern Cape. The Third respondent, Mr Siviwe Mali is the Provincial Treasurer of SAMWU: Eastern Cape.
- [7] SAMWU approached this Court for an interdict against the holding of a Provincial Shop Steward Council. This Court on 23 March 2018, issued a *rule nisi* calling upon the respondents to show cause why a final order should not be granted in the following terms:
- “...
In the event that the Provincial Shop Steward Council has already been convened as at the time of hearing of this application, a declaration order is issued that the Provincial Shop Steward Council (PSSC) for the Eastern Cape Province is convened contrary to the provisions of clause 7.9.3 of SAMWU's constitution and is unlawful.
...”
- [8] The respondents anticipated the return date and the matter came before Steenkamp J on 11 April 2018. An *ex tempore* judgment was handed down wherein the rule *nisi* was confirmed. On or about 23 April 2018, the respondents filed an application for leave to appeal against the judgment of Steenkamp J. On 5 May 2018, SAMWU filed this urgent application which is opposed by the respondents.

⁴ The respondents in their answering affidavit disputes that the second respondent is a former official.

[9] In support of its application in terms of section 18 of the Superior Courts Act, SAMWU made the following submissions:

- 9.1. In February 2018, the National Executive Committee of SAMWU took a decision that the trade union shall conduct all its activities through a national year plan and this included the PSSC and Provincial Executive Committee (PEC) meetings.
- 9.2. As on 23 March 2018, the Central Executive Committee (CEC) had not been convened to decide on the dates for the PSSC meetings in the provincial structures. On 12 March 2018, Qina in his capacity as Provincial Chairperson of SAMWU: Eastern Cape, published a notice to municipalities within the Eastern Cape indicating that the PEC intended to convene its PSSC meeting on 22 March 2018.
- 9.3. On 15 March 2018, the General Secretary of SAMWU addressed a letter to Qina advising him that the contemplated PSSC meeting was not convened in terms of the constitution of SAMWU, and he was requested to withdraw the notice calling for that meeting.
- 9.4. On 20 March 2018, it became apparent to SAMWU National Office Bearers that the SAMWU: Eastern Cape was proceeding with the intended PSSC meeting. As a result of that eventuality, the General Secretary instituted urgent proceedings before this Court to interdict the holding of the PSSC meeting.
- 9.5. The respondents in opposing the interdict contended that the PSSC meeting was convened on instruction of the PEC and further that the PSSC was funded through the provincial fund raising mechanisms. They further contended that the PSSC was not convened to finalise any resolutions, but the purpose of the PSSC meeting was to plan for the May Day campaigns and activities.
- 9.6. SAMWU on the other hand contended that the PSSC meeting in fact made resolutions that were aimed at extending the constitutionally mandated term of office of shop stewards. Furthermore, to change the

manner in which monthly membership fees were collected and paid to the trade union. SAMWU contends that the resolutions sought to divert the membership subscriptions to the respondents/provincial structure in contravention of the South African Local Bargaining Council: Main Collective Agreement.

- 9.7. SAMWU avers that the impugned PSSC meeting further precipitated in a resolution, which had the effect of reinstating Myolwa who had been dismissed by SAMWU on allegations of misconduct on 10 November 2017, and who had since referred a dispute to the CCMA.
- 9.8. The issue that SAMWU takes with the reinstatement of Myolwa was that the PSSC is a “campaigning” structure, which is not constitutionally mandated to reinstate any union official. SAMWU further contended that the employment relations within the trade union fell within the domain of the General Secretary. As a consequence of his “reinstatement”, Myolwa continued to hold himself out as a union official and continued to meet with local municipal authorities under the banner of SAMWU.
- 9.9. On 23 April 2018, SAMWU wrote to Myolwa seeking an undertaking from him that he would cease to hold himself as an authorised representative of SAMWU. In a letter dated 26 April 2018, Myolwa’s attorneys of record failed to make the undertakings as requested by SAMWU.

Urgency:

[10] As mentioned above, the respondents opposed this application on various grounds amongst others that was that the application was not urgent. The respondents contend that the application lacks the necessary urgency on the following grounds:

- 10.1. The National Office Bearers were informed in a letter dated 15 November 2017, that the Eastern Cape Province would be

withholding monthly membership subscriptions. That decision was taken in a PEC meeting held between 24 and 26 October 2018. The decision was motivated by the PEC's demand that the National Office Bearers must call for and schedule a Special Congress within three months. The PEC further resolved that it would not be interacting with the National Office whether on an organisational and/or administrative level until such time that, the Special Congress was convened.

10.2. The National Office Bearers were further advised in a letter dated 15 November 2018, that the decision to terminate the employment relationship between the trade union and Myolwa was unprocedural and unconstitutional, and it was noted that the PEC had rejected the decision by the National Office Bearers to dismiss Myolwa.

10.3. The National Office Bearers were aware as of 16 November 2017 that Myolwa was conducting himself as a Provincial Office Bearer, and therefore in the circumstances, the urgency claimed was self-created.

[11] In contending that the application is indeed urgent, SAMWU avers as follows:

11.1. The application for leave to appeal was filed on 23 April 2018. The consultation between those representing SAMWU and their attorneys of record took place on 26 April 2018. This application was eventually filed on 2 May 2018.

11.2. In respect of Myolwa, it was contended that he was warned and requested to make an undertaking on or before 23 April 2018, that he would not conduct himself as if he was an official of the trade union. In his response on 26 April 2018 through his attorneys of record, Myolwa had failed to make such an undertaking. In that regard, SAMWU contends that this application was filed within reasonable time.

11.3. Furthermore, SAMWU contends that the application for leave to appeal against the *ex tempore* judgment of Steenkamp J has the effect of suspending the operation of the order thereof. In the result, the PSSC meeting and the resolutions thereof would remain binding

and operational pending the leave to appeal and/or appeal proceedings. SAMWU avers that it should be borne in mind that one of the resolutions of the PSSC meeting was the reinstatement of Myolwa, and if such resolutions remained not interdicted and restrained, he might continue to act on behalf of the trade union when in fact he has no such authority.

- [12] I have difficulty in appreciating the respondents' contentions that the matter is not urgent. For the purposes of determining urgency, what is of importance in this case is to have regard to the events after the Steenkamp J's order was issued on 11 April 2018. Until the filing of the respondents' application for leave to appeal, there is nothing that suggested that the respondents would not consider themselves bound by that order. It therefore implies that the urgency of the matter could only have arisen when the application for leave to appeal was launched and not any period earlier.
- [13] The application for leave to appeal was launched on 23 April 2018, whilst this urgent application was launched on 2 May 2018 and filed on 5 May 2018, some eight court days later. The respondents' reference to matters that took place prior to the Steenkamp J's order is merely an attempt at revisiting issues that were dealt with leading to the granting of that order, and are not relevant for the purposes of determining whether this particular application is urgent or not.
- [14] The Deputy General Secretary of SAMWU and deponent to the founding affidavit has fully explained the steps taken by him upon becoming aware of the application for leave to appeal, including that the application could only be served on the respondents on 2 May 2018 due to public holidays in between the consultations with attorneys of record and its final drafting. Myolwa was further granted an opportunity to give undertakings by 23 April 2018 in correspondence addressed to him, and he had only responded on 26 April 2018.
- [15] The application may have been heard some 18 days since the application for leave to appeal was. However, I am satisfied that SAMWU acted with the

necessary haste upon becoming aware of the application for leave to appeal and there is therefore no merit in the submissions that the urgency in this matter is self-created.

Issue of jurisdiction:

- [16] The respondents take issue with the jurisdiction of this Court to grant the relief sought. It was submitted on their behalf that section 18 of the Superior Courts Act⁵ was not applicable in proceedings before this Court, and that to the extent that this Court did not have a similar provision, it therefore lacked jurisdiction to consider the matter before it.
- [17] The respondents' contentions that this court lacks jurisdiction to determine the application before it in terms of the provisions of section 18 obviously lacks merit. The starting point is that it is correct that the Rules of this Court, together with the provisions of the LRA are silent in regard to the status of the final orders issued by the Court in circumstances where an application for leave to appeal has been lodged. The provisions of Rule 11(3) and 11(4) of

⁵ **18. Suspension of decision pending appeal**

- (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
- (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
- (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
- (4) If a court orders otherwise, as contemplated in subsection (1)—
 - (i) the court must immediately record its reasons for doing so;
 - (ii) the aggrieved party has an automatic right of appeal to the next highest court;
 - (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
 - (iv) such order will be automatically suspended, pending the outcome of such appeal.
- (5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.

the Rules of this Court, however address this conundrum and provide that the Court may adopt any procedure that it deems appropriate in the circumstances.

- [18] Flowing from several decisions in this Court⁶, there can be no doubt that by virtue of the Labour Court being a Superior Court in terms of section 151(2) of the LRA, and thus subject to the Superior Courts Act, section 18 of that Act finds application in this court. This is so to the extent that there is no conflict between the provisions of that Act and those of the LRA in terms of which this Court was established, within the contemplation of section 2(3) of that Superior Courts Act⁷.
- [19] Further to the extent that the LRA or the Rules of this Court are silent on the status of final orders pending appeal proceedings, it cannot be said that there is conflict within the meaning of section 2(3) of the Superior Courts Act. Furthermore, and as correctly pointed out on behalf of SAMWU, this court under the provisions of section 158(1)(a)(i) and (iii) of the LRA is empowered to grant any appropriate relief.
- [20] In line with a further exposition of the provisions of section 18 by Van Niekerk J in *Fidelity Security Services (Pty) Ltd v Naidoo and Another*, the applicant in such instances is required to demonstrate that the facts and circumstances of the particular application are exceptional and warrant a deviation from the normal rule⁸. This required the applicant to show that the facts and circumstances of its particular case are uncommon, unusual and/or out of the ordinary to the extent that a departure from the ordinary rule that an appeal suspends the operation of the judgment and order appealed against should

⁶ *Luxor Paints (Pty) Ltd v Lloyd* (2017) ILJ 1149 (LC); *Wenum v Maquassi Hills Local Municipality* (J 1684/15, 22 July 2016); *Fidelity Security Services (Pty) Ltd v Naidoo and Another* (J1837/2015) [2016] ZALCJHB 70 (3 February 2016); *Tshepo Joseph Matseba v Liberty Group Limited* Case no: J 2920/16 (Delivered on 14 December 2016); *South African Maritime Safety Authority ('SAMSA') v Muroro Dziruni* Case No: J 1818/17 (Delivered on 15 December 2017)

⁷ Which provides that;

'The provisions of this Act relating to Superior Courts other than the Constitutional Court, the Supreme Court of Appeal or the High Court of South Africa, are complementary to any specific legislation pertaining to such Courts, but in the event of a conflict between this Act and such legislation, such legislation must prevail.'

⁸ The 'threshold factual test' referred to in *Incubeta Holdings (Pty) Ltd and another v Ellis and another* 2014 (3) SA 189 (GJ)

not apply. Furthermore, the applicant is required to prove on a balance of probabilities that it will suffer irreparable harm should the order for leave to execute not be granted pending the appeal. Finally, the applicant must prove on a balance of probabilities that the respondent in the application for leave to execute will not suffer irreparable harm if leave to execute is granted pending appeal⁹.

Have the requirements of the relief sought been met?

- [21] SAMWU contends that it has a *prima facie* right to the relief sought on the grounds that it had secured an order in its favour, which declared *inter alia*, that the PSSC was convened by the respondents unlawfully. It further contended that it needed to protect the terms of the Court order until such time that the application for leave to appeal is finally determined, failing which the appeal proceedings would be moot. In this regard, it was further contended that if the terms of the order were not protected, the impugned resolutions of the unlawfully constituted PSSC would become operational and enforced, and the purported reinstatement of Myolwa would continue. SAMWU further contends that it has a *prima facie* right to interdict Myolwa from holding himself out as the Provincial Secretary pending the finalisation of the application for leave to appeal or a determination of his dismissal dispute before the CCMA.
- [22] In the answering affidavit, the respondents simply denied that SAMWU had established a *prima facie* right to the relief sought, and made reference to annexure 'MA5' , which is essentially correspondence from SAMWU's attorneys of record in respect of another matter pending before the Labour Appeal Court.
- [23] It is however not sufficient for the purposes of this application to simply argue that SAMWU has not established a *prima facie* right on the grounds that there are questions of legitimacy surrounding its national leadership as annexure 'MA5' states. The fact of the matter is that the legitimacy or otherwise of the SAMWU's national leadership is an issue that is pending before the Labour

⁹ At para 6

Appeal Court, and until such time that the issue is finally determined, it is not for *this* court to pronounce upon it.

- [24] What is relevant for the purposes of this application, and notwithstanding the clear internal strife within SAMWU and questions surrounding the legitimacy of its national leadership, its current national leadership is in possession of a favourable court order, which in the absence of anything cogent coming from the respondents, it is entitled to execute.
- [25] In regards to alternative remedies, in the absence of SAMWU utilising the provisions of section 18 of the Supreme Court Act, I fail to appreciate how it can be said that it has any other remedy if it seeks to execute its favourable order. No other forum can assist SAMWU in respect of the relief it seeks.
- [26] In regard to the requirements of irreparable harm, it further goes without saying that the relief granted by Steenkamp J could only have been granted as SAMWU had demonstrated harm in the matter before him. In the light of the order secured, it goes without saying that if it is not executed pending the determination of the application for leave to appeal, the respondents would proceed to implement the impugned resolutions taken by the PSSC, and amongst other things, begin a process of channelling SAMWU's members monthly subscriptions into accounts of unknown persons as it is alleged, and further ignore the decision to dismiss Myolwa.
- [27] Again not much came out of the answering affidavit to dispute that SAMWU would suffer irreparable harm if it is unable to execute its order pending the final determination of the application for leave to appeal that order. The respondents' contention that they will suffer permanent harm consequent to the execution of the order on the basis that the entire members of the Eastern Cape demand that Myolwa should be their leader despite him being dismissed by the national office is a matter for the parties to deal with in terms of their own constitution, and it bears little relevance to a determination of whether irreparable harm to SAMWU had been demonstrated in this case or not.

- [28] The balance of convenience in the light of the averments made in the answering affidavit clearly favour the granting of the relief sought. The respondents' averments in this regard merely relate to the internal strife within SAMWU which is something this Court should stray away from.

Conclusions:

- [29] This Court can only adjudicate on matters of law and fact. The law is such that SAMWU has in this case, asserted its rights in terms of section 18 of the Superior Courts Act, and has demonstrated that the facts and circumstances of this particular application are exceptional and warrant a deviation from the normal rule. I am satisfied that on the facts, SAMWU has demonstrated that it would be prudent to depart from the ordinary rule that an appeal suspends the operation of order of Steenkamp J. In the main, SAMWU has further proven on a balance of probabilities that it will suffer irreparable harm should the order for leave to execute not be granted pending the appeal. It has further demonstrated that it has no other available alternative remedy, and that there is nothing placed before the Court by the respondents to demonstrate that they would suffer irreparable harm if leave to execute is granted pending appeal.
- [30] It is with great reluctance that it has to be stated that the applications before the Court as is evident from the pleadings, are symptomatic of the deep fissures within SAMWU. This is indeed a sad state of affairs for a large union with a rich history in local government circles, and an important partner in the Main Collective Agreement entered into with all local municipalities. In the end, the old African proverb that; *'When elephants fight, it is the grass that suffers'* is even more apposite in this case. The 'elephants' in this case are SAMWU national office bearers in the one corner, and the Eastern Cape PEC/region of SAMWU in the other corner. The 'grass' is unfortunately the long-suffering membership of SAMWU, who diligently pay their monthly subscriptions, with an expectation that their interests as workers will be dutifully served, instead of being casualties in an internal fight which they never bargained for. In a nutshell, the internal squabbles within SAMWU are not in anyone's interests, more specifically its members.

[31] I have further had regard to the requirements of law and fairness in regard to costs. The protagonist in this SAMWU debacle need to get their act together in the interests of their members. It is therefore my view that a cost order will not contribute in any meaningful way in that regard.

[32] In the premises, the following order is made;

Order:

1. The application is heard as one of urgency and the rules relating to forms and manner of service are dispensed with.
2. The order of this Court (per Steenkamp J) issued on 11 April 2018 under case number J 965/18 is declared operational, executable and not suspended pending the final determination of the application for leave to appeal and any subsequent appeal proceedings that may follow.
3. There is no order as to costs.

E Tlhotlhemaje
Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant:

Adv. Thato Manda

Instructed by:

Maenetja Attorneys

For the Respondents:

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LABOUR COURT