IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Reportable

Case no: CA7/08

In the matter between

City of Cape Town **Appellant**

and

SOUTH AFRICAN MUNICIPAL

WORKERS UNION

(obo M Abrahams & 106 others) **Respondent**

Heard: **9 November 2010**

Delivered: **7 February 2012**

Summary: Section 21A(1) of the Supreme Court Act, no 59 of 1959 – Appellant complying with Labour Court order restraining and interdicting it from holding an abridged disciplinary enquiry - Jurisdiction of Labour Court to intervene in uncompleted disciplinary process – subsidiary to main issue but resolved by another LAC decision and therefore academic – outcome of appeal no practical effect on parties in terms of Section

21A(1) – appeal dismissed

JUDGMENT

MLAMBO JP

[1] This is an appeal directed at the judgment and order of the Labour Court (Potgieter AJ) dated 3 February 2009 in which a final interdict was granted. The appeal is before us with the leave of this Court.

[2] The background of the matter can be traced to certain events which occurred on the morning of 15 August 2007 in the vicinity of Cape Town. In the early morning of that day, a large number of metropolitan police officers in the employ of the appellant congregated at the Bonteheuwel Metropolitan Police Depot and drove from there in convoy to the N2 motorway at a slow speed, alleged to be not more than 10km per hour en route to the city. This was around 7am, a peak morning traffic period and the convoy led to a serious disruption of the city bound traffic for a considerable part of that morning. On arrival at the city centre, the metropolitan police officers congregated in the vicinity of the Civic Centre for more than an hour in a bid to hand over a petition to the Mayoress. This also caused chaos in the City Centre and adversely affected businesses in the vicinity.

[3] The appellant did not take kindly to the conduct of its employees, which it viewed as a deliberate traffic blockade amounting to serious misconduct. With the aid of cameras, it was able to identify 117 employees as having participated in the events of the morning in question and decided to institute disciplinary action against them. It also formed the view that holding 117 disciplinary hearings was not feasible and proposed to convene a collective or abridged hearing[1]. It justified this view in its answering affidavit in the court *a*

1 The terms 'hearing' and 'enquiry' will be used interchangeably in this judgment.

quo as follows:

> 'The immense amount of time which would be required to deal with the evidence and cross-examination of 117 employees, and their witnesses, would result in a delay of many months, if not years. This not only offends against the ordinary requirement that disciplinary steps should be speedily finalised, but would occasion substantial financial prejudice to the respondent and its ratepayers, having regard to the fact that the monthly wages of the 117 suspended employees amounts to approximately R936 000,00.
>
> Fairness requires no more than that each employee is afforded a full and fair opportunity of putting forward reasons showing that he or she did not participate in the group misconduct complained of and/or as to why any collective sanction decided upon should not be applied to them. The right to a hearing is not intended to unnecessarily complicate or protract the taking of disciplinary steps in the workplace, but is intended to ensure that the person knows the accusations against him, and is given an opportunity of stating his case. If the form of the enquiry passes muster in this regard, the requirements of fairness are met.'

[4] Before initiating the collective disciplinary hearing, the appellant consulted the respondent, whose members were amongst those implicated in proceedings and also spelt out the procedure that it intended to follow. It also consulted another trade union, the Independent Municipal and Allied Trade Union (IMATU), whose members were also implicated. The respondent was not amenable to the suggested abridged disciplinary hearing but IMATU had no problem with the proposed proceedings. The appellant and IMATU concluded an agreement in terms of which an abridged disciplinary hearing would be held. It is not necessary to set out in finer detail how the abridged disciplinary hearing would unfold save to state that it was an abridged process in the true sense. The appellant's evidence would be contained in an affidavit to which implicated employees had the right to respond via written representations. They would then be afforded an opportunity to make submissions, regarding the charges, to the chairperson appointed to preside over those proceedings, who would thereafter hand down his verdict. The respondent's opposition to

the proposed abridged disciplinary enquiry was that it was not in compliance with the Disciplinary Collective Agreement, a collective agreement,[2] which was binding on the parties and which, it asserted, makes provision for the institution of disciplinary proceedings against employees.

[5] Despite the respondent's opposition, the appellant proceeded with the abridged disciplinary hearing by issuing a collective charge sheet against all implicated employees including the respondent's members based on the agreement concluded with IMATU. The respondent objected and the resultant impasse drove the respondent to seek urgent relief in the court *a quo*. The essential relief it sought was for a declarator that the abridged disciplinary hearing initiated by the appellant was in breach of the collective agreement binding on the parties and that the appellant was to be interdicted and restrained from proceeding in that manner. I should also mention that before the respondent launched the urgent proceedings, it had referred a dispute to the South African Local Government Bargaining Council (the bargaining council), characterising it as a failure by the employer (the appellant) to comply with the terms of the disciplinary collective agreement *i.e*. in instituting the abridged disciplinary hearing. The respondent had also made representations to the appellant, IMATU as well as the chairperson of the enquiry which were turned down by the latter. It is at that point that the respondent decided to launch the urgent proceedings. In its application, the respondent asserted that the Disciplinary Collective Agreement was binding between the parties and that disciplinary proceedings against its members were to be held in terms thereof.

[6] The Labour Court granted the respondent the declaratory and interdictory relief it sought with costs. The court found that the applicable disciplinary procedure was the one in the collective agreement and it outlawed the abridged procedure the appellant sought to follow. In coming to that conclusion, the Labour Court stated:

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2 This collective agreement was concluded on 3 February 2004 by the Respondent, IMATU and the South African Local Government Association (SALGA) under the auspices of the South African Local Government Bargaining Council. The appellant is a member of SALGA..

> '[23] It follows in my view that in the circumstances of the instant case, Applicant is entitled to insist that the Respondent comply with the national collective agreement and the stipulated procedure for disciplinary proceedings. Applicant accordingly has established a clear right to the relief being sought in these proceedings. In my view the remaining requirements for a final interdict, namely an injury actually committed or reasonably apprehended as well as the absence of a satisfactory alternative remedy have equally been satisfied in the circumstances of this case.'

[7] The appellant abandoned the abridged disciplinary enquiry and complied with the Labour Court's order. It proceeded to discipline Respondent's members in terms of the procedure set out in the collective agreement. However, the appellant also applied for leave to appeal. It made its position very clear that it intended to see through its appeal against the judgment of the *Court a quo* and that proceedings in terms of the collective agreement were not to be construed as abandoning its appeal. The Court *a quo* dismissed the application but leave was granted by this Court.

[8] At the time of hearing the appeal, the appellant had finalised all the disciplinary enquiries and had dismissed the respondent's members found guilty of participating in the traffic blockade. We were also informed that the respondent had declared a dispute arising from those dismissals. I mention these facts simply to illustrate the point that this appeal is concerned with the earlier dispute regarding the holding of an abridged disciplinary hearing *vis a vis* the procedure set out in the collective agreement and not the subsequent dismissals.

[9] The primary issue we are called upon to consider in this appeal is whether there are circumstances in which the Labour Court is competent to intervene, as it did *in casu*, in uncompleted disciplinary proceedings where no finding or sanction has yet been made or issued, and if so, what those circumstances were. However, the respondent has argued that the issue pursued on appeal is academic and that the outcome of the appeal would have no practical effect between the parties. This is in light of the fact that the appellant has complied with the court *a quo's* order and initiated disciplinary action in terms of the

collective agreement. It is prudent, in my view, to consider this issue at the outset.

[10] Section 21 A (1) and Section 21 A (3) of the Supreme Court Act[3] provide:

> '(1) 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.
>
> …
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> (3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs.'

[11] The principle implicit in this provision has been applied by our courts for some time to the effect that courts are there to resolve real and existing disputes and not to deal with issues that are academic or to provide advice on abstract questions. In *Geldenhuys and Neethling v Beuthin*[4] the principle was articulated in the following terms: '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 v Minister of Home Affairs*[5] the Constitutional Court explained that: '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.'. See also *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others,*[6] *Premier, Provinsie Mpumalanga, en 'n Ander v Groblersdalse Stadsraad,*[7] *Rand Water Board v Rotek Industries (Pty) Ltd,*[8] *Port Elizabeth Municipality v Smit,*[9] *Radio Pretoria v Chairperson of the Independent*

3 Supreme Court Act 59 of 1959.
4 1918 AD 426 at 441.
5 2000 (2) SA 1 (CC) at para 21 footnote 18.
6 1997 (3) SA 514 (CC) at para17.
7 1998 (2) SA 1136 (SCA) at 1143 A – C.
8 2003 (4) SA 58 (SCA) at paras 12 - 14.
9 2002 (4) SA 241 (SCA) at para 7.

Communications Authority of South Africa and Another.[10]-

[12] I am mindful of the fact that the Labour Relations Act (LRA)[11] does not have a provision similar to Section 21 A (1) but that, in my view, is no impediment to the application of the principle by this Court or the Labour Court. Section 167(1) of the LRA provides that this Court is a court of law and equity. This renders the court competent to import any rule or principle of general application such as the one at issue presently into its own processes. The Labour Court in *Johannesburg City Parks v SAMWU and Others*[12] mentioned section 21 A (1) in refusing leave to appeal after it had found that the issue at the centre of the dispute had 'become moot'.[13] That decision, in my view, is eminently proper.

[13] Returning to the facts of this case, it is not in dispute that there is no longer any dispute between the parties arising from the issue that went to the court *a quo*. The respondent is correct therefore in its assertion that the outcome of this appeal will have no practical effect between the parties. Counsel for the appellant argued however that we should nevertheless hear the appeal as the issues raised were not only relevant to the parties *inter se* but also to the public in general and therefore called for determination by this Court. Counsel argued that for this reason the outcome of the appeal would have meaningful practical effect in general. He argued in the first place that a definitive statement from this Court was required whether the Labour Court has jurisdiction to intervene in uncompleted disciplinary enquiries. Reference was made in this regard to Labour Court decisions on the subject, in particular *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd and Another,*[14] *Mantzaris v University of Durban-Westville and Others*[15] and *Booysen v SAPS and Another.*[16] The other issue calling for the appeal to be entertained, we were told, was that the collective agreement had been extended for a further period. Counsel contended that clarity was required from this Court whether

10 [2004] 4 All SA 16 (SCA) at para 41.
11 Act 66 of 1995 as amended.
12 Case no J 130/06 delivered on 26 April 2006 at paras 8-9.
13 *Johannesburg City Park* at para 12.
14 (1998) 19 ILJ 635 (LC).
15 (2000) 21 ILJ 1818 (LC)
16 (2008) 10 BLLR 928 (LC).

that agreement did in fact make provision for collective hearings. Counsel submitted that without such clarity there was a real prospect of future applications to the Labour Court to intervene in uncompleted disciplinary inquiries in view of this alleged uncertainty in the collective agreement.

[14] In the *Port Elizabeth v Smit* matter (*supra*) there was on appeal no longer any dispute or *lis* between the parties. The SCA expressed skepticism at the notion that an appeal could be entertained where there was no longer a *lis* between the parties simply because the matter involved the public interest. In this regard the SCA stated:

> 'In my respectful view it seems, however, that this distinction between public law and private law is founded on considerations of expedience rather than on principle. If, as a matter of principle, a court has no power and therefore no discretion to consider an appeal where there is no *lis*, in the sense of a matter in actual controversy *inter se,* I can see no reason why this principle should not apply to matters of public law as well. Conversely, if a court has the discretion to entertain an appeal despite the absence of a *lis*, in the above sense, there seems to be no reason in principle why this discretion should not also extend to litigation between two private individuals as well.'[17]

Despite its skepticism, the SCA assumed that it could entertain the merits of the appeal because of the public interest argument but dismissed it in any event in terms of section 21A(1). The SCA expressed itself as stated above after considering the following statement in *R v Secretary of State for the Home Department, Ex parte Salem:*[18]

> 'The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near

17 Port Elizabeth at p 10 para 7.
18 [1999] 2 All ER 42 at 47 D-F.

future.' *Compare Western Cape Education Department and Another v George*[19].

[15] Assuming that the public interest factor is a relevant consideration in deciding whether to entertain an appeal where there is no longer a *lis* between the parties, I would imagine that there must be exceptional facts and a good reason justifying this. On the facts of the case at hand neither is present. The jurisdiction of the Labour Court to intervene in uncompleted disciplinary processes, though indirectly related, was not the issue before the court *a quo*. The issue, as I have already pointed out, was whether the appellant could follow the abridged disciplinary process or whether the process in the collective agreement held sway. The court *a quo* resolved the issue in favour of the procedure in the collective agreement as contended by the respondent. That order resolved the true dispute between the parties and has been complied with.

[16] In any event, should there have been any doubt about the jurisdiction of the Labour Court to intervene in uncompleted disciplinary proceedings such doubt, as fate would have it, was put to rest by this Court in *Booysen v The Minister of Safety and Security and Others*[20] in a judgment handed down shortly before this appeal was heard. There this Court stated:

> 'To answer the question that was before the court *a quo*, the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However, such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive'.

This is the definitive statement of the law in so far as this issue is concerned and I align myself with it. The appeal on this point is therefore clearly

19 1998 (3) SA 77 (SCA) 83 E – F.
20 2011 BLLR (1) 83 (LAC) at para 54.

academic and deserves no further attention from us.

[17] The further argument based on the extension of the collective agreement is also misconceived. The fact of the matter is that the collective agreement is binding on the parties. That being the case, it is to that collective agreement that any party bound thereby must resort should such party have one or other problem regarding the application thereof. In this case, it is the appellant's view that the collective agreement does not provide for the holding of collective disciplinary hearings. Assuming that this is correct it is clear from the collective agreement that the appellant has remedies. The first of these is that the appellant is entitled in terms of clause 16 to take that matter up with the bargaining council. That clause provides:

> 'i Any person or party may refer a dispute about the interpretation or application of this collective agreement to the Central Council of the SALGBC.'

[18] The other remedy is that the appellant can approach the bargaining council for exemption from its provisions. It is common cause that the appellant did not invoke any of these remedies when it insisted on holding the abridged disciplinary hearing. There is therefore nothing exceptional in the extension of the collective agreement as the appellant has avenues to pursue to resolve whatever problems it may have with the agreement. The fact that a similar situation may recur frequently in the future as a result of this alleged uncertainty in the agreement does not justify the hearing of this appeal as the collective agreement contains a process in terms of which the alleged uncertainty can be resolved.

[19] The appellant has raised a number of other arguments attacking the order of the *court a quo* e.g. whether the respondent had demonstrated that there were exceptional circumstances justifying intervention, that there was good authority supporting the appellant's approach regarding the abridged hearing etc. These arguments cannot be considered in the context of an appeal that will yield no practical effect between the parties. The appeal is clearly

misconceived and must fail.

[20] In the circumstances, the following order is granted:

[21] The appeal is dismissed with costs.

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Mlambo JP

Zondi AJA and Molemela AJA concurred in the judgement of Mlambo JP

APPEARANCES:

FOR THE APPELANT: Adv AC Oosthuizen SC and Adv T J Golden

Instructed by Herold Gie Attorneys

FOR THE RESPONDENT: Mr J Whyte

Instructed by Chealdle Thompson Haysom