IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No: 130/06

In the matter between:

JOHANNESBURG CITY PARKS Applicant

and

SOUTH AFRICAN MUNICIPAL WORKERS UNION First Respondent

MAFANYA, sc & OTHERS Second and Further Respondents

JUDGMENT

REVELAS J

[1] On 6 February 2006, this court issued a *rule nisi*, interdicting any strike action by the respondents in pursuance of the first respondent's referral dated 3 June 2001 to the South African Local Government Bargaining Council ("SALGBC") under referral number JMD 060304. The applicant now seeks confirmation of that rule. The respondents seek the discharge thereof.

[2] The first respondent ("the Union") had given notice to the applicant that it intended to embark on a strike on 7 February 2006.

On 3 June 2005 it had referred a mutual interest dispute to SALGBC which was set down for mediation on 11 July 2005. The applicant did not attend, because it had adopted the view that since the SALGBC first became accredited in April 2005, that it had no jurisdiction over it. Consequently, the commissioner tasked with mediating the dispute, issued a certificate of non-resolution, which the applicant says is invalid.

[3] The *rule nisi* was issued since the applicant was successful in persuading the court that the certificate was invalid as the SALGBC had no jurisdiction to issue it in the first place.

[4] In support of its assertion the SALGBC has no jurisdiction over it, the applicant relies on the fact that there is currently a demarcation dispute pending in the Commission for Conciliation, Mediation and Arbitration ("the CCMA"), precisely about the jurisdiction issue. It argues that until the CCMA pronounces on the question whether the SALGBC or the CCMA has jurisdiction over the applicant, the Union is obliged to refer all disputes against it, to the CCMA.

[5] The demarcation dispute was referred during November 2004 to the CCMA in terms of section 62 of the Labour Relations Act, no 66 of 1995, as amended ("the Act"). It was referred by IMATU and the first respondent. On 19 November 2004 a notice in terms of section 62(7) of the Act was published in the government gazette.

[6] In the referral, the Unions (IMATU and the SAMWU) seek a

declaration to the effect that each of the utilities, agencies and corporations (UAC's) of the applicant fall within the registered scope of the SALGBC. The CCMA therefore also has to determine, *inter alia*, whether the applicants employees were employed in the municipal sector (the scope of the SALGBC).

[7] These UAC's are Johannesburg Water (Pty) Ltd, Pikitup Johannesburg (Pty) Ltd, the applicant, the Johannesburg Zoo, the Johannesburg Metropolitan Bus Services (Pty) Ltd, the Johannesburg Property Company (Pty) Ltd and the Johannesburg Fresh Produce Market (Pty) Ltd. They were all cited as the first to ninth respondents respectively, in the statement of case filed with the CCMA under case number GA 18299/04. The applicant is cited as the fifth respondent in those proceedings. The tenth to twelfth respondents are the City of Johannesburg, the South African Local Government Association, and the SALGBC.

[8] The SALGBC was registered in March 2001. The applicant was established during November 2000 by the City of Johannesburg Metropolitan Municipality. It was appointed as an agent of that Municipality to manage and maintain the public open spaces, parks, conservation areas and cemeteries within the greater Johannesburg area. The applicant was staffed to a large extent by employees who were transferred from the previous local government bodies of greater Johannesburg area, in terms of section 197 of the Act. The City of Johannesburg controls the applicant, owns all the shares in it, funds it and appoints its board.

[9] In June 2004 the SALGBC entered into a collective agreement on conditions of service with the SALGA, IMATU and the Union before me. The agreement was extended to non-parties.

[10] The applicant is adamant that it does not fall within the scope of

the SALGBC as it has always raised an objection to any referral of a dispute against it, to the SALGBC. It object on the basis that it had no jurisdiction over it. It maintains that insofar as the Union seeks to rely on its referral of its mutual interest dispute to the SALGBC and the certificate of outcome issued by it, as constituting compliance with the requirements of section 64(1) (a) of the Act, it is attempting to pre-empt the outcome of the demarcation dispute.

[11] The respondents argue that the certificate of outcome is valid until it is set aside. They say that they are not obliged to refer any dispute against the applicant to the CCMA, simply because the applicant says the SALGBC has no jurisdiction. It was also submitted that if they should oblige and refer their dispute to the CCMA, it could be construed as recapitulation which would weaken their case before the CCMA.

[12] Section 64(1) (0) of the Act stipulates that employees have the right to strike if the issue in dispute has been referred to a council or the CCMA, a certificate stating that the dispute remains unresolved, has been issued, and 30 days has elapsed since the referral was received by the council. The respondents say all three these requirements have been met.

[13] The applicant bases its case mainly on section 51(4) of the Act, which provides:

> "**If one or more parties to a dispute that has been referred to a council, do not fall within the registered scope of that council, it must refer the dispute to the commission".**

It argues that since the applicant does not fall within the registered scope of the council in question (the SALGBC), the council had to refer it to the CCMA, which it did not do, and therefore the certificate was invalid. The aforesaid argument is premised on the assumption that, as an objective fact, the applicant does not fall within the registered scope of the SALGBC.

[14] The existence of the complex and prolix demarcation dispute pending before the CCMA, is in my view, an indication that it is not an objective fact.

[15] The applicant argued that the construction which the respondents wishes to place on the referral to the SALGBC, means that the respondent could have referred their dispute to any council, therby ignoring the pre-emptory provisions of section 51(4) of the Act. If the respondents had referred their dispute to the Motor Industry Bargaining Council, their referral would not be accepted, because it obviously and patently has no jurisdiction. The same cannot be said of the SALGBC.

[17] Section 62(3) of the Act provides that where in proceedings before the Labour Court, it is necessary to determine a question regarding the registered scope of a bargaining council, the Labour Court "**must adjourn those proceedings and refer the matter to the CCMA"**. I

do not intend to determine the demarcation issue, but I do have to consider the matter of interim relief, pending the outcome of that dispute. I do not interpret section 62(3) of the Act to mean that when there is a demarcation dispute pending, and a mutual interest dispute arises in the interim, any strike pertaining the mutual interest dispute, should be interdicted if it has not been referred to the CCMA. I still have to be convinced that the applicant, as a matter of fact, falls outside the registered scope of the council. That is the onus upon the applicant if it wants confirmation of the *rule nisi*.

[16] To determine this issue, one has to consider the facts and in doing so, I am going to venture somewhat closely to a few aspects which the CCMA will have to consider in the demarcation dispute. I do so because the right to strike is protected by the Constitution and should not lightly be fettered by technicalities, particularly in circumstances where there has ostensibly been compliance with the requirements of section 64(1) (a) of the Act. I also do so because the applicant's main argument seems to be that because *it* has never accepted the jurisdiction of the SALGBC, it has none. Furthermore, section 51(4) makes provision only for the situation where there is a certainty about the registered scope of the council in question. In this case there is no such certainty at present. There is also no history that the Union members have consistently in the past, referred their disputes against the applicant and other UAC's in the demarcation dispute to the CCMA. The respondent has also not placed much by way of facts before me, to show why exactly it

says it falls outside the registered scope of the council in question.

[18] The SALGBC (or "Council"), is a bargaining council registered in terms of the Act which has as its registered scope "**the Local Government Undertaking"**. Its constitution defines **"local government undertaking"** to mean one in which **"the employer and employees are associated for the institution, continuance and finalisation of any act, scheme or activity normally, undertaken by a municipality".**

[19] There is no suggestion that the employees of the applicant are associated with it in any other way. The applicant was not a party to the collective agreement between the SALGBC, SALGA and the two Unions who are party to the demarcation dispute (including the first respondent). Neither have any of the first to ninth respondents who are parties to that dispute entered into the agreement. The collective agreement has however been extended to non-parties, and that is of significance in determining this issue.

[20] The employees still do the type of work, such employees as themselves, have always been doing and have done in the past. Their work is typical of those who work for an employer who provides municipal services, which would fall or usually fall under Local Government. It is not strange that when there are Local Government elections, the various political parties which hope to gain control in Local Government, all focus on promises of better service delivery. The services they have in mind are largely non other than the services provided by the parties cited and referred to in the matter before me, in association with one another.

[21] I am therefore not convinced, for purposes of confirmation of the rule, that the applicant falls outside the scope of the council. The rule must therefore be discharged with costs. I decline to make an order for wasted costs on a punitive scale against the applicant for the postponement of 7 March 2005. The applicant can pay them on the ordinary scale as between party and party. The applicant is liable for these costs because it should not have assumed that the rule, in a case where a substantive issue is in dispute, would go unopposed in the absence of a settlement agreement.

[22] It is therefore ordered that:

1. The rule is discharged.

2. The applicant is to pay the costs of this application, including the wasted costs of 07 March 2006, on a scale as between party and party.

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Judge E Revelas
Judge of the Labour Court

Date of hearing: 17 March 2006
Date of judgment: 22 March 2006

On behalf of the applicant

Adv R Hutton

Instructed by: Moodie and Robertson

On behalf of the respondent

Adv J.G. van der Riet SC

Instructed by: Cheadle Thompson and Haysom