

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J 45/2019

In the matter between:

CROSS-BORDER ROAD TRANSPORT AGENCY

Applicant

and

NATIONAL TRANSPORT MOVEMENT

Respondent

Heard: 18 April 2019

Delivered: 3 May 2019

Summary: Return date of urgent application to declare strike action unprotected. Rule *nisi* discharged.

JUDGMENT

PRINSLOO, J

Introduction:

[1] On 16 January 2019, this Court (per Moshwana, J) granted the Applicant an interim interdict declaring the strike action that was scheduled to commence on 17 January 2019 unprotected and the Respondent's members were interdicted and restrained from participating in the said strike action.

[2] On 16 January 2019, the matter was unopposed and the return date was set for 18 April 2019, when the matter came before me. The Respondent (NTM) filed an answering affidavit, to which the Applicant filed a reply.

Brief history:

[3] The Applicant's Chief Executive Officer (CEO), Mr Khumalo, was appointed to this position by the Minister of Transport (the Minister) in terms of the provisions of the Cross-Border Road Transport Act¹.

[4] On 15 November 2018, the NTM addressed a letter to Mr Ramathe, the Chairman of the Applicant's Board, wherein they demanded that the CEO be placed on precautionary suspension by 16 November 2018, pending an investigation into matters that were set out in the letter of demand. The allegations made against the CEO were recorded in the letter as follows:

- '1. Gross misconduct in relation to fruitless and wasteful expenditure deriving from the trips undertaken by the CEO at the expense of the CBRTA, which trips did not benefit the entity in any manner;
2. Irregular creation of strategic manager, support services for Mr Victor Dladla in the CEO's office after he was demoted at the Regional Manager's office and the subsequent promotion of Mr Dladla to a senior manager's position in operators relations department without advertising the position and/or following the recruitment and selection processes;
3. Maladministration in that the CEO appoint his former PA, Ms Nandipha Mboxela at a higher remuneration package as compared to her counterparts, who possess higher qualifications than her;
4. Misrepresentation and/or dishonesty in that the CEO had irregularly rated himself and recommended a performance bonus for himself;
5. As well as allegation against the CEO as set out in the Auditor General's report.'

[5] The NTM demanded that the CEO be placed on precautionary suspension pending an investigation into the aforesaid matters, failing

¹ Act 4 of 1998.

which a dispute would be referred and preparation would be made for strike action pertaining to the aforesaid matters.

- [6] On 20 November 2018, the NTM referred a mutual interest dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and the facts of the dispute were recorded as being that the Applicant refused to suspend and investigate the CEO. The matter was conciliated on 8 January 2019 and as it remained unresolved, a certificate of outcome was issued, indicating that the NTM may resort to strike action.
- [7] On 14 January 2019, the NTM issued a strike notice wherein the Applicant was given notice of the strike action that was scheduled to commence on 17 January 2019. The strike action was due to the Applicant's refusal to suspend and investigate the CEO for various acts of disciplinary infractions brought to the attention of the Chairman of the Applicant's Board.
- [8] On 16 January 2019, the Applicant approached this Court on an urgent basis for an order to declare the strike action unprotected and to interdict the NTM and its members from participating in the strike.

The urgent application:

- [9] The Applicant approached this Court on an urgent basis and submitted that the intended strike action would be unprotected as contemplated in section 68 of the Labour Relations Act² (LRA) on three grounds.

9.1 Firstly, the CEO was appointed by the Minister and the power to suspend him, vests in the Minister and the Applicant is not empowered to suspend the CEO, wherefore it is unable to meet this demand. On the return date, the Applicant indicated that it was not persisting with this ground and that it needs no further consideration.

² Act 66 of 1995 as amended.

9.2 Secondly, the demand to suspend the CEO is not a lawful demand since it is for the immediate suspension of the CEO and does not contemplate proper processes and grounds for such suspension.

9.3 Thirdly, the demand for an investigation of the CEO has already been complied with, hence the demand is unlawful.

[10] It is evident that throughout and since November 2018, the demand made by the NTM related to the suspension and investigation of the CEO. I will deal with the two grounds on which it is alleged that the strike is unprotected in turn.

Suspension of the CEO

The Applicant's case

[11] The Applicant's case is that the demand for the suspension of the CEO is unlawful. The Applicant took issue with the fact that it was afforded an extremely truncated period of time to comply with the demand to suspend the CEO as the matters raised by the NTM require consideration before the CEO can be suspended.

[12] Furthermore, the CEO must be presented with an opportunity to respond to a possible intention to suspend him, with consideration of his representations, before a fair and lawful suspension could be implemented. The truncated period indicated by the NTM is indicative of the fact that the demand is not for a lawful suspension and the manner in which the demand is framed, indicates that the NTM is not demanding a process that may lead to a suspension, but a suspension itself.

[13] A suspension pending an investigation is only called for in the event that an employee is likely to interfere with the investigation or with the evidence to assist the investigation. There must also be *prima facie* evidence of wrongdoing before an employee could be suspended pending an investigation. The NTM has failed to present such *prima facie* evidence of wrongdoing, despite being called upon to do so.

- [14] The only thing that would satisfy the NTM is the actual suspension of the CEO and not a lawful suspension.

The NTM's case

- [15] The NTM in its opposing affidavit reiterated the alleged acts of misconduct committed by the CEO and persisted with the view that it was entitled to pursue the demand that the CEO be placed on precautionary suspension and be investigated for misconduct. The NTM justified the truncated period afforded to the Applicant by stating that it was due to the severity of the allegations against the CEO, which in the main pertained to gross violation of the Public Finance Management Act³ (PFMA) by undertaking fruitless trips despite the financial position of the Applicant, alleged corruption and gross violation of the recruitment and selection processes.
- [16] The NTM contended that the CEO is intimidating and threatening the prospective witnesses and should therefore be suspended.

Analysis

- [17] It is evident that the NTM's demand is for the immediate suspension and subsequent investigation of the CEO, without any provision for processes preceding such suspension or any indication that the suspension demanded be lawfully effected. It is trite that a suspension has to serve a legitimate purpose and cannot be effected without such a legitimate purpose as that would in all probability render the suspension unfair and may expose an employer to litigation relating to an unfair suspension.
- [18] Mr Beaton for the Applicant submitted in his heads of argument that the demand is unlawful firstly for reasons related to the substantive fairness of the demand namely that a suspension pending an investigation is only called for in the event that an employee is likely to interfere with the investigation and where there is *prima facie* evidence of wrongdoing.

³ Act 1 of 1999.

[19] On the procedural side, the demand does not enable the Applicant to effect a fair suspension by affording the CEO a fair opportunity to comment on the allegations of intimidation. In the founding affidavit, the Applicant also expressed concern for not affording the CEO an opportunity to respond to a possible intention to suspend him.

[20] Mr Beaton referred to the matter of *Passenger Rail Agency of South Africa v SA Transport and Allied Workers Union and Others*⁴ where SATAWU demanded *inter alia* for the suspension of the CEO and for a forensic investigation to be conducted to probe possible acts of misconduct. SATAWU had not unequivocally demanded only a fair suspension and the Court held that:

'Looked at from a different perspective, what would the employer have needed to do to satisfy this demand? It is difficult to escape the conclusion that the only thing that would have satisfied the demand was the actual suspension of the individuals in question, even if the union accepted the employer had to follow a fair process. In this respect, the facts of this matter are distinguishable from those in *City of Johannesburg Metropolitan Municipality v SAMWU & Others (2009) 30 ILJ 2064; [2009] 5 BLLR 431 (LC)*, in which the court noted that: "in these proceedings, the suspension demands, originally tabled in broad terms, have been clarified by the union in its answering affidavit. Its members seek to strike in support of a demand that the employees concerned be fairly suspended.'

[21] The Applicant's case in short is that, as the NTM has not provided a valid, justifiable reason for the suspension of the CEO and as the demand is not for the suspension to be effected fairly, the demand is unlawful. Suspension can only be implemented after following due process and on good cause.

⁴ (2012) 33 ILJ 2659 (LC) at para 10.

[22] In *Long v South African Breweries (Pty) Ltd and Others*⁵, the Constitutional Court recently considered the issue of precautionary suspension and held that:

‘In respect of the merits, the Labour Court’s finding that an employer is not required to give an employee an opportunity to make representations prior to a precautionary suspension, cannot be faulted. As the Labour Court correctly stated, the suspension imposed on the applicant was a precautionary measure, not a disciplinary one. This is supported by *Mogale, Mashego* and *Gradwell*. Consequently, the requirements relating to fair disciplinary action under the LRA cannot find application. Where the suspension is precautionary and not punitive, there is no requirement to afford the employee an opportunity to make representations.

In determining whether the precautionary suspension was permissible, the Labour Court reasoned that the fairness of the suspension is determined by assessing first, whether there is a fair reason for suspension and secondly, whether it prejudices the employee. The finding that the suspension was for a fair reason, namely for an investigation to take place, cannot be faulted. Generally where the suspension is on full pay, cognisable prejudice will be ameliorated. The Labour Court’s finding that the suspension was precautionary and did not materially prejudice the applicant, even if there was no opportunity for pre-suspension representations, is sound’. (Footnotes omitted)

[23] It is evident from *Long*⁶ that the Constitutional Court has held that in the event of a precautionary suspension, an employer is not required to give an employee an opportunity to make representations prior to his/ her suspension. Although *Long* was not in the context of a strike, in principle it has taken a step away from *PRASA*⁷ where it was held that the demand for suspension must be a demand for a fair suspension. *In casu*, ‘fair’ is affording the CEO a fair opportunity to comment on the allegations

⁵ [2018] ZACC 7 at paras 23 -25.

⁶ *Ibid.*

⁷ *Supra* n 4.

and to respond to a possible intention to suspend him. This is not a requirement in a precautionary suspension.

- [24] There is no merit in the Applicant's case that a suspension can only be implemented after following due process. It follows that the NTM's demand that the CEO be placed on precautionary suspension pending investigation into matters that were set out in the letter of demand of 15 November 2018, is not unlawful for the reason that the demand does not provide for a fair procedure in suspending the CEO.
- [25] On the other hand, there is merit in the Applicant's case that a suspension can only be implemented on good cause and that it has to be substantively fair. The NTM has not indicated the reason why the CEO is to be suspended and to make a demand to suspend the CEO without disclosing the substantive grounds for suspension, is not good enough.
- [26] The NTM was invited to disclose the substantive reason to suspend the CEO and even after the issue was raised in the Court papers, the NTM did no more than make a bald and unsubstantiated allegation as to why the CEO should be suspended. More is needed and the NTM's demand fell hopelessly short of disclosing a reason for the CEO's suspension.
- [27] Having said that, I have considered that in *Long*⁸ it was held that precautionary suspension was permissible when there is a fair reason for suspension and where it was for an investigation to take place, the suspension was for a fair reason.
- [28] In my view this falls within the NTM's demand, namely that the CEO be placed on precautionary suspension pending an investigation and the demand that the CEO be suspended, is not unlawful, provided that the demand for the investigation to be conducted, is a lawful one. This is the next issue to be considered. Had it not been for the fact that part of the NTM's demand was for an investigation to be conducted, the decision of this Court could have been different. This judgment is not to be understood as authority for a demand for suspension, without disclosing

⁸ Id n 5.

a fair reason for suspension, to constitute a lawful demand for purposes of strike action.

Investigation already embarked upon

The Applicant's case:

[29] The Applicant's case is that an investigation into the allegations made by the NTM has been conducted and that the demand for an investigation has thus been complied with and that there can be no strike on this demand.

[30] The Applicant's Audit and Risk Committee investigated various allegations against the CEO and the outcome report was presented to the Applicant's Board during October 2018. The Board had resolved to forward the report to the Minister for consideration and the Minister has not yet made a decision in respect of the report.

The NTM's case

[31] The NTM disputed that its demands were responded to and stated that the allegations against the CEO pertained to serious allegations of misconduct (as I have already alluded to supra) and these issues were raised with the Applicant in November 2018. The issues raised have still not been investigated.

[32] The NTM disputed that the allegations against the CEO were covered or that they were part of the investigation already conducted and in respect of which a report was issued dated 17 April 2018.

Analysis

[33] The Applicant has not attached the full investigation report to its papers before this Court, but appended only the covering page of the report dated 17 April 2018 in support for its contention that an investigation had indeed been conducted. It is evident from the covering letter that the report was a preliminary review into allegations of acts of corruption, abuse of power by the CEO, tender irregularities and potential fruitless

and wasteful expenditure. It is not evident from the single page covering letter what issues and allegations were investigated and it is impossible to determine from the document placed before this Court, whether the issues raised by the NTM had indeed been covered and investigated.

[34] It is significant that on the Applicant's own version, the Audit and Risk Committee investigated various allegations concerning the CEO, including some of the issues raised by the NTM. On this version alone, it is evident that only 'some' of the issues raised by the NTM were indeed investigated and for this reason, it cannot be said that the demand has been complied with.

[35] The demand calling for an investigation is a lawful one that had not been complied with as only 'some' issues raised by the NTM had been investigated.

[36] In argument Mr Beaton conceded that some of the NTM's demands in respect of the investigation to be conducted, remain valid demands. On this ground alone, the strike action remains lawful and thus protected.

Costs

[37] In awarding costs, this Court has a discretion, guided by the requirements of law and fairness. In my view the interest of justice will be best served by making no order as to costs, having regard to the ongoing collective bargaining relationship between the parties and the prospect of prejudice to that relationship should an order for costs be made.

[38] In the premises I make the following order:

Order

1. The *rule nisi* issued on 16 January 2019 is discharged;
 2. There is no order as to costs.
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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate R G Beaton SC

Instructed by: Savage Jooste & Adams Inc Attorneys

For the Respondent: Mr M Gumede, NTM official

LABOUR COURT