

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Of interest to other judges

Case No: J 1799/19

In the matter between:

**JOHANNESBURG METROPOLITAN
BUS SERVICES (SOC) LTD**

Applicant

and

**DEMOCRATIC MUNICIPAL AND
ALLIED WORKERS UNION**

First Respondent

**MEMBERS LISTED IN ANNEXURE
“A”**

Second Respondent

Heard: 19 September 2019

Delivered: 20 September 2019

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

LAGRANGE J

Introduction

[1] This is an urgent application for leave to appeal against the final order handed down on 30 August 2019. Pursuant to that order, after a ballot was held in terms of the order, a strike commenced on 16 September 2019 in respect of the two demands of the union contained in the second and third paragraphs of the strike notice, namely; demands requiring the employer to:

- 1.1 accede to the principle of salary progression based on an employee's number of years of service in the employment of the JMBS with

employees being grouped in cohorts of three years' service beginning at 0 to 3 years and ending at 24 to 27 years, and

1.2 to allocate offices and office equipment and materials to the union at all three depots of JMB.

- [2] The employer ('JMBS') has applied for urgent leave to appeal against the court's finding that the respondents were entitled to embark on a protected strike in respect of the demand for an agreement in principle on pay progression in respect of certain cohorts of employees categorised by length of service. In addition, it seeks an order that the respondents should be restrained from participating in a strike in pursuance of the pay progression demand pending the finalisation of the appeal. The appeal is to be launched on an urgent basis if leave to appeal is granted.
- [3] JMBS submits there is a reasonable prospect another court will conclude that: the demand is not one the employer could properly consider; acceding to the demand would not resolve the dispute; the demand for an 'in principle' agreement on pay progression is a disguised wage demand, and the recognition of an 'in principle demand' as a legitimate strike demand raises a novel legal issue.
- [4] While not necessarily agreeing that there is a reasonable possibility another court will find differently on most of these points, I accept that the issue raised is a novel one on which another court might find differently, simply because it is not the type of demand issue that has been considered before. It was argued by the union that a demand of this kind has been previously considered by the labour court in the case of ***Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of SA & others***.¹ However, I do not think the demands in question are analogous to the demand for an in principle agreement on pay progression. In *Vanachem* the court was not concerned with the true content of demands or whether they were inchoate but whether they could be construed as matter of mutual interest. The essence of the contested demand in this case entails a demand that the employer commit agreeing

¹ (2014) 35 ILJ 3241 (LC)

on a new component to remuneration without having to accede to when it would be negotiated, implemented or what the increments would amount to, albeit that the union was demanding that any progression agreed upon would be determined with reference to which length of service cohort an employee fell under. I was not referred to any case in which the court has determined whether a demand of this nature is a disguised remuneration demand or that addresses the coherence of such a demand.

- [5] Accordingly, I am satisfied that leave to appeal should be granted. I am also satisfied the matter is urgent as the strike is already in progress and any harm suffered is ongoing.
- [6] The law applicable determining the effect of granting leave to appeal and whether the order appealed against can nonetheless be enforced pending the outcome of an appeal is governed by s 18 of the Superior Courts Act, 10 of 2013, which states:

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.

(emphasis added)

[7] The SCA held in *University of the Free State v Afriforum*² that the bar a party that wishes to enforce the order, notwithstanding leave to appeal being granted, is a high one.³ However, in this case, JMBS is not seeking to enforce the order, because the order interdicted strike action only on the basis that no ballot had been held and that one of the demands could not be the subject matter of a protected strike if the ballot was held. JMBS argued that the court's decision that the respondents could strike in respect of a demand for an agreement in principle on pay progression was *obiter* and the essence of the judgment was that the strike was interdicted in the absence of a ballot being held. Yet JMBS specifically sought interdictory relief on more than one ground, one of which was that the demand could not be the subject matter of a protected strike even if a ballot was held. The judgment determined if that was correct and issued a declaratory order declining that relief. It was as much a part of the judgment as the decision to conditionally interdict the strike.

[8] It was suggested in argument by JMBS that the prayer to interdict the strike over the contentious demand in respect of which leave to appeal is sought ought to be considered in the light of the judgment in ***Gallocher v Social Housing Regulatory Authority and Another***.⁴ That case

² [2017] 1 All SA 79 (SCA);

³ At paragraphs [10] and [11].

⁴ (J1485/2019) [2019] ZALCJHB 162 (3 July 2019)

concerned whether an order uplifting an employee's suspension which the court had ordered should be enforced pending the outcome of an appeal process. The court was seized with the issue whether or not exceptional circumstances warranted an exception to the normal rule that the order should be suspended, and found they did.

- [9] That is not what JMBS is asking the court to do in this instance. In this application JMBS is asking the court *not to enforce* its order pending the outcome of the appeal but to issue an interdict *contrary* to the order it made, pending the appeal. In my understanding that is not a power the court can exercise incidentally in the course of granting leave to appeal. It is actually tantamount to a second attempt to obtain the same interdictory relief it originally applied for, albeit on an interim basis, having failed to obtain it on a final basis. This cannot be competent relief under section 18(3) of the Superior Courts Act. In which case, the default position applies, namely that the effect of the order is suspended pending the outcome of the appeal.
- [10] The only currently effective part of the order is the declaratory order permitting the respondents to engage in protected strike action in pursuit of their demand for an agreement in principle on pay progression. Suspending that declaratory relief simply means that pending the outcome of the appeal there is no such declaratory order in effect. Any continuation of the strike during this period carries a risk for the respondents that if JMBS is successful on appeal on this issue, the strike in respect of the pay progression demand will have been unprotected during the period between this judgement and the outcome of the appeal.
- [11] In light of the above, it is not necessary to consider the factors that must be considered in whether to enforce an order pending an appeal under s 18(3) of the Superior Courts Act and the ordinary consequences of granting leave to appeal will follow.
- [12] Neither party pressed the issue of costs in these proceedings and accordingly no cost order will be made.

Order

- [1] The applicant is granted leave to appeal against the court's declaratory order in the judgment handed down on 30 August 2019 that the respondents may embark on a protected strike in respect of their demand for an agreement in principle on pay progression.
- [2] The applicant must deliver its notice of leave to appeal on an urgent basis by no later than 23 September 2019.
- [3] No order is made as to costs.

R G Lagrange

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:

Adv. M.J Van As – Instructed by Werksmans
Attorneys

RESPONDENT:

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