IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Not of interest to other judges
Case no: J 446/2016

In the matter between:

JOHANNESBURG CITY PARKS AND ZOO **Applicant**

and

SAMWU **First Respondent**

THE PEOPLE LISTED IN ANNEXURE ''X'' TO THE NOTICE OF MOTION **Second Respondent**

Heard: **11 March 2016**
Delivered: **11 March 2016**
Edited: **2 June 2017**
Summary: **Matter settled – costs argued – each party to pay its own costs**

***EX TEMPORE* JUDGMENT**

COETZEE AJ

Introduction

[1] This is the *ex-tempore* judgment in matter J446/2016, between the Johannesburg City Parks and Zoo, the applicant, and the South African Municipal Workers Union (Samwu), the first respondent, and the second and further respondents.

[2] In this matter today, by agreement, a draft order was made an order of court.

[3] The order reads as follows:

> "By agreement between the parties, the court makes the following order:
>
> 1. The rule nisi of 4 March 2016 is discharged.
> 2. The respondents undertake not to participate in or promote any strike in relation to the issues identified in annexures A and B to the Founding Affidavit pending the finalisation of the referral process in the Bargaining Council.
> 3. The question of costs will be determined by the court."

[4] Both parties addressed the Court.

[5] This is the judgment on costs in terms of the agreed court order.

[6] Section 162 of the Labour Relations Act[1] (the LRA) prescribes that a cost order may be made according to the law and fairness. The generally accepted legal position in the civil courts is that costs will follow the result.

[7] "Fairness" requires a consideration of a number of factors. Section 162 further specifies that the conduct of the parties in proceedings with or defending the matter in court should form part of the considerations of a costs order. The section reads as follows:

> "162. Costs.—

[1] Act 66 of 1995 (as amended).

(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account—

(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and

(b) the conduct of the parties—

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court.

(3) The Labour Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the Court."

Analysis

[8] I attempted to summarise the conduct of the applicant and the conduct of the respondents pursuant to the submissions made and as I gained it from the papers in order to determine an appropriate order for costs in this matter.

[9] For the sake of convenience, I have divided the issues into three rubrics. The first is the applicant's conduct complained of, secondly, the respondents' conduct and lastly other considerations.

[10] I first deal with the conduct of the applicant.

The conduct of the applicant

[11] One of the main complaints against the conduct of the applicant is that it did not comply with the 48 hours' notice prescribed in terms of section 68 of the LRA when calling the respondents to court.

[12] The applicant submits that it sent a letter on 3 March 2016 forewarning the respondents. The respondents did not respond thereto.

[13] The respondents say that they did not receive it. There is a dispute of fact on this issue.

[14] It is common cause that the applicant issued the formal notice about three hours prior to the application being heard. The respondents raised this as a second relevant consideration.

[15] The applicant, in respect of the short notice, explains its conduct in terms of the reasons for urgency set out in its founding affidavit. Those considerations were considerations such as that live animals had to be fed, water having been turned off and, most importantly, also that the public was negatively affected by what is common cause was to be an unprotected strike.

[16] Further, in justification of the three hours' formal notice, the applicant says in this paragraph that the short notice was precipitated by the respondents by conducting or engaging in an unprotected strike without any notice whatsoever.

[17] The respondents complain (in this regard) that the purpose of the 48 hours' notice, is for the parties to have sufficient time to reflect, especially the respondents in this case, on whether the conduct should proceed or what their response should be.

[18] On the facts, it appears to me that it is improbable that any reflection would have resulted in a solution. The strike, notwithstanding the interim order of 4 March 2016, continued until 6 March 2016 and it is unlikely, looking at it coldly, that any reflection would have made any difference in this regard. It is therefore likely that the respondents did not suffer any prejudice as a result of the short notice.

[19] The further conduct of the applicant that I have regard to is that the allegations in the founding affidavit are thin in respect of who participated in the strike and the premises where the strike occurred.

[20] It appears to me that some of the second and further respondents were joined merely because they were members of the first respondent without any specific information that they were participating in a strike. In addition, the applicant filed a replying affidavit that contained information that should have been in its founding affidavit.

[21] The procedure that the applicant adopted with its replying affidavit is an incorrect procedure, although I do not believe that the whole of the replying affidavit should be disregarded. One issue, for instance, is the participation of IMATU. The respondents raised the participation of IMATU for the first time in the answering affidavit. The applicant then dealt with this matter in the replying affidavit. It is an overstatement that the Court should disregard the whole of the replying affidavit and then take that into account in making a cost order. The contents of the replying affidavit is a factor that the Court takes into account.

The conduct of the respondents

[22] As far as the respondent's conduct is concerned, I rely mainly on the founding affidavit and the answering affidavit without particular reference to the replying affidavit.

[23] The respondents say there was no strike action and if there were something that looked like strike action, it was contained to the Johannesburg Zoo and Springfield and it did not affect the other depots.

[24] The strike was unprotected. The strike commenced without any compliance with any of the prescripts of the LRA. The strike commenced without any strike notice of whatever form.

[25] The strike placed at risk the wellbeing and lives of the animals. The strike affected the public such as, for instance, the school children arriving in buses on a pre-planned and arranged school outing for which they had

paid. The applicant turned them away due to the conduct of the striking employees participating in the unprotected strike.

[26] The conduct of the respondents in denying any strike action until 11 March 2016 (that is today) before giving an undertaking counts against them. The first respondent has not yet formally called the strike off.

[27] Today, on the return date, the first respondent was still opposing the matter on the basis that there was no strike. It is likely that the Court might have confirmed the interim order, albeit in a much more restricted format, in the absence of an undertaking.

Other considerations

[28] There are also other considerations for purposes of a cost order.

[29] Ordinarily a party, advancing appropriate facts, is entitled on an urgent basis and on shorter notice, to approach the Court, especially if members of the public are affected or life and limb are endangered by the unlawful and unprotected conduct.

[30] Secondly, the Court in this case, determined a shortened and urgent return date so that the matter was ripe for a hearing within a week. This obviated a postponement of the matter or an arrangement for papers to be filed.

[31] Thirdly, the respondent was not deprived of its right to strike. The respondents embarked upon an unprotected strike.

[32] Fourthly, the purposed of the interim order was to stop the unlawful conduct. The first respondent failed to stop the unlawful strike and on the papers today is still denying any strike action.

[33] Lastly, the parties have agreed to the undertaking that I have read into the record.

[34] Both parties have achieved substantial success in that the order was discharged but also that the unlawful action was terminated.

[35] Having regard to all of these factors, in the exercise of my discretion. I conclude that I should not make any order as to costs in favour of any of the parties. Each party should pay its own costs.

Order

[36] I make the following order:

1. There is no order as to costs.

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F. Coetzee

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant:	Attorney C Beckenstrater of Moodie & Robertson
For the Respondent:	Adv S Shangisa
Instructed by:	Madlela Gwebu Mashamba Attorneys