IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 45/16

In the matter between:

SUN INTERNATIONAL LIMITED **Appellant**

and

SOUTH AFRICAN COMMERCIAL

CATERING AND ALLIED WORKERS UNION **Respondent**

Heard: **23 February 2017**

Delivered: **03 May 2017**

Coram: Davis, Jappie JJA and Kathree-Setiloane AJA

JUDGMENT

DAVIS JA

Introduction

[1] This is an appeal against the judgment of Rabkin-Naicker J sitting in the court *a quo* in which she ordered that the appellant be interdicted from engaging in

replacement labour during the course of a protected lockout on the basis that the strike which had given rise to the lockout had ended.

[2] The substance of the appeal before this Court concerns one crisp question, namely the interpretation of s76(1)(b) of the Labour Relations Act 66 of 1995 ("LRA"). Section 76 (1) (b) of the LRA provides:

> '[a]n employer may not take into employment any person for the purposes of performing the work of any employee who is locked out, unless the lock-out is in response to a strike'. (my emphasis)

[3] The court *a quo* found that the lockout which continued after the strike had ended was no longer "in response to the strike" and therefore the employment of replacement labour was prohibited. It is against this finding that appellant comes before this Court.

The central factual matrix

[4] On 21 September 2015, following an unsuccessful attempt for conciliation and the issuing of a certificate of outcome by the CCMA, respondent issued a strike notice in terms whereof it gave appellant notice of a three-day strike commencing at 05h45 on 25 September 2015, and ending at 05h45 on 28 September 2015 in support of its wage demands.

[5] To the extent that it is relevant, respondent's letter reads thus:

> 'Take further notice that the intended strike action and picketing will follow this planned programme of action:
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> On 25 September 2015, from 05h45 all workers will embark on a total tools down and the marches will take place on this day, from 10h00 until 14h00.
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> 1. On the 26th and 27th picketing in all units will follow, see attached list of units participating.

2. The workers will return to their work stations from 05h45 on 28 September 2015. The Union reserves its right to issue another notice, should a need arise.'

[6] On 22 September 2015, appellant issued respondent with a lockout notice in terms of which it notified respondent that it intended to institute a lockout in response to the "strike" and that the lockout would take effect on 08h00 on 25 September 2015. The basis of appellant's decision to engage in a lockout was stated as follows:

> 'In terms of the lockout, Sun International will exclude its employees who are members of SACCAWU from its various workplaces for the purpose of compelling such employees to accept Sun International's final offer, regarding changes in wages and/or terms of conditions of employment as set out, in full, in Annexure A attached to this writing; and
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> The lockout will continue until such time as Sun International's aforesaid final offer has been accepted and during this period such employees will not be entitled to any remuneration or benefits.'

[7] After the strike had occurred and the lockout had been implemented on 25 September 2015, respondent launched an urgent application in the court *a quo* seeking to interdict appellant from employing replacement labour during the lock-out after the strike had ended. Based on the interpretation it adopted of s76(1)(b) of the LRA, the court *a quo* held that appellant was not entitled to engage replacement labour as the strike had ended.

[8] After these events, a wage agreement was concluded between the parties on 07 October 2015. It is thus common cause that the dispute which gave rise to both the strike and the lockout had been resolved. In the light thereof, respondent raised a point *in limine* with respect to the appeal against the judgment of the court *a quo,* namely whether there remained a live dispute for this Court's determination and hence whether the relief sought by appellant will have any practical effect. In respondent's view the appeal was thus moot.

Accordingly, the issue of mootness must be determined prior to any substantive inquiry into the meaning of s76(1)(b) of the LRA.

Mootness

[9] Respondent relies in particular on s16(2)(a)(i) of the Superior Courts Act 10 of 2013 for its submission that the appeal is moot. This section provides:

> 'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone'

[10] Section 21A(1) of the now repealed Supreme Court Act 59 of 1959 corresponds with the present s16 (2)(a)(i) of the Superior Courts Act. Hence the jurisprudence relating to the repealed provision remains relevant. The meaning of s21 A(1) is captured by Brand JA in *Port Elizabeth Municipality v Smit*[1]:

> 'It can be argued, I think, that s 21 A is premised upon the existence of an issue subsisting between the parties to the litigation which requires to be decided. According to this argument s 21 A would only afford this Court a discretion not to entertain an appeal when there is still a subsisting issue or *lis* between the parties the resolution of which, for some or other reason, has become academic or hypothetical. When there is no longer any issue between the parties, for instance, because all issues that formerly existed were resolved by agreement, there is no "appeal" that this Court has any discretion or power to deal with.'

For a further discussion of this principle see *Legal Aid v Magidiwana* 2015 (2) SA 568 (SCA) at paras 18-22

[11] Respondent contends that the dispute between the parties has been resolved. No notice to strike nor to lockout has been issued nor is either contemplated. The employment of replacement labour is not an issue

[1] 2002 (4) SA 241 (SCA) at para 7.

between the parties at present and there is no suggestion that it is currently in appellant's contemplation.

[12] To the contrary, appellant contends that the dispute has not become moot and it raises in support of this argument the decision of this Court in *Mawethu Civils (Pty) Ltd and Another v National Union of Mineworkers and Others* (2016) 37 ILJ 1851 (LAC). In that case, an interim order interdicting a strike had been discharged by the Labour Court. This Court entertained an appeal in circumstances when there was no longer any strike action. It upheld the appeal, finding that the court *a quo* ought to have confirmed the interim order. Murphy AJA examined the question of mootness and concluded thus at para 23:

> 'Counsel for the respondents argued that the appeal has become moot with the passage of time and will have no practical effect. That is not correct. There is a live dispute between the parties about the legal character and consequences of the strike that has continued relevance in the on-going industrial relations in which they are involved. The appellants legitimately seek judicial affirmation of their stance in regard to the appropriate means of resolution of a dispute of this nature.'

[13] Appellant contends that the parties continue to be in dispute about whether replacement labour can be used in these circumstances and accordingly submits that the approach adopted in *Mawethu Civils* is applicable to the present case. In the event that the court finds the appeal to be moot, appellant contends that the Court should nonetheless exercise its discretion to entertain the appeal. In this connection it referred to the decision in *Executive Officer FSB v Dynamic Wealth Ltd and others* 2012 (1) SA 453 (SCA) which I shall analyse presently.

[14] In summary, appellant's argument was that, as the appeal raises a discrete legal issue, being the interpretation of s76 (1)(b) of the LRA and that this issue is of importance to the labour community at large, as in future disputes

replacement labour might be used. It was therefore important for this Court to resolve the conflict between the court *a quo*'s judgment and two other judgments of the Labour Court namely, *Ntimane and Others v Agrinet t/a Vetsak (Pty) Ltd* [1999] 3 BLLR 248 (LC) and *Chemical Energy Paper Printing Wood and Allied Workers Union v National Magazine Printers* (1999) 20 ILJ 2864 (LC).

Evaluation

[15] In *Mawethu Civils, supra,* the court held that there was a live dispute between the parties that had not been resolved. Its finding appeared to turn on whether it was a term of the employment contract that employees had to work unpaid overtime in order to receive paid leave for a day following upon a public holiday. The dispute focussed on an averment of the evidence of a long standing practice which the employer had insisted had become an accepted employment term, a claim which was hotly contested by employees who were in an on-going employment relationship with the employer. It appears, on this analysis of the facts, that the on-going relationship and what terms framed this relationship formed the justification for a finding that there was a live dispute. The upshot of the approach adopted by Murphy AJA in *Mawethu Civils, supra* was that, as there was a live dispute, this finding justified the Court in proceeding to deal with the merits of the case.

[16] By contrast, in this case there is no suggestion that there is any form of live dispute between the parties. The dispute which gave rise to the lockout and strike was settled in October 2015. There was not a scintilla of evidence produced to indicate to the contrary. Accordingly, it is not possible to find that there is a live dispute on the present facts sufficient to adopt a similar approach to that set out in *Mawethu Civils*.

[17] As noted appellant sought to invoke the decision in *Executive Officer FSB, supra*. In support of an argument that this Court should exercise its discretion to hear the substantive dispute *Executive Officer FSB, supra* turned on the

scope of s5 of the Financial Institutions (Protection of Funds) Act 28 of 2001 which provides that a financial institution may, on good cause shown by the Registrar of Financial Institutions, be placed under curatorship for a period that the court deems fit. On appeal, the court found that, based on inspector's reports, the respondents had acted illegally and dishonestly. Hence, the Registrar had been compelled to act to remove the person responsible from the management and control of the institutions concerned. Accordingly, the court held that an interim order of curatorship should have been granted by the High Court and that the dispute had been incorrectly decided by the court *a quo*. However, in the interim, respondent's business was closed due to the withdrawal of its licences and it was thus no longer appropriate to appoint liquidators. The question therefore raised was whether the appeal should be dismissed for having no practical effect or result. Wallis JA said the following:

> 'I do not agree that the appeal will have no practical effect or result. Its determination involves the proper construction of an important provision in the regulatory armoury of the Registrar, the test to be applied in considering an application for curatorship under s 5(1) of the FI Act and a consideration of the evidential status of an inspection report. These are all important issues that will impact upon the future conduct of the Registrar.
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> Lord Slynn of Hadley said in *R v Secretary of State for the Home Department, Ex Part Salem*:
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> '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 future.'
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> The present seems to me precisely the type of case where the court should hear and decide the dispute because of its importance in the field of financial regulation, where it will have a practical effect.' (paras 43-44)

[18] In *Executive Officer FSB* it was clear that, as the Registrar was required to work with the relevant legislation on a daily basis, clarity was required in order to determine whether a curatorship order was competent. In short, the regulatory system for which the Registrar was responsible was dependent upon a definitive interpretation of the relevant section and the registrar's powers.

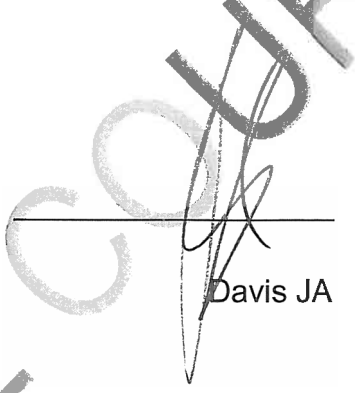
[19] In the present case, appellant argues that, as there are conflicting approaches to the relevant section, the broad labour law community is uncertain about the interpretation of the section and this uncertainty impacts upon many parties. This is a very different scenario from that of a regulatory authority which has to work daily with the relevant empowering legislation.

[20] The present case is clearly fact driven. When the merits of the case are examined much of the argument turned on the fact that respondent had written a letter in which it said: "The union reserves its right to issue another notice should a need arise." Whether one sentence can be considered to justify the argument that the disputed lock out was in response to a strike, which was continuing as a result of a threat to issue another strike notice, is a question which can only be resolved on the facts. That the dispute between the parties ended but a week later simply illustrates that the issue between the parties turned on the particular facts of the case. The dispute is no longer live between the parties and therefore does not deserve the attention of this Court. When a live dispute triggers the application of s76(1)(b) of the LRA, the Labour Court and/or this Court will doubtless deal with the application of the section through the prism of the factual matrix confronted at the time.

[21] Appellant has in effect asked for an advisory opinion as to future conduct. Appellant does not represent the broader labour law community nor did any other party seek to join as an *amicus* in order to provide further information or argument to this Court. There was a dispute between two parties and that matter has been resolved. It is not a case which should be heard by this

Court because it falls within the doctrine of mootness as I have outlined it. There is therefore no basis by which to decide the interpretation question relating to s76(1)(b) of the LRA.

[22] For these reasons, the appeal is dismissed. There is no award as to costs.



Davis JA

Jappie JA and Kathree-Setiloane AJA concurred

APPEARANCES:

FOR THE APPELLANT:	Adv A Myburgh SC
	Instructed by Zyl Rudd Inc
FOR THE RESPONDENT:	Adv V Ngalwana SC
	Instructed by Voyi Inc