IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA54/2019

In the matter between:

NATIONAL UNION OF MINEWORKERS **Appellant**

and

CULLINAN DIAMOND MINE, A DIVISION OF

PETRA DIAMONDS (PTY) LIMITED **Respondent**

Heard: **25 November 2020**

Delivered: **14 December 2020**

Summary: ***Strike—Legal—Payment of bonuses to non-striking employees during course of* F *strike—Recourse to permissible retaliatory economic measure by employer—Not unfair discrimination.***

Strike—Legal—Use of retaliatory economic measures to defeat strike justified—Employer acting out of necessity—Measures justified.

Coram: Coppin JA, Murphy and Savage AJJA

JUDGMENT

MURPHY AJA

[1] The appellant ("NUM") appeals against the judgment of the Labour Court (Moshoana J) which dismissed its claim that the respondent had discriminated against its members who participated in a protected strike by paying a discretionary bonus to non-striking employees.

[2] The respondent operates a diamond mine in Cullinan. It employs more than 1200 employees. NUM represents over 500 employees and negotiates wages on their behalf. On 29 August 2013, after wage negotiations between NUM and the respondent reached impasse, NUM and its members commenced a protected strike. The strike lasted for 12 operational days, and terminated on 15 September 2013.

[3] Shortly before the commencement of the strike, on 26 August 2013, the respondent addressed a letter to all employees urging them to consider its final wage offer favourably. It added that "any employee who joins the industrial action (even for just one day) runs the risk of losing the potential bonus payment scheduled for end September 2013". The mentioned bonus was discretionary in nature, was usually awarded on the fulfilment of certain conditions and was determined jointly by the respondent and its parent company, Petra Diamonds (Pty) Ltd. The next day, 27 August 2013, another circular was distributed which stated unequivocally that "once strike action commences, striking employees will forfeit production bonuses". A third communication was circulated on 28 August 2013, which included the following advice:

> 'It is important to note that the potential bonus payment scheduled for September 2013 is based on the company's performance in the 2013FY, the completion of a successful audit of the 2013FY results and the successful settlement of the wage negotiations for the 2104FY without the negative impact of a strike. The strike will definitely impact the quantity of this bonus negatively. The choice whether to partake in the strike or to come to work remains the choice of each and every employee.
>
> The negative impact of the strike on the company as well as the bonus of employees will be reduced if revenue could be safely generated during the

> strike period. Employees who decide to come to work and assist the mine to generate revenue during this period by performing alternative and additional duties in an exceptional manner would be considered for an additional payment.'

[4] After the strike ended, it was decided that all employees, whether they had been on strike or not, would not receive the annual production bonus, but an exceptional performance bonus would be paid to all employees who had worked one day or more during the course of the strike and had contributed to exceptional productivity and performance during this period. A written communication circulated on 22 October 2013 explained the situation as follows:

> 'The strategy around the annual bonus payments in the Petra Group rewards financial performance and production target achievement, based on audited results. The criteria based in assessing whether to award a bonus or not include: 1) achieving or exceeding production targets; 2) achieving or exceeding profitability targets; 3) confirmation of annual result by means of the external audit; and 4) a period free of major disruptions leading up to the payment of the bonuses.
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> Considering all the circumstances, it is Cullinan Diamond Mine's position not to make any performance bonus payment in September/October 2013.
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> The Company recognises that certain employees contributed above and beyond their normal duties to minimise the impact of recent disruptions on production and revenue losses. Therefore employees will receive an additional payment in accordance with the Company's approach in rewarding exceptional behaviour. These payments will be included in the October pay-run.'

[5] Mr Kemp, the respondent's mine manager, testified that during the strike, the mine was able with 34% of the available man-hours (the non-striking employees) to achieve a production level of 52% of the expected carats. This, he asserted, was exceptional performance deserving of a bonus payment calculated (differently to the discretionary annual production bonus) in accordance with a formula which rewarded employees not only for attendance

during the strike, but also for their individual efforts in respect of production in that time.

[6] NUM questioned whether it was possible for the non-striking employees to achieve the 52% production level when the majority of employees were on strike. However, it was not suggested to Mr Kemp in cross-examination that his figures were mistaken or and that it was unlikely that 52% of the production target had been achieved through the employment of only 34% of man-hours. Kemp was adamant that the dominant or proximate reason for the payment of the bonus, as stated in the contemporaneous documentation, was payment for exceptional performance and not a reward for not exercising the right to strike. The non-striking employees were given the bonus not only for their attendance at work during the strike but also for their performance in minimising the effects of the lost production caused by the strike.

[7] NUM referred a dispute to the Labour Court in which it claimed that the payment of the bonus was "a breach of section 5(2)*(c)(*vi) and section 5(3) of the Labour Relations Act[1] ("the LRA") as read with sections 6 and 10 of the Employment Equity Act[2] ("the EEA") and unfair discrimination.

[8] The EEA does not apply to discrimination of the kind alleged in this case. The EEA governs unfair discrimination on the proscribed and analogous grounds listed in section 6(1) of the EEA. Discrimination against employees exercising rights under the LRA or participating in trade union activities is governed principally by section 5 of the LRA, which in relevant part reads:

> '(1) No person may discriminate against an employee for exercising any right conferred by this Act.
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> (2) Without limiting the general protection conferred by subsection (1) no person may do, threaten to do, any of the following…
>
> (c) prejudice an employee or person seeking employment because of past, present or anticipated –

[1] Act 66 of 1995.
[2] Act 55 of 1998.

> (i) membership of a trade union…
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> (iii) participation in the lawful activities of a trade union…
>
> (vi) exercise of any right conferred by this Act…
>
> (3) No person may advantage, or promise to advantage, an employee or person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute.'

[9] The provisions of section 5 of the LRA prohibit anti-union discrimination. Section 5(1) of the LRA is a general prohibition, while the specific provisions of section 5(2) and 5(3) target particular kinds of discrimination without derogating from the generality of the prohibition in section 5(1) of the LRA. Although the term "discriminate" is not qualified with the adverb "unfairly", our constitutional and anti-discrimination jurisprudence generally require that discrimination be unfair and/or unjustifiable in order to constitute an infringement of violation. A contravention of section 5(1) therefore comprises two elements: discriminatory conduct or action, and such being unjustifiable.[3]

[10] NUM's incorrect reliance on the EEA is inconsequential. Its statement of case and the evidence leave no doubt that it alleges discrimination of the kind contemplated in section 5(1) of the LRA, and specifically contends that the striking employees were prejudiced for exercising their right to strike conferred by section 65 of the LRA (section 5(2)*(c)*(vi) of the LRA) and that the non-striking employees were unfairly advantaged for not exercising their right to strike (section 5(3) of the LRA). The Labour Court held that the evidence did not disclose any infringement of section 5 of the LRA; nor was there discrimination in terms of the EEA because discriminating on the grounds of participation in a strike was not a listed or analogous ground, and was in this instance in any event rational and justifiable.

[3] *SAFCOR Freight (Pty) Limited t/a SAFCOR Panalpina v SA Freight & Dock Workers Union* (2013) 34 ILJ 335 (LAC) at para 21.

[11] The issue on appeal is thus whether the payment of bonuses to the non-striking employees amounted to unfair discrimination in terms of section 5 of the LRA.

[12] In the past our courts interpreted the provisions of the LRA's predecessor, the Labour Relations Act 28 of 1956 ("the 1956 LRA"), to permit employers to resort to the payment of bonuses to non-strikers in order to mitigate the harmful consequences of a legal or protected strike.

[13] In *Chemical Workers Industrial Union v BP South Africa*,[4] a decision was taken by the employer during the first day of a legal strike to pay bonuses to non-striking employees who were regarded as strategic to the continued operation of the business or were requested to work longer hours than usual or to perform tasks falling outside their job description. The bonuses were paid after the strike ended and were justified as incentives for continuing to work and a reward to employees for the extra effort made to enable the employer's operations to continue. The employer had never previously paid bonuses of this kind to its employees. The Industrial Court held that the payment of the bonuses to the non-strikers did not constitute an unfair labour practice in terms of section 46(9) of the 1956 LRA.

[14] The Industrial Court reasoned as follows:

> 'Surely, it cannot be doubted that an employer is entitled to attempt to defeat a strike, even a legal one, through a range of economic weapons of his own... The position is put thus by Fabricius and Landman Assessors in East Rand Gold & Uranium Co Ltd v NUM (1989) 10 ILJ 683 (LAC) at 698H-I:
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> 'Where the bargaining agent intends resorting to lawful industrial action in order to resolve the impasse it is not unfair for an employer to resort to unilateral action which is aimed at the preservation of his property and the viability of his business. He would also be permitted to take every fair and reasonable action to counteract any industrial action to which the bargaining agent may resort.'
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> Examples of the economic weapons said to be available to an employer in the event of a strike or impending strike are: (a) a pre-emptive lockout, assuming

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[4] (1991) 12 ILJ 599 (IC).

> that deadlock has been reached in negotiations, (b) certain forms of secondary lock-out, and (c) the employment of temporary replacement labour. To these may be added the employer's ultimate economic weapon of dismissal. Bearing in mind their possible harsh consequences for the workers, all these economic weapons should be resorted to by the employer with care and circumspection… their use should be aimed at the preservation of the employer's property and/or the viability of his business, be suitable and necessary for that purpose, and constitute fair and reasonable action on the part of the employer. There is, however, no *numerus clausus* of economic weapons at the disposal of an employer who wishes to combat industrial action embarked upon by his employees and/or their bargaining agent. His choice of weapon is restricted only by the need for its use to fall within the parameters indicated. Where such is the case then clearly there cannot be any question of the employer's having perpetrated an unfair labour practice. Moreover, it seems to me that, in such circumstances, the employer will inevitably be seen to have acted in circumstances of necessity, so that, on this ground, too, his actions will be justified….
>
> However, the fact of the matter is that where certain of an employer's workers elect to embark upon a strike whilst others do not, good and compelling economic reasons do exist for the employer differentiating in his treatment of striking and non-striking workers, albeit, as in the instant case, for the duration of the strike only. In such circumstances, there cannot, in my opinion, be talk of any victimization of striking workers…when it is clear that respondent's object in making such payment was not to penalize applicant's striking members, but, rather, to preserve its business operations.'

[15] The Appellate Division took a similar view in *SACCAWU v OK Bazaars (1929) Ltd.*[5] After annual wage negotiations with the trade union broke down, some 7 000 employees embarked upon legal strike action in spite of a warning by the employer that striking employees stood to forfeit their annual bonuses. The employer ordinarily paid a discretionary annual bonus to its employees. The strike endured for approximately seven weeks and the employer later resolved to pay an annual bonus only to those employees who had not participated in the strike. Strikers, in contrast, forfeited all or part of their bonuses in

[5] [1995] 7 BLLR 1 (A).

accordance with the respondent's policy. The union contended that the employer's conduct constituted an unfair labour practice.

[16] The Appellate Division rejected the union's argument that irrespective of the circumstances it was always unfair to offer employees financial inducements to abstain from striking. Accepting that the freedom to strike was a necessary ancillary to effective collective bargaining, the court was nonetheless of the view that this did not preclude employers from taking steps to discourage strikes. Whether or not a particular inducement by an employer constituted an unfair labour practice was dependent on the circumstances in which it occurred. The strike had caused substantial loss to the employer and it therefore seemed anomalous for the strikers to claim a bonus granted in recognition of service during the year. While the court accepted that an employer should in principle treat like classes of employees alike, it was permissible to distinguish between strikers and non-strikers and to pay an inducement to abstain from striking. The withholding of bonuses from all employees would be unfair to those employees who relying on the inducement had stayed at work.

[17] The decisions in *CWIU v BP South Africa and SACCAWU v OK Bazaars (1929) Ltd* were decided before the enactment of the LRA in 1995. The question then is whether section 5 of the LRA requires a different approach and perhaps the prohibition of the practice of rewarding non-strikers with bonuses for staying at work.

[18] There is no express provision in the LRA prohibiting employers from providing non-strikers with rewards for the extra work or exceptional performance they may put in during the strike. NUM's position is essentially that the employer's conduct should be seen as undermining collective bargaining by discouraging employees from exercising the right to strike and thereby weakening its impact. This, it argued, is against the object of the LRA to promote orderly collective bargaining as the preferred means of setting terms and conditions of employment. By allowing the payment of bonuses to non-strikers, the message is sent that in future employees will be better rewarded if they do not strike. Likewise, by rewarding non-strikers the employer is advantaging them for not exercising their right to strike and is thus acting in contravention of section 5(3)

of the LRA. The Labour Court accepted this line of reasoning in FAWU and *Others v Pets Products (Pty) Ltd*[6] and in *NUM v Namakwa Sands – A Division of Anglo Operations Ltd*.[7] In those cases, the non-strikers were respectively paid vouchers and redeployment allowances. The Labour Court found in both instances that the practices were discriminatory and infringed the various anti-discrimination provisions of section 5 of the LRA. NUM submits that these decisions support the general proposition that granting non-strikers rewards during a strike unjustifiably dilutes the right to strike and is prohibited.

[19] As stated, there is no general express provision in the LRA or elsewhere outlawing the practice of paying bonuses to non-strikers. The issue is whether that practice is unfairly discriminatory.

[20] As discussed, the Appellate Division in *SACCAWU v OK Bazaars (1929) Ltd* held that even if we accept (as we must) that the right to strike is a necessary ancillary to effective collective bargaining, that does not preclude employers from taking steps to discourage strikes or to mitigate their impact. Whether employer conduct during industrial action constitutes unfair discrimination is dependent on the context in and reasons for which it occurred. Simply put: was the differentiation justified in the circumstances?

[21] There is no denying that the impact of differential treatment between strikers and non-strikers was disadvantageous for the strikers. The respondent's intention or motive in making the payment, stated to be innocent and not aimed at punishing striking, does not save its conduct from being categorised as discriminatory. Though the basis of the differentiation may, on the face of it, be innocent, the effect of the differentiation is discriminatory in the narrow sense that there is a disparate impact. Hence, there was at the very least indirect discrimination which was either fair or unfair.

[22] The strongest argument supporting the contention that the payment of rewards to non-strikers is generally unfair is that such conduct undermines the union as bargaining agent. However, a distinction can be drawn between bypassing or

[6] [2000] BLLR 781 (LC).
[7] [2008] 7 BLLR 675 (LC).

undermining the bargaining agent (for instance by negotiating directly with employees during a strike or offering employees an additional reward for resigning their membership of the recognised union) and the deploying of a retaliatory measure as part of the collective bargaining power play during a strike.

[23] Insofar as the policy of the LRA aims to strengthen collective bargaining as the means of industrial self-regulation, its success depends on strong representative trade unions and employers acting within stable bargaining relationships underwritten by the right to engage in industrial action. The possibility of an ultimate power play by either side is a powerful inducement for agreement and industrial peace. As the Industrial Court suggested in *CWIU v BP South Africa*, collective bargaining is a two-way street. Just as the employees have measures to compel the process to advance their interests such as strikes, go-slows, overtime bans, work to rule, boycotts and picketing; so too does the employer, who may seek to protect its interests by resorting to the lock-out, unilateral implementation of its last offer, the employment of temporary replacement labour and ultimately operational requirements dismissals when the strike becomes dysfunctional. An employer is entitled to attempt to thwart a strike through these various options. In offering bonuses to non-strikers on the eve of the strike, as happened in this case, the employer hopes to gain a tactical advantage before the campaign of its employees picks up momentum at a time when its business is not overly vulnerable.[8]

[24] Some believe that the lock-out is the equivalent of the employees' right to strike. That is not so. The true countervailing power is the employer's prerogative to act unilaterally. Davies and Freedland describe the position as follows:

> 'A lock-out is not the employer equivalent of a strike…the reciprocal employer lever is really the management prerogative to maintain or to change the terms and conditions which the employer would pay its employees who want to work in its operations…[T]he ability of management to institute changes unilaterally is perhaps the employers' real equivalent of the employees' strike.'[9]

[8] E Cameron et al: *The New Labour Relations Act* (Juta 1988) 95.
[9] Davies and Freedland: *Labour Law* (Weidenfeld & Nicholson 1979).

[25] Thus, just as it is legitimate for a trade union to resort to industrial action (temporarily suspending the contract) in response to an employer's unilateral management changes, so too it may be legitimate (depending on the circumstances) for the employer to respond to a strike with a unilateral exercise of the managerial prerogative to alter temporarily the terms of employment. Economic sanctions underwrite the collective bargaining process. The unilateral offer of bonuses or additional overtime payments to non-strikers (who may not be members of the union) is no more or less objectionable than the employment of replacement labour, provided the measures are suitable and necessary (proportional) for that purpose.

[26] It is also important for labour courts and tribunals to constrain their intervention in the collective bargaining process aimed at resolving disputes of interest and the fashioning of new rights by collective agreement. The point was eloquently made 30 years ago by Clive Thompson as follows:

> '[T]he court should tread with great circumspection on the terrain of collective bargaining proper. It should not attempt to prescribe to the parties what deals are 'fair' or 'unfair'; in an essentially market-oriented economy, the substantive outcome of bargaining – the content of collective agreements – should be determined by market forces. It goes without saying that one is assuming a market which recognises the legitimate role of organised labour and capital. The eventual collective deal must reflect the relative strengths of the parties if it is to endure…On matters monetary, the court should adopt a hands-off policy… Power is brought to bear in the collective bargaining process through strikes on the one hand and lock-outs or unilateral action on the other. If the court interferes with the legitimate exercise of power, it threatens the very logic of collective bargaining. It is therefore of paramount importance that the court should acknowledge the co-ordinates which map out the area of autonomous collective bargaining. Here there should be one guiding principle: a recourse to industrial action will be legitimate when the parties have bargained in good faith to impasse. Before that point, economic action is premature and the court should intervene to safeguard the negotiating process; thereafter, such action

> is often part of the resolutive process and the court should be conspicuous by its absence.'[10]

[27] The payment of the exceptional performance bonus in this case was mooted for the first time in the circular of 28 August 2013, the day before the strike commenced. The circular indicated that employees who decided "to come to work and assist the mine to generate revenue during this period by performing alternative and additional duties in an exceptional manner would be considered for an additional payment". By then impasse had been reached and the parties were positioning to bring legitimate power to bear. The employees were geared up to strike and the employer offered inducements for exceptional performance during the strike.

[28] Although prima facie indirect discrimination, in the context of the constitutional scheme guaranteeing the right to engage in collective bargaining,11 the respondent's conduct was not unfair and was a legitimate exercise of that right as "part of the resolutive process". To state the obvious, no right (including the right to collective bargaining and the right to strike) is absolute. The rights of both industrial actors are subject to reasonable limitation and from time to time require harmonisation. The respondent's conduct was not inconsistent with the policy objectives of the LRA. By reason of its temporary retaliatory nature, and the computation of the bonus being explicitly tailored to attendance and performance for the limited period of the strike, the bonus was a proportional means of advancing the respondent's collective bargaining objectives.

[29] As such, the respondent's conduct did not unfairly discriminate against or prejudice the striking employees; nor did it unfairly advantage the non-strikers without legitimate reason. The non-strikers were not advantaged for not exercising their right to strike. They were advantaged for their attendance and exceptional performance during the strike. But for the

[10] E Cameron et al: *The New Labour Relations Act* (Juta 1988) 99.
[11] Section 23(5) of the Constitution

exceptional performance the bonus would not have been paid. Accordingly, the respondent's conduct was not an infringement of the relevant provisions of section 5 of the LRA.

[30] The Labour Court accordingly did not err in dismissing the application and the appeal hence must fail. Fairness and the ongoing relationship between the parties dictate that there should be no order for costs.

[31] In the premises, the appeal is dismissed.

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JR Murphy

Acting Judge of Appeal

Coppin JA and Savage AJA concur in the judgment

APPEARANCES:

FOR THE APPELLANT: Adv. Baloyi

Instructed by Molebaloa Inc

FOR THE RESPONDENT: Adv A Redding SC

Instructed by Mervyn Taback Inc