THE LABOUR COURT OF SOUTH AFRICA
AT JOHANNESBURG

Of Interest to other Judges

Case no:C 99/2024

In the matter between:

WESTERN PROVINCE CATERERS HEALTH CARE DIVISION (PTY) LIMITED	**Applicant**
and	
THE FOOD AND ALLIED WORKERS UNION (FAWU)	**First Respondent**
BONGANI MGIJIMA	**Second Respondent**
MEMBERS OF FAWU (As per Annexure "A")	**Third to Eighteenth Respondents**

Heard: 19 April 2024

Delivered: (This judgment was handed down electronically by emailing a copy to the parties. The date of delivery of this judgment is deemed to be 22 April 2024)

Summary: (Return day – Strike interdict – unprotected – rule discharged)

JUDGMENT

LAGRANGE J

[1] This applicant employer ('W P Caterers') seeks confirmation of an interim rule, issued on 15 March 2024, interdicting the first respondent union ('FAWU') and its members from striking in support of a demand for organisational rights

and related relief. It also seeks a punitive cost order against the first FAWU or, alternatively, against all the respondents. On 19 April, the rule was extended pending judgment being handed down.

[2] After unsuccessfully engaging with the employer, FAWU referred an organisational rights dispute to the CCMA. The conciliating commissioner confirmed that the union wished to embark on strike action, to which the employer objected pointing out that it is engaged in providing essential services in the form of catering services to patients at private health clinics. In the absence of being able to satisfy the commissioner that it was engaged in an essential service, the commissioner issued a certificate of outcome marking the block on the form identifying a “Strike/Lockout” as the next step.

[3] The next day (5 March 2024), the second respondent, Mr B Mgijima (‘Mgijima’), a union official, advised the employer’s private clinic client that the union had obtained a certificate which entitled it to strike at the client’s premises. The client contacted WP Caterers to convey its concerns and the latter engaged its attorneys who started corresponding with FAWU. The gist of the lawyer’s letters to FAWU concentrated on advising the union that any strike action it initiated relying on the certificate of outcome would be unprotected because the employees were working in an essential service. A copy of the essential service determination was attached to the first letter sent to FAWU.

[4] FAWU’s written response, penned by Mgijima, took the view that if the employer wanted to dispute the union’s right to embark on strike action, it had to deal with the certificate of outcome first. Clearly, it adopted the view that the certificate was a seal of approval on the legal status of any consequent strike action, a persistent legal myth still held to be true in some union circles. He urged the applicant to focus its attention on resolving the impasse and that if it failed “… *to communicate a roadmap in resolving this issue, strike will remain the only option as per the certificate.*”

[5] The employer responded by dispelling the argument that the certificate was any kind of authorisation of strike action which would be unprotected on

account of taking place in an essential service. An ultimatum was issued to the union calling upon it to issue a written undertaking by 16h00 on 7 March 2024, to the effect that its members would not engage in any strike action. The union responded somewhat as it did before, challenging the employer to do what was necessary to set aside the certificate, which was followed by a mild tirade in which it blamed the employer for the union having to approach the CCMA. It claimed that the employer had been unreceptive to efforts to settle the dispute in a conciliatory matter or by arbitration. Nonetheless, it held open the door to further engagement provided the employer treated the respondents as equals. The letter concluded by stating that FAWU had no issues with the client or the service it provided in general.

[6] In any event, in the absence of obtaining the undertaking it had sought, the employer decided to launch the urgent application to interdict any impending strike action, which was heard on 15 March. The application was not opposed.

[7] On the 9 April, more than a week before the return day, FAWU filed an answering affidavit deposed to by Mgijima. In it he stated that he had informed the union's members employed by the applicant that the strike would be unprotected and that the union would refer the organisational rights dispute to arbitration, which they accepted. He also confirmed that a request for arbitration of the organisational rights dispute had already been made on 20 March. Lastly, he stated that no strike notice had been issued and stated that "*we do not intend to give notice of a strike, there has been no strike and we will not be embarking on a strike.*"

[8] There was some discussion between the parties prior to the return day but they could not settle the matter beforehand.

Evaluation

[9] The applicant's main concern is the failure of the union to give any undertaking not to strike, which it argued necessitated it approaching the court

on the first occasion. It took Mgima's responses to its letters, as well as his approach to its client, to indicate that the union was intending to embark on strike action.

[10] The first issue is whether the rule should be confirmed. As the union has now referred the organisational rights dispute to arbitration and has stated under oath it has no intention of striking, that is one very good reason to discharge the rule. Moreover, even though this undertaking was only given after the interdict was granted it was given well in advance of the return day. In addition, apart from expressing a belief that it could embark on strike action, the union took no further steps, which could have suggested it was about to embark on strike action. In the circumstances, there seems to be no good reason to perpetuate the rule.

[11] Should the union be held liable for the applicant's costs? In view of the finding above, there is no reason why the union should be liable for any costs for the hearing on the return day. In view of the referral of the dispute to arbitration and FAWU's undertaking, it is questionable why the applicant felt compelled to pursue the confirmation of the rule. There was no reason for either party to incur the costs of return day in my view.

[12] In relation to the initial application, I would agree that the union's correspondence could not have reasonably been expected to provide any assurance it was not bent on pursuing strike action, even if it had not yet issued a notice of strike action. Its conduct in approaching the employer's client and advising it that it could now strike at its premises was not disavowed. It is true, on a generous reading, that the union's second letter did convey some conciliatory gestures. For example, it did invite the applicant to re-engage with it and argued that it was the employer's representative at the conciliation hearing which had argued against arbitration as a means of resolving the dispute. It might have been possible to steer the correspondence into a less confrontational channel if these issues had been teased out a bit more.

[13] Nonetheless, I do not think the second response from Mgijima was sufficient to reassure the applicant that the union was no longer intent on strike action as an ineluctable course of action. He implied this option had been imposed on it by the applicant and refused to engage with applicant's contention that a strike could not be protected because would take place in an essential service.

[14] I am inclined to make some kind of cost award against the union for unnecessarily refusing to give the undertaking, which it only did after the interim order was issued. It had put the applicant in the invidious situation of deciding whether to take a chance the union would not strike weighed up against the union's conduct, which suggested it believed its only legal recourse was strike action and that it was completely deaf to the employer's detailed explanation why a strike would not enjoy protected status in light of the essential services determination. It was argued for the union that the union's stance was no different from other situations where there is contestation over the legal status of planned strike action, which can only be resolved at court. There is some merit in that argument, in situations where there really are two plausible contesting versions of the protected status of a strike. However, in a case such as this where the dispute does not involve serious disputes of fact, or is not a matter of a disputed interpretation of a collective agreement or the like, but where the employer party presents an unarguable reason why the strike cannot be protected, for which it provides ample support, and the other party refuses to even engage with that claim, I do not see why the applicant needs to bear the costs of bringing an application to establish the obvious.

[15] However, as I have indicated, I also see no reason why it was necessary to seek the confirmation of the rule in this matter.

[16] In the circumstances, as a matter of fairness and law both no cost order should be made.

<u>Order</u>

1. The rule is discharged.
2. Each party must bear their own costs.

R G Lagrange

Judge of the Labour Court of South Africa.

<u>Appearances:</u>

For the Applicant: M van der Berg

Instructed by: Bernard, Vukic, Potash & Getz

For the Respondent: G Doble of Cheadle, Thompson and Haysom