

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case no: JA17/98

In the matter between

SOUTH AFRICAN NATIONAL SECURITY

Appellant

EMPLOYERS ASSOCIATION

and

TRANSPORT AND GENERAL WORKERS UNION

First

Respondent

PROFESSIONAL TRANSPORT WORKERS UNION

Second

Respondent

OF SOUTH AFRICA

NATIONAL SECURITY WORKERS UNION

Third

Respondent

SOUTH AFRICAN CLEANERS, SECURITY AND

Fourth

Respondent

ALLIED WORKERS UNION

SECURITY OFFICERS CIVIL RIGHTS UNION

Fifth Respondent

SOUTH AFRICAN SECURITY WORKERS UNION

Sixth

NATIONAL SECURITY GUARDS AND ALLIED

Respondent

Seventh

Respondent

WORKERS UNION

FOOD AND GENERAL WORKERS UNION

Eighth

Respondent

JUDGMENT

1]The Appellant is the South African National Security Employer's Association ('SANSEA'), a registered employer's organisation which represents 350 employers in the security industry. The eight respondents are trade unions which collectively represent more than 40 000 members in the security industry ('the unions'). The security industry employs about 60 000 employees.

2]SANSEA has negotiated wages and other conditions of employment with the unions annually since 1993. The practice in the past was that in about October of each year the parties exchanged demands, commenced negotiations soon thereafter, and attempted to conclude an agreement prior to the end of February the following year with a view to having the agreement gazetted in terms of s 51A of the Labour Relations Act, 28 of 1956 ('1956 Act') and extended to all employers and employees in the security industry.

3]On 6 April 1996 the Minister of Labour made an order in terms of s 51A of the 1956 Act. The effect of the order constituted an extension of the collective agreement

concluded between the parties. The collective agreement was extended to non-parties. The agreement came into effect on 15 April 1996.

4]During about October 1996 SANSEA and the unions commenced negotiations in respect of wages and other conditions of employment for 1997/1998. Those negotiations resulted in a collective agreement on 28 February 1997 ('1997/1998 agreement'). The 1997/1998 agreement provided:

'1. That the Security Order Published under Government Notice No. R 568 of 6 April 1996 be amended as follows:

1.1. Clause 3. WAGES

Increase of 13% for grades "D" and "E" and 12 % for grades "A", "B" and "C" and all other categories, applicable to all areas.

1.2. Clause 3 (5). NIGHT SHIFT ALLOWANCE

R 1,00 per shift.

1.3. Clause 5 (7). FREE PERIODS

To be substituted BY:

1996 Wage Order clause with the following sub-clause added:

"The free period shall commence no less than 12 hours after completion of the last shift."

2. That this Agreement remain in force for a period of 12 months from the date of implementation and that no further wage increases be granted before the expiry of the 12 month period.'

5]On 27 March 1997 the Minister of Labour made an order in terms of s 51A of the 1956 Act which came into effect on 7 April 1997 and which extended the terms of the

1997/1998 agreement to non-parties. The effect of that order was to extend the collective agreement.

6]There was a dispute between the parties on the application papers as to when the 1997/1998 agreement expires. Mr Kennedy, who appeared for the first respondent on appeal, conceded that the collective agreement expires on 6 April 1998 and that the conditions of employment provided for in the collective agreement will operate until then.

7]On 2 September 1997 the First Respondent sent a telefax to SANSEA which contained the consolidated 'wage proposals for 1998/1999' of the unions. Negotiations commenced on about 7 October 1997. Four lengthy meetings were held. The purpose of those negotiations, in the words of SANSEA, was 'negotiating wages and substantive terms and conditions of employment for 1998/1999.'

8]On 12 December 1997, the second respondent, acting on behalf of all the unions, declared a dispute regarding the parties' failure to reach agreement on wages and substantive terms and conditions of employment for 1998/1999. On the same day the dispute was referred for conciliation to the Commission for Conciliation, Mediation and Arbitration ('Commission') in terms of the Labour Relations Act, 66 of 1995 ('1995 Act').

9]The parties met at the Commission but were unable to resolve the dispute. On 3 February 1998 the Commission issued a certificate stating that the dispute remained unresolved.

10]On 16 February the second respondent gave SANSEA notice in terms of s 64(1)(b) of the 1995 Act that its members would strike on 23 February. On the following day the first respondent gave SANSEA notice that its members would strike on 20 February.

11]On 20 February members of the first respondent went on strike. On Monday, 23 February, members of the second and seventh respondents went on strike.

12]On 23 February SANSEA's attorneys sent a telefax to each of the unions in which it was contended on a number of grounds that the strike was not protected in terms of the 1995 Act. The unions were given notice of SANSEA's intention to launch an urgent application in the Labour Court if the strike was not called off.

13]Because the strike continued, SANSEA duly brought an urgent application in the Labour Court, which was argued on Thursday, 26 February. An order was sought declaring that the strike was unprotected and interdicting the first to seventh respondents from instigating or participating in the unprotected strike action. On Friday, 27 February, Zondo J found that the strike was not unprotected and dismissed the application with costs. Shortly after giving judgment, the Court granted leave to appeal to this court. SANSEA's attorneys thereafter applied to have the appeal heard urgently, an application which was not opposed by the unions. The application was granted and the appeal set down for hearing on Wednesday, 4 March.

14]It was common cause before Zondo J that two of the requisites for the grant of a

final interdict, namely, an injury actually committed or reasonably apprehended and the absence of any other satisfactory remedy, had been met. The only issue was whether or not SANSEA had shown a clear right.

15]In the case of any strike that does not comply with the provisions of Chapter Four of the 1995 Act the Labour Court has exclusive jurisdiction to grant an interdict to restrain any person from participating in the strike or any conduct in contemplation or in furtherance of the strike (s 68(1)(a)(i)).

16]It is not disputed that the unions complied with the provisions of s 64(1) of the 1995 Act before the commencement of the strike in that:

- (a) the issue in dispute was referred to the Commission and a certificate stating that the dispute remained unresolved was issued;
- (b) at least 48 hours written notice of the commencement of the strike was given to SANSEA.

17]SANSEA contends that the strike is unprotected having regard to the limitations on the right to strike contained in sections 65(1)(a) and 65(3)(b)(i) of the 1995 Act. S 65(1)(a) provides: 'No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out if -
that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute...'.
S 65(3)(b)(i) provides: 'Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out -

if that person is bound by -

any arbitration award or collective agreement that regulates the issue in dispute...’.

‘Issue in dispute’ is defined in s 213 ‘in relation to a strike or lock-out’ as meaning ‘the demand, the grievance, or the dispute that forms the subject matter of the strike or lock-out...’.

18]The argument advanced on behalf of SANSEA by Mr Loxton, who appeared with Mr Franklin, is that the words ‘issue in dispute’ bear a similar meaning to ‘matter giving occasion for the strike’ employed in s 65(1)(a) of the 1956 Act. In Photocircuit SA (Pty) Ltd v De Klerk N O a o 1991 (2) SA 11 (A) at 20 I-J Preiss AJA held that s 65(1)(a) required ‘...that the dispute should be about a matter that is dealt with in the agreement.’ In the present case the strike is about wages, a matter regulated by the 1997/1998 collective agreement. SANSEA contends that on a proper interpretation of s 65 of the 1995 Act the ‘issue in dispute’, in the context of the facts of this case, must be broadly interpreted as being a dispute about wages and conditions of employment, as generic terms. On that ‘broad interpretation’, no strike may take place for improved wages until the collective agreement has expired. Collective bargaining may take place during the currency of the collective agreement but not industrial action. The interpretation contended for by SANSEA was said to be preferable to the one contended for by the unions because it is more in keeping with the primary purposes of the 1995 Act of providing a framework within which parties can bargain collectively, of promoting collective bargaining, and of promoting labour peace: see s 1 and North East Cape Forests v SAAPAWU a o (2) [1997] 6 BLLR 711 (LAC) at 719H-J. Those objects are not served if a trade union, having concluded a collective agreement concerning wages for a particular year, is entitled before the expiry of that agreement, to enforce compliance with wage demands for a succeeding

year, during the currency of that agreement. The object of industrial peace is rendered nugatory. There is then no guarantee of industrial peace for the duration of the collective agreement. Notionally, on the union's argument, they would be entitled to strike shortly after concluding a collective agreement. The implicit quid pro quo for entering into collective bargaining, enduring industrial action and finally concluding a collective agreement on the issues in dispute is that there shall for the duration of the agreement be industrial peace. The public interest in a guaranteed respite from industrial action would be served by the interpretation for which SANSEA contends. The submission, in effect, is that industrial action cannot be resorted to during the currency of the agreement in order to amend a collective agreement which regulates terms and conditions of employment: there is an absolute peace obligation in respect of any disputes which might arise in the employment relationship, even though the issues are not specifically regulated by the collective agreement.

19]SANSEA further submits that Clause 2 of the 1997/1998 agreement, quoted in paragraph [4] above, necessarily means that the parties to the agreement contemplated that strike action in support of a demand for increases in wages would and could not take place prior to the expiry of the twelve month period referred to in the clause. Accordingly, the strike is prohibited by virtue of the provisions of s 65(1)(a) of the 1995 Act.

20]SANSEA's interpretation of the 1995 Act does not find favour.

21]Every worker enjoys the fundamental right to strike: s 23(2)(c) of the Constitution of the Republic of South Africa Act 108 of 1996. One of the primary objects of the

1995 Act is 'to give effect to and regulate the fundamental rights conferred by...the Constitution' (s 1). The reference in section 1 of the 1995 Act to s 27 of the Interim Constitution should be read as referring to s 23 of the Final Constitution: Business South Africa v Congress of South African Trade Unions a o [1997] 5 BLLR 511 (LAC) at 517A-B. In view of the fundamental nature of the right to strike, a limitation on that right which is not expressly provided for in the 1995 Act should not lightly be inferred.

22]Sections 65(1)(a) and 65(3)(b)(i), read with the definition of 'issue in dispute', cannot be given a literal interpretation - that much is conceded by both Mr Loxton and Mr Kennedy. For example, if the definition of 'issue in dispute' is substituted for those words in s 65(3)(b)(i), the section reads: 'No person may take part in a strike...if that person is bound by...a collective agreement that regulates [the demand, the grievance, or the dispute that forms the subject matter of the strike]...'. By its very nature, a collective agreement does not regulate a demand, a grievance or a dispute.

23]What the legislature intended with s 65(3)(b)(i), in my view, was to provide that the parties are bound to the terms of the collective agreement for the period that it is operative and that they are precluded from resorting to industrial action to change its terms. So, for example, having agreed on wages in the security industry for the period 7 April 1997 to 6 April 1998, the unions are not entitled to strike to increase the wages for that period.

24]What the 1995 Act does not expressly prohibit is a resort to industrial action by one of the parties to a collective agreement to resolve a dispute about an issue which

is not regulated by the collective agreement.

25]On the facts of this case the dispute between SANSEA and the unions which forms the subject matter of the strike is the wage dispute for the 1998/1999 year. The 1997/1998 agreement does not regulate that issue. Accordingly, in terms of s 65(3)(b) (i) the unions are not prohibited from embarking on a strike to compel compliance with its demands.

26]What SANSEA in effect contends for is a further limitation on the right to strike which is not expressly contained in the 1995 Act. For SANSEA to succeed, the limitation must arise by way of necessary implication and accord best with the general purpose of the 1995 Act: Ceramic Industries t/a Betta Sanitary Ware v National Construction Building and Allied Workers Union (2) (1997) 18 ILJ 671 (LAC) at 675G. The arguments advanced on behalf of SANSEA fall far short of justifying such an implication.

27]As conceded by SANSEA, the parties to the 1997/1998 agreement were entitled to bargain collectively about the terms of the 1998/1999 agreement during the currency of the 1997/1998 agreement. As a matter of established practice that is in fact what they did. They did so because it was obviously desirable to attempt to achieve consensus before the expiry of the 1997/1998 agreement. When consensus was not reached, and deadlock was declared, there was no statutory bar to one of the parties invoking the conciliation procedures provided for in the 1995 Act by referring the dispute to the Commission. On the contrary, it was in accordance with good industrial relations practice to invoke the aid of an independent third party in order to

attempt to break the deadlock. Conciliation having failed, once the Commission issued a certificate stating that the dispute remained unresolved, the unions acquired the right to embark on a protected strike - subject to compliance with the requirement in s 64(1)(b) that 48 hours written notice of the strike was given. Having complied with the provisions of s 64(1), and as the issue in dispute was not regulated by a collective agreement, the unions could lawfully exercise the right to strike. The 1995 Act is incapable of an interpretation by necessary implication that the right to strike is subject to a further, unexpressed, limitation in terms of which the right could only be exercised at the expiry of the collective agreement on 6 April 1998. The strike is an essential and integral element of collective bargaining: Barlows Manufacturing Co Ltd v Metal and Allied Workers Union a o (1990) 11 ILJ 35 (T) at 42E; NUMSA v Boart MSA (Pty) Ltd [1996] 1 BLLR 13 (LAC) at 20H. The freedom to strike is integral to the system of collective bargaining - the withholding of their labour is a legitimate weapon available to workers seeking to achieve rational demands through lawful means: NUMSA v Vetsak Co-operative Ltd 1996 (4) SA 577 (A) at 588F-G. In keeping with the practice of resolving disputes before the expiry of the collective agreement, the unions were entitled to strike with the purpose of breaking the deadlock before 6 April 1998. As contended by the first respondent '...there is no reason in law, logic or labour relations requiring the [first respondent] and its members to delay such strike until the previous agreement has expired.'

28]One of the factors on which SANSEA relies for its interpretation of the 1995 Act is the spectre that parties to a collective agreement may have no sooner put pen to

paper than the union calls a strike on its demands for an increase in wages for the following year. Those are not the facts of this case. If those facts ever present themselves they will have to be dealt with at that stage. One of the considerations which the court will take into account in deciding such a case is whether the nominal issue in dispute is the true dispute: Fidelity Guards Holdings (Pty) Ltd v PTWU a.o. [1997] 9 BLLR 1125 (LAC) at 1129F-H.

29]The interpretation contended for by SANSEA is not one that finds universal support if regard is had to comparative law. A distinction is made in the literature between peace clauses in collective agreements which prohibit all collective disputes before expiration of the collective agreement (an 'absolute' peace obligation) or those which prohibit only disputes regulated in the existing collective agreement and leaves space for industrial action about matters not covered by the collective agreement ('relative' peace obligations). The latter kind is said to be more prevalent, especially where the right to strike is constitutionally protected: See Blanpain/Engels (eds) Comparative Labour Law and Industrial relations in Industrial Market Economies Kluwer 1993 at 429; Blanpain/Ben-Israel (eds) Strikes and Lock-outs in Industrialized Market Economies Kluwer 1994 at 35, 61, 68, 157-8 and 217. The interpretation contended for by SANSEA may also delay the legal exercise of the right to strike for an unacceptably long period in contravention of international labour standards: c.f. Ben-Israel International Labour Standards: The case of Freedom to Strike Kluwer 1988 at 120-121.

30]SANSEA contends that the 1997/1998 agreement prohibits a strike in respect of the issue presently in dispute. The submission is that in terms of clause 2 (quoted in

paragraph [4] hereof) no further wages can be 'granted' before 6 April 1998. In order for SANSEA to concede to the unions' wage demands it will have to grant the required increases. The date of such grant will necessarily be the date upon which the concession is made, notwithstanding the fact that the increase may only be implemented later. By necessary implication, therefore, the parties to the agreement contemplated that strike action in support of a demand for increases in wages would and could not take place prior to the expiry of the 12 month period.

31]That interpretation of the 1997/1998 agreement flies in the face of the conduct of the parties each year since 1993 and the stated intention of the parties. In the founding affidavit of Mr D C Masterson, the national president of SANSEA, he described the intention of the parties in these terms: 'Typically the applicant and the respondents exchange demands during October of the year preceding the wage agreement and negotiations commence as soon as possible thereafter. The parties have always attempted to conclude an agreement prior to the end of February of the following year with a view to having the agreement gazetted in terms of the provisions of s 51A of the Labour Relations Act, 28 of 1956 (as amended) and extended to all employers and employees within the security industry.' (The emphasis is mine.)

32]Clause 2 means that no further wage increases were to be granted to take effect before the expiry of the 12 month period.

33]Section 65(1)(a) envisages the inclusion of a peace obligation in a collective agreement. It is left to the parties to agree on the extent of the obligation: the Act

places no limit on what the parties may agree. The 1997/1998 agreement does not, however, prohibit a strike in respect of the issue presently in dispute.

34]On appeal Mr Loxton raised, for the first time, a new point. He submitted that the strike was unprotected for a further reason. He contended that in the answering affidavit of the first respondent it was demanded that the wage increases be implemented from 1 March 1998; that demand contemplates an amendment to the 1997/1998 agreement prior to it expiring; and accordingly the strike falls foul of the provisions of s 65(3)(b)(i).

35]The answer to that submission is that on these papers it was never part of the unions' demands that wage increases be implemented from 1 March 1998 and therefore did not form an element of the dispute about which the unions went on strike. In the first respondent's answering affidavit it was stated in unambiguous terms that the unions' demands were '...in respect of wages and other terms and conditions of employment which will be applicable after the expiry of the present collective agreement regulating wages and working conditions....the parties have always understood the issue in dispute (which is the subject of the strike) to be about the conclusion of another collective agreement after the expiry of the present collective agreement.' What the first respondent did do, was to 'submit' that in the negotiations which preceded deadlock 'they were negotiating with the purpose of concluding a collective agreement about wages and other terms and conditions of employment which were to apply as from 1 March 1997....Since 1993 the date of implementation of new terms and conditions of employment has been 1 March...I respectfully submit that for the parties to the collective agreement the date of

implementation is 1 March.’ The first respondent went on to submit that the dispute as to when the present collective agreement ends and when a new collective agreement will take effect is dependant upon when the date of implementation of the present collective agreement was. The first respondent tendered that this dispute be referred to expedited arbitration under the auspices of the Commission or by means of private arbitration.

36]The appeal is dismissed, with costs.

Myburgh J P

I concur,

Froneman DJP

I concur,

Kroon JA

Date of hearing: 4 March 1998

Date of judgment: 5 March 1998

Counsel for Appellant: C D A Loxton SC and Adv A E Franklin instructed by Deneys

Reitz

Counsel for Respondent: Adv P Kennedy instructed by Cheadle, Thompson & Haysom

This judgment is available on the Internet at: <http://www.law.wits.ac.za/labourcrt>.