

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case Number: J2162/98

In the matter between:

CHEMICAL WORKERS' INDUSTRIAL UNION

Applicant

and

PLASCON DECORATIVE (INLAND) (PTY) LTD

Respondent

JUDGMENT

CAMERON, JA:

[1] This is an application which, on the initiative of the respondent ("Plascon"), the Judge-President directed in terms of section 175 of the Labour Relations Act 66 of 1995 ("the LRA") be heard by the Labour Appeal Court sitting as a court of first instance. The question at issue is whether employees outside the bargaining unit to which a strike demand relates may take part in an otherwise protected strike. This was the issue that previously arose in *Afrox Ltd v SA Chemical Workers Union and others (1) (1997) ILJ 399 (LC)*.

[2] The proceedings stem from the refusal of an employers' affiliation, the "Industrial Chemicals Group" (of which Plascon is part) ("the ICG"), to agree to the demands of the application ("the union") regarding wages and terms and conditions of service in the industry. When the negotiations resulted in deadlock, the union referred a dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") and on 13 July 1998 obtained a certificate in terms of section 64(1)(a)(i) of the LRA to the effect that the dispute remained unresolved. The union gave the ICG notice of the commencement of strike action, the nature of which was specified.

[3] It was common cause that these procedures rendered the strike “protected” in terms of section 67 of the LRA. The question was to which participating employees and thus how broadly that protection applied. Plascon recognised the union as the collective bargaining agent of its members employed in grades below what is known as the “C category” (“bargaining unit employees”). The negotiations preceding the strike concerned the wages and terms and conditions of these employees.

[4] The union also has members within the “C category”, and claims members as well amongst temporary or contract workers who do not fall within the bargaining unit (“non-bargaining unit employees”). After the strike commenced on 3 August, Plascon gave notice to striking non-bargaining unit employees of its intention to discipline them for striking. When Plascon proceeded to initiate disciplinary proceedings, the union gave notice of urgent legal proceedings to forestall this.

[5] The union originally sought, apart from condonation relating to urgency, and costs, an order in the following terms:

“2 Declaring that the strike by all the applicant’s members employed by the respondent complies with the provisions of chapter IV of the Labour Relations Act;

2 Restraining the respondent from disciplining or dismissing any of the applicant’s members for their participation in the strike.”

[6] In its founding affidavit the union contended that every union member employed by Plascon had the right to strike in respect of the issue in dispute. Plascon’s answering affidavit averred that non-bargaining unit employees had different terms and conditions of employment, and different employment interests from bargaining unit employees. It stated that the dispute the union referred to the CCMA concerned the ICG’s failure to agree to demands in respect of the bargaining unit, and that the strike embarked upon was in support of those demands. It contended that none of the striking employees outside the bargaining unit was party to that dispute or had any material interest in its outcome, since their wages and terms and conditions of service were unaffected by the strike. Those employees accordingly did not enjoy the protection afforded to bargaining unit employees by Chapter IV of the LRA.

[7] The union’s replying affidavit, and a later supplementary affidavit, pursued a factual dispute about whether temporary and contract employees were union members. This is not germane to the present proceedings, since the union claimed relief only in respect of those who were in fact its members.

[8] On Wednesday 26 August, before the application was due to be heard on Friday 28 August, Plascon formally withdrew disciplinary proceedings against all non-bargaining unit strikers, and placed on record that it had no intention of taking

disciplinary action against any recognised members of the union “for their participation in the strike under consideration”. This was accompanied by a tender to pay all the costs occasioned to the union by the application.

[9] Plascon took the view that this meant that there was no longer any dispute between the parties as there was no “live issue” to which it remained a party. The union insisted that it remained entitled to approach the Court for the declarator sought in para 2 of its notice of motion. The question of the justiciability of the union’s remaining claim of relief was argued on Thursday 27 August, when Mr Cassim and Mr Franklin appeared for Plascon. This Court ruled that the union, for whom Mr van der Riet appeared, was entitled to proceed with the application for the declarator. It was indicated that reasons would be furnished later.

[10] Plascon, persisting in its attitude to justiciability, indicated in a letter to this Court that it declined to file heads of argument or to appear at the hearing of the application since there was no “lis” between the parties. However, on Friday 18 September, Plascon’s attorneys in a letter to the union’s attorneys somewhat modified its stance. It now placed on record that “on reflection” Plascon was “of the view that the strike engaged upon by all of your client’s members was indeed protected” and offered to compensate temporary or contract workers who had been dismissed as a result of their participation in the strike.

[11] Plascon’s original submission was in effect that the union’s claim to relief disappeared when Plascon withdrew disciplinary proceedings against non-bargaining unit employees. Mr Cassim submitted that the Court was not required to give a “consultative opinion” on the non-bargaining unit employees’ statutory rights when the threat of disciplinary action against them had been withdrawn.

[12] This submission mistook the nature not only of the union’s legal rights but also of its entitlements in approaching this Court for relief, and failed to take account of either the formal or the substantive aspects of the issues still before the Court. Formally, the union and the employees it represents became entitled, when joinder of issue took place, to a hearing in respect of the entire ambit of the relief they claimed. Joinder of issue (*litis contestatio*) occurred when the union filed its reply to Plascon’s answering affidavit, and the matter was set down for hearing. (Compare *Milne NO v Shield Insurance Co Ltd* 1969(3) SA 352 (A) at 358F-G; and *Waikiwi Shipping Co Ltd v Thomas Barlow and Sons (Natal) Ltd and another* 1978(1) SA 671 (A) 676C-H). Plascon’s answering affidavit placed on record its opposition not only to the grant of an interdict restraining it from implementing discipline, but to the declarator which encapsulated the legal basis of the union’s claim to relief. Once issue was joined on both these questions, the union became formally entitled to their adjudication.

[13] In any event, in substance Plascon's original undertaking fell far short of giving the union the assurance it sought in respect of its non-bargaining unit members. Plascon's undertaking related to their participation in "the strike under consideration". This clearly meant that Plascon reserved to itself the right to discipline non-bargaining unit employees for similar strike action in future. When the union took recourse to legal proceedings, it did not seek merely to secure an undertaking from Plascon to withdraw specific disciplinary proceedings then current or threatened. Nor did it seek to protect its members from disciplinary action by Plascon in general. The relief it sought was crafted to protect them from disciplinary action, then current, threatened or possible in future, deriving from Plascon's refusal to concede the right its members claimed to embark on protected strike action even when they fell outside the bargaining unit to which the strike issue related. In relation to that right, Plascon, having joined issue, gave no undertaking.

[14] Plascon's current "view", that striking non-bargaining unit members were "indeed protected", still embodies no general concession. Even at this stage, Plascon does not concede that the union is entitled to the declarator it sought when issue was joined. That question in my view therefore remains current and the union is entitled to have it decided. (Contrast *van Erk v Holmer* 1992(2) SA 636 (W), criticised in *B v S* 1995 (3) SA 571 (A) at 577D - 579A, where the parties settled the matter and their agreement was made an order of Court, but the Judge, despite the disposal of the case, subsequently furnished reasons for accepting a recommendation by the Family Advocate which was embodied in the parties' settlement and the Court's order.)

[15] After the question of justiciability was decided, Mr Loxton agreed at the Court's request to act as *amicus curiae*. The Court is indebted to him for heads of argument and submissions during the hearing which were of material assistance to it.

[16] In terms of section 213 of the LRA, "strike" means -
"the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory".

“Dispute” is defined to include an alleged dispute, while “issue in dispute” in relation to a strike or lock-out is defined to mean “the demand, the grievance or the dispute that forms the subject matter of the strike or lock-out”.

[17] Strikes and lock-outs are regulated by Chapter IV (sections 64-77) of the LRA. Section 64(1) provides in general terms that “every employee has the right to strike and every employer has the right to lock-out”, subject to certain conditions. These are set out in sub-paras (a) to (d), read with sub-sections (2) and (3). They comprise an attempt at conciliation in regard to “the issue in dispute” (sub-para (a)), and notice (sub-paras (b), (c) and (d)). Section 65 is headed “Limitations on right to strike or recourse to lock-out”. It provides that “no person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or lock-out” if (in summary terms) a collective agreement prohibits it, the issue in dispute is arbitrable or justiciable, or (subject to exceptions) the person is engaged in an essential or a maintenance service. Secondly strikes are dealt with in section 66. In terms of section 66(1), in section 66, ‘secondary strike’ “means a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees have a material interest in that demand.” Section 66(2) prohibits participation in a secondary strike unless the strike that is to be supported complies with the provisions of section 64 and 65 (sub-para (a)); notice has been given (sub-para (b)); and the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer (sub-para (c)).

[18] In a number of recent cases, this Court has outlined the basic principles that inform its approach to the task of construing the provisions of the LRA. The statute itself requires in section 3 that it be interpreted to give effect to its primary objects, and in conformity with the constitution (Constitution of the Republic of South Africa, Act 108 of 1996) and South Africa’s public international law obligations. Section 1 expresses the LRA’s primary objects amongst others as “to give effect to and regulate the fundamental rights” conferred by section 23 of the Constitution (para (a)); and to promote “orderly collective bargaining” (para (d)(i)). “Conformity with the Constitution” entails inter alia that the provisions of the LRA must be considered against the background of the Constitution, which is the supreme law of the land and which itself requires that this Court when interpreting the LRA promote the spirit, purport and objects of the Bill of Rights. (See *Business South Africa v Congress of*

South African Trade Unions and other (1997) 18 ILJ 474 (LAC) at 476F-478I; *Ceramic Industries t/a Betta Sanitary Ware v National Construction, Building and Allied Workers' Union* (1997) 18 ILJ 671 (LAC) at 675E-I; *Carephone (Pty) Ltd v Marcus NO and others* (case no JA5/98, para [8].)

[19] The Constitution expressly enshrines the right to strike. In terms of section 23(2)(c), every worker has the right “to strike”. That right, though expressed in unlimited terms, is subject to curtailment provided the restriction complies with section 36, which permits limitation “to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors”, a number of which are expressly set out. (Compare *S v Makwanyane and another* 1995 (3) SA 391 (CC) at 436E-F (para [104]); *S v Williams and others* 1995 (3) SA 632 (CC) at 650 (paras [58]-[60]); and *S v Bhulwana* 1996 (1) SA 388 (CC) at 395H (para [18].)

[20] The starting point where a constitutional right is given without express limitation, as Kentridge AJ stated in *Attorney-General v Moagi* 1982 (2) Botswana LR 124 at 184, in a statement he repeated on behalf of a unanimous Constitutional Court in *S v Zuma and others* 1995 (2) SA 642 (CC) at 651I (para [15]), is that “Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them”. Kentridge AJ had in mind cutting constitutional rights down “so as to bring them into line with the common law”, but in my view his remarks suggest a general caution when seeking to read implicit limitations into constitutional rights. Nevertheless, the constitutional right to strike may need to be given specific content in circumstances where it is contended that limitations on its exercise are unconstitutional, though that is not in issue here.

[21] It is plain that the right to strike, conferred without express limitation in the Constitution, is subjected to a number of significant, expressly stated, limitations in the LRA. The statute not only sets formal preconditions for the exercise of the right to strike, but imposes material limitations on who may strike. Strikers or those acting in contemplation or furtherance of a strike whose conduct falls outside the statute’s limitations are deprived of the protections section 67 provides, and are accordingly

vulnerable (if employees) to dismissal and (in any event) to suit for delict or breach of contract. The constitutional validity of none of these express limitations is in issue before us. The issue is whether the right to strike as embodied in the statute contains the limitation for which Plascon originally contended, namely that only those employees of an employer who are directly affected by the strike demand may embark on a protected strike. That limitation is not expressed in the statute. The question is whether a proper interpretation of the provisions of the statute, against the background sketched above, imports them.

[22] The most notable feature of the definition of “strike” in the LRA is its wide terms. It comprises three elements: (i) the non-performance of work; (ii) by employees; (iii) for the purpose stated. That purpose is to remedy a grievance or resolve a dispute “in respect of any matter of mutual interest between employer and employee”. The absence of any article, definite or indefinite, before either “employer” or “employee” is conspicuous. It has the effect of rendering at its most general and non-specific the employer/employee relationship to which the strike dispute must relate. (Mr Loxton’s phrase was “generic”.) It follows that while it is clear that the employees not performing work must all share the purpose of remedying a grievance or resolving a dispute, the definition imposes no other requirements of mutuality - whether a shared employment relationship with an employer or a shared interest in the grievance or dispute - upon them.

[23] The terms of the definition are thus wide enough to encompass both primary strikes (section 64) and secondary strikes (section 66). They are obviously also broad enough to cover a strike involving employees of the same employer who are not directly affected by the strike dispute.

[24] The broad terms of the definition of “strike” correspond with the definition of “issue in dispute”. This offers no identification of the parties to the dispute, and thus imposes no limitation on who they may be. It also corresponds to the scheme of Chapter IV. Section 64 regulates strikes and lock-outs by parties to the same employment relationship. The specificity of this association appears from the use of the definite article (“the employer” and “the employees” in the notice requirement (section 64(1)(b) and (c)) and in the provisions providing for a freeze on or reversal of unilateral changes to terms and conditions of employment (sub-sections 64(4) and (5)), as well as from the use of the possessive pronoun (“the employees ... their employer”; “the employer ... its employees” in section 64(3)). Section 66 by contrast defines “secondary strike” as one “in support of a strike by other employees against their employer”. The contrast with the provisions of section 64 gives the allusion to “other” employees special significance. It differentiates the secondary strikers who will not perform work from the “other” employees, namely those whose primary right to strike is regulated by sections 64 and 65. The possessive pronoun “their” also indicates that the “other” employees have in common with each other an employment relationship with the same employer.

[25] It follows that I do not agree with Mr Loxton’s submission that the purpose of section 66 is to limit the right of employees to engage in a strike which, but for

section 66, would fall within the ambit of section 64. In my view, the grammatical usage the legislature adopted indicates that section 64 comprehends a strike by employees only of the same employer (“the primary employer”). Conversely, the scheme of the Chapter as well as the language of section 66, suggest that employees not employed by the primary employer can engage in protected strike action only if their conduct complies with section 66.

[26] This reading of the Chapter’s provisions entails that employees employed by the same employer who are not directly affected by the strike demand must, if they are to be capable of striking at all, fall within the terms of section 64. Both Mr van der Riet and Mr Loxton (who supported the conclusion that statutory protection applies to non-bargaining unit employees who join a protected strike) drew attention, correctly, in my view, to the most telling anomaly that would arise if Plascon’s original stance on the ambit of protection accorded primary strikes were upheld - that no statutory protection would be afforded employees who strike in support of demands by co-employees, while secondary strikers supporting a strike by employees employed by an entirely different employer may receive such protection.

[27] The arguments of both Mr van der Riet and Mr Loxton proceeded, also in my view correctly, on the premise that a proper appreciation of the statutory provisions concerning strikes depends on their purpose. Mr van der Riet contended that the purpose of section 64(1)’s procedural requirements is to compel employees to explore the possible resolution of their dispute through negotiations before exercising their right to strike. The concept of a protected strike presupposes such negotiations. Once that purpose has been fulfilled, no further statutory object would be served by limiting the right to strike only to employees directly affected by the demand. Instead, the restriction envisaged would place a substantive limitation on the right of non-bargaining unit union members to strike for which the provisions of the statute offer no explicit or implicit support. I agree with the submission.

[28] The Constitutional Court has itself emphasised the general importance of the right to strike:

“Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers enjoy collective power primarily through the mechanism of strike action.”

The Court went to point out that the importance of the right to strike for workers has led to its being entrenched far more frequently as a fundamental right in constitutions than is the right to lock out, and that the two rights “are

not always and necessarily equivalent” (*In Re: Certification of the Constitution of the Republic of South Africa 1996* 1996 (10) BCLR 1253 (CC) 1284-1285 (para [66])). This is of course not to say that striking should be encouraged or unprocedural strikes condoned: but only that there is no justification for importing into the LRA< without any visible textual support, limitations on the right to strike which are additional to those the legislature has chosen clearly to express.

[29] The issue in the present case is whether non-bargaining unit employees, whose conditions of service the strike demand did not directly affect, could embark on an otherwise protected strike. That parallels the question Zondo AJ dealt with in *Afrox Ltd v SA Chemical Workers Union and others (1)* (above), where workers employed by the same employer at different plants embarked on strike action. Zondo AJ concluded (at 403I) that “once a dispute exists between an employer and a union and the statutory requirements laid down in the Act to make a strike a protected strike have been complied with, the union acquires the right to call all its members who are employed by that employer out on strike and its members so employed acquire the right to strike”. It follows that in my view this conclusion was correct.

[30] The union was accordingly entitled to all the relief it sought. There is an order as follows:

“The strike by all of the applicant’s members employed by the respondent complies with the provisions of chapter IV of the Labour Relations Act 66 of 1995.”

E Cameron
Judge of Appeal

I agree:

J F Myburgh
Judge-President

I agree:

J C Froneman
Deputy Judge-President

Appearances: JG van der Riet, instructed by Cheadle, Thompson & Associates

No appearances for the respondent on 21 September 1998

Amicus curiae: C D A Loxton, SC

Date of hearing: 21 September 1998

Date of judgment: 30 September 1998