

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD IN CAPE TOWN)**

CASE NO: CA7/00

In the matter between

COUNTY FAIR FOODS (PTY) LTD

APPELLANT

AND

FOOD AND ALLIED WORKERS UNION

1ST

RESPONDENT

MEMBERS OF FIRST RESPONDENT

2ND

RESPONDENTS

**EMPLOYED BY THE APPELLANT AS LISTED
IN ANNEXURE "A" TO THE
FOUNDING AFFIDAVIT**

JUDGEMENT

ZONDO JP

[1] The appellant employs the second and further respondents at its abattoir at Hocroft in Stellenbosch. The

second and further

respondents are members of the first respondent which is a registered trade union. The appellant and the first respondent have been dealing with each other for many years. They concluded a recognition agreement with each other in March 1991. At that time the Labour Relations Act, 1956, (Act No 28 of 1956) as amended ("**the old Act**") was in operation. That Act was repealed when the Labour Relations Act, 1995 (Act No 66 of 1995) ("**the Act**") was passed. Most sections of the Act came into operation on the 11th November 1996.

- [2] The recognition agreement which the parties concluded in 1991 is a "**collective agreement**" in terms of the Act. Clauses 11 and 12 of the agreement contain a dispute procedure to be followed when there is a collective dispute. It is not necessary to quote the procedure. It suffices to state that it contemplates the convening of certain meetings and a referral of such dispute to mediation before there can be a resort to statutory procedures.
- [3] A dispute arose between the appellant and the respondents in July 1998 in connection with a rationalisation exercise with which the appellant was engaged. Clearly this was a "**collective dispute**" in

terms of the recognition agreement. The parties held their first dispute meeting on the 24th July 1998. A second meeting was scheduled but it did not take place. The appellant stated that this was because the first respondent's official failed to arrive timeously. Apparently the union official arrived about 35 minutes late. The first respondent says its official arrived hardly five minutes after the appellant's officials had arrived. The first dispute meeting failed to resolve the dispute. There are certain disputes of fact in regard to the second meeting which it is unnecessary to resolve because I am prepared to assume, without deciding, that the dispute procedure in the recognition agreement was not complied with before the statutory procedure was resorted to.

- [4] In due course the first respondent referred the dispute to the Commission for Conciliation, Mediation and Arbitration ("**the CCMA**") for conciliation. Two meetings were actually held at which conciliation was attempted but in the end the dispute remained unresolved. A certificate of outcome was subsequently issued to the effect that the dispute remained unresolved. The first respondent then gave the appellant a strike notice as required by sec64(1) (b) of the Act. This prompted the appellant to launch an urgent application in the court a quo to interdict the contemplated strike. The matter came before Mlambo J who dismissed the application with costs. He refused leave

to appeal. The appellant then petitioned the Judge President for leave to appeal. The petition was granted.

- [5] The appellant contended that the contemplated strike would be an unprotected strike and should, for that reason, be interdicted. It appears from the judgement of the learned Judge a quo that the main contention before him was that the first respondent had not complied with the dispute procedure contained in the collective agreement and that, in the absence of compliance with such dispute procedure, the strike would be unprotected. The respondents' stance was that they had complied with the dispute procedure but that, even if they had not complied with it, they had complied with all the requirements stipulated by the Act and that, in those circumstances, their strike would be a protected strike in terms of the Act.
- [6] Before us Mr Rogers, who, together with Mr Janisch, appeared for the appellant, submitted that the strike was unprotected because of the provisions of sec 65(1)(a) of the Act. Sec 65 is headed: **"Limitations on right to strike or recourse to lock-out"**. Sub-sec (1)(a) states: **"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-**
- (a) that person is bound by a collective agreement**

that prohibits a strike or a lock-out in respect of the issue in dispute.”

- [7] Mr Rogers correctly submitted that the respondents were bound by the collective agreement. He further submitted that the collective agreement prohibited a strike in respect of the issue in dispute in this case. Mr Rogers submitted that the provisions of sec 65(1)(a) were wide enough to include a situation where a party was bound to follow the procedure set out in a collective agreement before it could resort to a strike over a specific issue in dispute. He contended that in this case the respondents were required to have observed the dispute procedure set out in the collective agreement before there could be a resort to strike action and that their failure to do so meant that the strike was prohibited to terms of sec 65(1)(a). Mr Rogers submitted that sec 65(1)(a) means that striking over a specific issue is temporarily not permitted until certain procedures agreed upon have been exhausted but would be permitted thereafter.
- [8] In order to do justice to Mr Rogers’ argument, it is necessary to examine the nature of the prohibitions relating to strikes in the Act. In certain circumstances strikes and lock-outs are absolutely prohibited. Thus sec 65(1)(d)(i) and (ii) provide that not 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 engaged in an essential service or a maintenance service. Such a person simply has no right to strike or recourse to lock-out. This depends neither on the nature of the dispute nor on the timing of the strike nor on whether there has been compliance with certain procedures. There is simply no right to strike and no recourse to lock-out in such cases. Instead of the right to strike and the recourse to lock-out, the Act provides for the right to refer disputes of interest to arbitration. (Sec 74(4)).

- [9] The Act makes provision for situations where strikes and lock-outs are not absolutely prohibited, but are permissible, subject to certain conditions and qualifications. The Act identifies certain matters over which strikes and lock-outs are not permitted even if the parties are not involved in an essential service or maintenance service. In other words a party may not exercise the right to strike or the recourse to lock-out in respect of certain types of disputes. That is what is provided for in sec 65(1)(a) of the Act.
- [10] There are also situations where the Act prohibits strikes and lock-outs not because the type of dispute involved is an impermissible type of dispute as such but because the Act considers that another process is appropriate for the resolution of such disputes. In this regard reference can be

made to sec 65(1)(b) and (c). Sec 65(1)(b) precludes strikes and lock-outs by a person who **“is bound by an agreement that requires the issue in dispute to be referred to arbitration”** whereas sec 65(1)(c) precludes strikes and lock-outs where the issue in dispute is one that **“a party has the right to refer to arbitration or to the Labour Court in terms of this Act”**.

[11] The Act also deals with situations where an arbitration award, a collective agreement, or determination made by the Minister of Labour in terms of sec 44 of the Act or a determination made in terms of the Wage Act regulates the issue in dispute. (Sec 65(3)(a) and (b). These determinations usually operate for specified periods but may be extended from time to time. Then there are those situations where there is a right to strike and a recourse to lock-out but such can only be exercised after certain procedural requirements have been met. That is provided for in sec 64(1) of the Act. Lastly, the Act also contemplates situations where a party is exempted from first complying with the procedures set out in sec 64(1) before striking or locking-out. Those situations are provided for in sec 64(3).

[12] Mr Rogers' submission was that the wording of sec 65(1) (a) includes both the situation where the type of dispute over which a union wants to call a strike is prohibited by a

collective agreement and one where a collective agreement provides that in respect of certain types of disputes over which there can be strikes, there may be no strike until a certain dispute procedure has been exhausted. There is no merit in this submission. Indeed, the submission is based on a failure to appreciate the scheme of the Act.

- [13] The provisions of sec 65(1)(a) are clear. They simply recognise that there may be certain types of disputes which parties may agree in a collective agreement should not be the subject of strikes and lock-outs. The section provides that there may be no strikes and lock-outs about disputes in respect of which parties have agreed in a collective agreement that there should be no strikes and lock-outs. Moreover, Mr Rogers' interpretation would render *pro non scripto* the words **"in respect of the issue in dispute"** in s 65(1)(a) and would, probably, require the alteration of the words **"a strike or lock"** to read **"the strike or lock-out."**

- [14] The distinction between a prohibition of a strike because of the substantive nature of the dispute and because of a temporary procedural prohibition is evident from the definition of **"issue in dispute"** in sec 213. The phrase is defined, 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”.

It is clear from this definition that an issue in dispute concerns a matter of substance which forms **“the demand, the grievance or the dispute”**. For these reasons Mr Rogers’ submission falls to be rejected.

[15] The main point on which this matter was argued in the Court a quo appears to have been that, even though the requirements of the Act had been complied with, the respondents had not complied with the dispute procedure provided for in the collective agreement. Mlambo J rejected this argument. In doing so he followed Landman J in **Columbus Joint Venture t/a Columbus Stainless Steel v National Union of Metal Workers of South Africa (1998) 19 ILJ 279 (L C)**. In the appellants’ heads of argument this contention was pursued. Although it was not pursued in argument, it was not abandoned. In the light of this it requires to be dealt with in this judgement.

[16] In my judgement there is an insurmountable difficulty with the appellant’s contention. The Act sets out specific requirements which must be met in order for an employee to acquire the right to strike. Once those requirements have been complied with, the Act confers a certain protection and status on the strike. That is the protection and status of a protected strike as defined in sec 67(1). Sec 67(1) provides: **“In this Chapter, ‘protected**

strike’ means a strike that complies with the provisions of this Chapter and ‘protected lock-out’ means a lock-out that complies with the provisions of this chapter”(my underlining). From this it will be seen that the only requirement for a strike to acquire the status of a protected strike is that it must comply with the provisions of the chapter on strikes and lock-outs in the Act. Sec 64(3)(b) provides in effect that, if a strike conforms with the procedures in a collective agreement, the requirements of sec 64(1) of the Act need not be complied with. There are also other provisions which deal with situations which exempt a party from having to comply with the requirements of sec 64(1) in certain situations. (See 64(3)(a),(c),(d) and (e)).

- [17] It is clear from the provisions of sec 64(3)(b) that the legislature did consider a situation where a party complies with procedures in a collective agreement but not with the requirements of the Act and decided that, in such a case, such party should not be required to comply with another procedure, namely, the statutory pre-strike procedure before a strike could be resorted to. This was one of the deficiencies of the strike procedures under the old Act. Under that Act a party who had complied with a domestic pre-strike procedure was required to also comply with the statutory procedure before it could acquire the right to strike. This was one of the reasons why the ILO’s Fact-

Finding and Conciliation Commission on freedom of association concerning the Republic of South Africa criticised the South African pre-strike procedures under the old Act in its report as being inconsistent with freedom of association. (See (1992) 13 ILJ 739 at 755-756 at par 644).

- [18] Once a strike has been conferred with the status of a protected strike, various legal consequences flow from that. One of these is that participation in such strike is neither a delict nor a breach of contract. (See 67(2)). Another is that a person who is participating in such a strike is immune from any civil legal proceedings in respect of his participation in such strike and in respect of any conduct in furtherance of such strike. Thus sec 67(6) provides: **“Civil legal proceedings may not be instituted against any person for-**
- (a) participating in a protected strike or a protected lock-out; or**
 - (b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.”**

- [19] The only exception to sec 67(2) and (6) made by the Act is in respect of conduct which constitutes a criminal offence. (Sec 67(8)). It is therefore clear that, once it is accepted that there has been compliance with the requirements of the chapter on strikes and lock-outs, the strike is a

protected strike and no civil proceedings can be entertained in regard to such strike.

[20] What the legislature has sought to achieve is to give parties a choice of either following a pre-strike dispute procedure contained in a collective agreement or following the statutory procedure in sec 64(1). Compliance with either procedure suffices to confer on employees the right to strike and the resultant strike acquires the status of a protected strike with all the benefits and consequences which flow from such status. I have considered the question whether there could be any basis on which, applying purposive interpretation, it could be said that a strike which has been resorted to without prior compliance with a procedure in a collective agreement but has complied with the procedure of sec 64(1) of the Act can nevertheless be said not to be a protected strike. I do not think that that can be said without the court unjustifiably usurping the legislature's legislative function. In those circumstances I conclude that this point must also fail.

[21] It follows that the appeal falls to be dismissed. With regard to the issue of costs, both parties argued the matter on the basis that costs should follow the result. Mr Benjamin, who appeared for the respondents, asked that, if the appeal were dismissed, the respondents should be awarded costs of two attorneys. Mr Benjamin was

accompanied in court by another attorney. In these circumstances the respondents are entitled to the costs of the appearance of Mr Benjamin who is a senior attorney as well as the costs of the attendance of an instructing attorney which costs must be taxed as if Mr Benjamin were a Senior Junior advocate appearing in the Supreme Court of Appeal and his instructing attorney had been in attendance in court with him.

[22] In the result I make the following order:-

- (a) The appeal is dismissed with costs, such costs to be taxed as if Mr Benjamin was a Senior Junior advocate appearing in the

Supreme Court of Appeal with an instructing attorney in attendance.

RMM Zondo
JUDGE PRESIDENT

I agree

E.L. GOLDSTEIN

ACTING JUDGE OF APPEAL

I agree

D.M. DAVIS

ACTING JUDGE OF APPEAL

Appearances:

For the Appellant: Mr O. Rogers SC (with Mr Jarnisch)

Instructed by: Cliffe Dekker Fuller Moore Inc

For the respondent: Mr P. Benjamin

Instructed by: Cheadle Thompson & Haysom

Date of hearing: 29th November 2000

Date of Judgement: 15th February 2001