

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

CASE NO: JA28/01

In the matter between

SOUTH AFRICA CLOTHING TEXTILE

Appellant

WORKERS UNION

And

FREE STATE AND NORTHERN

Respondents

CAPE CLOTHING MANUFACTURERS'

ASSOCIATION

JUDGEMENT

ZONDO JP

Introduction

[1] Pursuant to hearing argument in this appeal on an urgent basis on the 4th September 2001, this Court handed down an order on the 6th September 2001.

The order that was handed down was in the following terms:.

“1. The appeal is upheld with costs which, by agreement between the parties, shall include the costs in the Court a quo.

2.The order of the Court a quo is set aside and is replaced by the following one:-

“The application is dismissed.”

2. This Court indicated then that it would furnish its reasons for the order in due course. These are they.

[2]The clothing industry in South Africa has five bargaining councils.

One of them is the **“Free State and Northern Cape”** Bargaining Council which has jurisdiction in the Free State and Northern Cape Provinces. Another one is the **“Northern Areas”** Bargaining Council. This one has jurisdiction in the areas falling under the former Transvaal. The others are the **“Western Cape”, “Eastern Cape”** and **“Natal”** Bargaining Councils.

[3] The appellant is a registered trade union which has its members a number of employees employed by employers in the clothing and textile industry throughout South Africa. It is party to each one of these councils. The respondent is a registered employers' organisation whose members are involved in the clothing industry in the Free State and Northern Cape Provinces. The respondent is the sole employer party to the **“Free State and Northern Cape”** Bargaining Council. It has only two members, namely, a company called Jaff and Co Ltd and NECLO (Pty) Ltd about which more later

[4] The chairman of the respondent is one Mr. Jaff. Mr. Jaff is also chairman and managing director of Jaff and Co Ltd. Jaff and Co Ltd has its head office in Johannesburg. It has a manufacturing branch in Kimberly. This means that Jaff and Co Ltd has operations in, at least, two areas, namely, Johannesburg and Kimberly. Its head office operation falls under the jurisdiction of the **“Northern Areas”** Bargaining Council. Jaff and Co Ltd's branch in Kimberly falls under the jurisdiction of the **“Free State and Northern Cape”** Bargaining Council.

[5] For purposes of the branch in Kimberly, Jaff and Co Ltd is a member of the respondent. For purposes of its head office in Johannesburg, Jaff and Co Ltd is a member of an employers' organisation called the Transvaal Clothing Manufacturer's Association ("TCMA"). TCMA is a member of the employer party to the **"Northern Areas"** Bargaining Council. The appellant is a member of the employee party to this bargaining council as well as a member of the employee parties to each one of the other bargaining councils including the **"Free State and Northern Cape"** Bargaining Council.

[6] It will be seen from the above that the two areas from which Jaff and Co Ltd operates, namely, Kimberly and Johannesburg, fall under the Free State and Northern Cape bargaining. The Johannesburg one falls under the Northern Areas Bargaining Council.

[7] NEWCLO (Pty) Ltd also operates in areas that fall under two different bargaining councils. Like Jaff & Co Ltd, Newclo (pty) Ltd has its head office in Johannesburg. It also has a branch in Kroonstad. Its

head office falls within the jurisdiction of the “**Northern Areas**” Bargaining Council. Its branch in Kroonstad falls under the area of jurisdiction of the “**Free State and Northern Cape**” Bargaining Council.

[8] There is no formal central bargaining structure for the clothing industry. However, the various clothing bargaining councils come together annually and negotiate wage rates and other terms and conditions of employment contained in their respective main agreements in an informal forum that they call the National Bargaining Forum. This has been the practice since 1993.

[9] Each year each council passes a resolution to negotiate the wage rates and other terms and conditions of employment contained in its Main Agreement at the national Bargaining Forum. If agreement is reached at the National Bargaining Forum each Council “**adopts**” that agreement and incorporated its provisions in its Main Agreement. Each council then requests the Minister of Labour to extend its agreement to non-parties within its registered scope.

[10] In May this year the appellant sent its negotiation proposals or demands to each employer party in the various clothing bargaining councils as well as to each clothing bargaining council. The appellant's proposals or demands in respect of each bargaining council were identical. After Mr Jaff had attended a number of meetings at the National Bargaining Forum in his capacity as a representative of the respondent, an agreement was reached between the appellant and the respondent that the respondent did not need to attend further meetings of the NBF. It was agreed that, once agreement had been reached between the appellant and other employer organisations at the NBF, the respondent and the appellant would then commence negotiations on the appellant's proposals to the respondent for purposes of the Main Agreement of the **"Free State and Northern Cape"** Bargaining Council in accordance with previous practice.

[11] The negotiations at the NBF failed. The appellant then started pursuing its demands in other councils separately but did not do as yet in respect of the **"Free State and Northern Cape"** council. In some councils, like the **"Natal"** one, the

negotiations produced a settlement. This also happened in the Eastern Cape as well as in the Western Cape ones. In the **“Northern Areas”** Bargaining Council the negotiations failed to produce a settlement. The appellant then complied with all the requirements of sec 64 of the Labour Relations Act, 1995 (Act No 66 of 1995) (**“the Act”**) in respect of the **“Northern Areas”** Bargaining Council in order to be able to call a protected strike. The respondent accepted that that strike was a protected strike. The employees employed by Jaff and Co Ltd and NEWCLO Ltd in their Johannesburg offices respectively who are members of the appellant were participate and, ultimately did participate in such strike.

- [12] Either just before such strike could commence or soon after it has started and while it was continuing, the appellant sent a notice to Jaff and Co Ltd as well as to NECLO (Pty) Ltd a to the effect that its members employed by Jaff and Co Ltd in its Kimberly branch and NEWCLO (Pty) Ltd in its Kroonstad branch would be going on strike. In such notice the appellant stated that the strike that its members employed by Jaff and Co

Ltd in Kimberly and by NECLO Ltd in Kroonstad would embark upon would be a **“secondary strike”** in support of the demands made by the appellant in respect of the wage rates and terms and conditions of employment in the Main Agreement of the **“Northern Areas”** Bargaining Council. As already stated, the main agreement of such council covers, among others, those employees employed by Jaff and Co Ltd and NEWCLO (Pty)Ltd who are barred in those companies’ respective offices in Johannesburg. The notice read thus:-

“18 August 2001

To: JAFF and Company

From: SACTWU

ATTN: THE MANAGING DIRECTOR

STEVEN JAFF

Dear Sir

**re: WRITTEN NOTICE OF SECONDARY STRIKE IN
TERM OF SECTION 66(2)(B) OF THE LABOUR**

RELATIONS ACT 66 1995

Please take notice that the Southern African clothing and Textile Workers Union (SACTWU) hereby give written notice of the commencement of the secondary strike in terms of section 66 of the Labour relations Act 66 of 1995 at Jaff and Company in Kimberly.

The abovementioned secondary strike shall commence on Thursday 23 August 2001 as from 06h00.

Take further notice that the abovementioned secondary strike is in compliance with Section 66 of the Labour Relations Act 66 of 1995.

The abovementioned secondary strike is in support of the primary strike by the Clothing and Garment knitting employees falling within the jurisdiction of the Northern Areas Bargaining Council.

The primary strike is in compliance with section 64 and Section 85 of the Labour relations Act 66 of 1995 notice of which was given in terms of section 64(1)(b) on 16 August 2001.

Take further notice that this notification applies to all employees of Jaff and Company who are members of Southern African Clothing and Textile workers union.

Yours sincerely.

WAYNE VAN DER RHEEDE

NATIONAL ORGANISING SECRETARY”

NECLO (pty) Ltd received a notice in similar terms in respect of its employees based in Kroonstad who are members of the appellant.

- [13] The strike notice prompted Mr Jaff the chairman of the respondent who, as already stated above, is also chairman and managing director of Jaff and Co Ltd, to write to the appellant

on behalf of the respondent on the 17th August. It is interesting to note that, although that letter is on the letter head of the respondent who jurisdiction is limited to the provinces of Northern Cape and Free Stat, the respondent's physical and postal addresses which appears on that letter are Johannesburg addresses which obviously is outside its territorial jurisdiction. Those addresses are probably the same as those of Jaff and Co Ltd's Head offices.

[14] In its letter the respondent adopted the attitude that the intended strike did not comply with s 66(1) of the Act and that, because of that reason, it would bring an application to the Labour Court to interdict such strike unless the appellant reconsidered its decision to pursue a strike of the employees employed by Jaff & Co Ltd in Kimberly and by NECLO Ltd in Kroonstad. Sec 66 is the section in the Act that sets out the requirements that must be complied with before a secondary strike can be embarked upon.

[15] Sec 66 reads thus:-" **In this section '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 fo a demand that has referred to a council of the striking employees, employed within the registered scope of that council, have a material interest in that demand”. The reliance by the respondent on sec 66(1) must have been because in its notice the appellant had referred to the intended strike as a secondary strike and had also alleged that the strike was in compliance with sec 66.

[16] Attempts between the parties to reach agreement on whether the strike would be a protected strike or not failed. The respondent then brought an urgent application in the Labour Court. Leaving out prayers relating to urgency and further and alternative relief, the order sought by the respondent in the Labour Court was in the following terms:-

“1) ...

2) Declaring the secondary alternatively primary strike

action intended to be embarked upon by members of the respondent illegal and in contravention of section 66 alternatively section 66 of the Labour Relation Act 66 of 1995 (“**the Act**”).

3) Directing the respondent to pay the costs of the above application on an attorney and own-client scale;

4)

[17] The urgent application came before Jammy Aj who granted an order declaring the intended “**secondary alternatively primary strike action**” illegal. For reasons that I need not refer to, he reserved the question of costs and directed that, if any parties sought to pursue that issues, written submissions would have to be made within 14 days whereafter he would decide it. Within days thereafter leave to appeal to this Court was sought and obtained. Thereafter a request was made to the Judge President of this Court on behalf of the appellant for the issuing of me on behalf of the appellant for the issuing of a direction that the appeal be heard as a matter of urgency. This request was granted. Appropriate

directions in regard to the delivery of the record and the heads of argument were made. The appeal was then set down for hearing on the 4th September.

- [18] Before us on appeal Mr Brassey submitted that the intended strike was a protected strike. He based this submission firstly on a contention to the effect that the strike was a secondary strike but that, even if it was not a secondary strike, it nevertheless was simply a strike that complied with the requirements of sec 64 of the Act. In arguing that the strike, was a secondary strike, Mr Brassey contended that the strike complied with the requirements of sec 66 of the Act. Since Mr Brassey's primary contention was that the intended strike would be a secondary strike, it is necessary to have regard to the definition of a secondary. Sec 66 defines a secondary strike as follows: “ ” **In this section ‘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 referred**

to a council of the striking employees, employed within the registered scope of that council, have a material interest in that demand”.”

- [19] The first question that arises in relation to Mr Brassey’s primary contention is whether the strike intended in this matter falls within the definition of a secondary strike. A fundamental element of the definition of a secondary strike in terms of sec 66 is that the employees who seek to go on a secondary strike to support other employees must be employed by an employer other than the employer who employs those they seek to support. The two groups of employees cannot be employed by the same employer. In this case the appellant’s members employed by Jaff and Co Ltd in Kimberly seek to support the appellant’s members employed by Jaff and Co Ltd in Johannesburg. The members of the appellant employed by NEWCLO (Pty)Ltd in Kroonstad seek to support the appellant’s members employed by NEWCLO (Pty)Ltd in Johannesburg. In each case the two groups are employed by the same employer. Mr Brassey sought to overcome

this difficulty in his argument by pointing out that in this case there is an employers' organisation involved. That is no answer to the difficulty. The employers' organisation employs neither group. Its involvement in the matter is primarily as a representative of the employers involved in this matter, namely, Jaff and Co Ltd and NEWCLO (Pty)Ltd. It follows that there is no merit at all in the contention that the strike intended in this matter is a secondary strike. Accordingly, the contention falls to be rejected. There was an argument presented on behalf of the respondent not by Mr Buirski who led for the respondent but by Mr Hulvey to the effect that the intended strike did not comply with the requirements of the Act as a secondary strike if it was one because the notice that was sent to the respondent was sent before the strike notice for the **"Northern Areas"** strike was sent out and that a secondary strike notice must follow and not precede the primary strike notice. This argument is not open to the respondent to advance because it is not part of its case in the papers. In any event it falls away once it is accepted, as this Court has found, that the intended strike was not a secondary strike.

[20] Mr Brassey's alternative argument was that this strike is an ordinary strike which is governed by the provisions of sec 64 as opposed to sec 66 and that, as such, all the requirements of the Act had been complied with and the strike was protected. There are certain similarities between the facts of this matter and the facts in the Afrox matter (*supra*) and in the Plascon Decorative matter. It is appropriate to deal briefly with each one of these cases.

[21] In Afrox the employer operated its business from a number of branches throughout the country. One of its branches was in Pretoria West. A dispute arose between the employer and SACWU, which was recognised union which members in many, if not, all the employer's branches. The employer wanted to introduce staggered shifts in the Pretoria West branch and the union and the employees in that branch were opposed to that move. After all the statutory requirements for a legal strike had been complied with, the employees employed in the Pretoria West branch went on strike. The employer accepted that that strike was legal and, thus, protected. Subsequently and while the employees

at the Pretoria West branch were still on strike, SACWU sought to call all its members employed by the employer in the other branches out on the strike to pursue its demands in respect of the Pretoria West branch.

[22] The union believed that such a strike would be a secondary strike and called it a secondary strike. The employer brought an urgent application to interdict such strike. The Labour Court had no hesitation in finding that the strike was not a secondary strike as there was only one employer involved and the definition of **“secondary strike”** contemplated at least two employers, one being the employer of the employees who are in the primary strike and the other being the employer of the intended secondary strikers. The Labour Court held in effect that a label did not affect the true nature of a strike. In other words, if a strike was a primary strike, it did not become a secondary strike simply because someone called it a secondary strike and vice versa.

[23] Having found that the strike was not a secondary strike, the Labour Court went on to hold that the strike constituted a primary

strike. At 403I - 404C the Labour Court had this to say:-

“In my judgement 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. Once SACWU acquired the right to call a strike against the applicant in respect of that dispute, its members who are employed by the applicant acquired the right to strike if called upon by SACWU to strike. Once in that situation a union is under no obligation to call its members out on strike at the same time and it is free to commence the strike with a small group of members and increase the number of its members participating in the strike as and when it considers that to be appropriate unless it has waived such a right. In this case the union started by calling out

on strike its members who are employed by the applicant in its Pretoria West branch. Now it has called its members in the other branches out on strike. The new Act does require that before members of a union can go on a protected strike, they should have been the ones who referred the issue in dispute to a council or to the Commission for Conciliation, Mediation and Arbitration. What is required is that the issue in dispute is that which is that the subject-matter of their strike [and] should have been referred to conciliation and the other statutory requirements should have been met”.

- [24] The Labour Court therefore decided in the Afrox matter that employees based in one branch of an employer were entitled to engage in a strike in support of the demands of their colleagues employed by the same employer in another branch if the strike in the latter branch is a lawful/protected strike. The application for an interdict was accordingly.

[25] In *Plascon Decorative*, a judgement of this Court, Cameron JA, with Myburgh JP and Froneman DJP concurring, stated at 429I that the issue in that case was **“whether non-bargaining unit employees, whose conditions of service the strike demand did not directly affect, could embark on an otherwise protected strike.”** This Court continues in the same passage and said:-

“That parallels the question Zondo AJ dealt with in *Afrox Ltd v SA Chemical Workers Union & 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.’”

[26] The decision of this Court in Plascon Decorative was therefore that non-bargaining unit employees have a right to strike in support of the demand of their co-employees in another bargaining unit in support of the demands of the later employees if all the requirements of the Act which are necessary for there to be a protected strike have been complied with.

[27] The Court a quo was referred to the Afrox and the Plascon Decorative cases. The Court a quo appears to have taken the view that the employees employed by Jaff and Co Ltd in Kimberly and by NEWCLO (Pty)Ltd in Kroonstad were obliged to follow the dispute resolution procedures prescribed in the Main Agreement of the “**Free State and Northern Cape**” Bargaining Council before they could embark on the intended strike. It is this that the Court a quo viewed as a distinguishing factor between this matter, on the one hand, and, the Afrox and Plascon Decorative matters, on the other. At page 4 to 5 of its judgement, the Court a quo said:-

“The dispute resolution procedures, which are a prerequisite to protected strike action and must first be followed and exhausted by employees falling within the jurisdiction of the regional bargaining council in which they are employed are defined in the collective main agreement applicable to those regions. The fact that employees falling under different bargaining councils may be employed by the same employer cannot ipso facto remove those employees from the jurisdiction of the council, or, exempt them from the provisions and operation of the collective agreement effective in the area of their employment. In each of those agreements the term ‘employee’ is defined as meaning ‘those employees falling within the jurisdiction of the scope of the bargaining council concerned.’”

- [28] Later on the Court a quo emphasised that **“no demand had been made, no dispute had been declared by the [appellant] withing**

the ambit of the Free State and Northern Cape Bargaining Council” It continued and said that **“no dispute resolution procedures have been invoked and pursued, on any basis which would clothe ensuing strike action with the protection afforded by section 64 and 67 of the Act.”**

[29] Before us Mr Buirski sought to defend the decision of the Court a quo on the very basis on which the Court a quo came to the conclusion that the intended strike would not be a protected strike, namely, that there was an obligation for compliance with the dispute procedure prescribed in the main agreement of the **“Free State and Northern Cape”** Bargaining Council. This is not the law. This proposition loses sight of certain important matter. Id deal with these below.

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[31] More importantly, the dispute which the intended strike sought to bring to an end had already been referred to the bargaining council with the requisite jurisdiction for conciliation and such attempts had failed. After all the statutory requirements required to be complied with before there could be a strike had been complied with, a protected strike had been embarked upon. The same dispute could not be referred to conciliation for the second time. The requirement in sec 64 that the issue in dispute be referred to the Commission for Conciliation Mediation and Arbitration or to a bargaining council with jurisdiction for conciliation is a requirement that the issue in dispute be referred to a bargaining council, where there is one with jurisdiction, which has jurisdiction in respect of such issue in dispute. A bargaining council cannot conciliate a dispute in respect of which it has no jurisdiction.

[32] In response to a question from the Bench and realising the jurisdictional difficulty that is raised by the submission that there should have been a referral of the dispute to the **“Free State and Northern Cape”** Bargaining Council, Mr Buirski sought to argue

that he dispute that was required to be

referred to conciliation before this intended strike could take place was the dispute about the amendment of the Main Agreement of the **“Free State and Northern Cape”** Bargaining Council. However, this argument met with the difficulty that the strike was not one that related to that dispute. It was a strike in support of the employees’ demands in the dispute which was the subject of the strike in the Northern areas. Mr Buirski could not overcome this difficulty. In the light of the this Mr Buirski’s contention fell to be rejected. In my view the fact that the employees seeking to go on strike in this matter are subject to a different bargaining council with a different main agreement is of no materiality as the intended strike is in support of the employee party’s demands in a dispute falling within the jurisdiction of another council. In the result I conclude that the ratio decidendi in *Afriflex and Plascon Decorative* applies in this matter. Accordingly the Court a quo erred in concluding that such strike would be unprotected. It will be a protected. It will be a protected strike.

RMM Zondo

Judge President

I agree

I agree

CR Nicholson
Judge of Appeal

N. Page
Acting Judge of Appeal

Date of Order: 6 September 2001

Date of reasons: 29 October 2001

For the Appellant: Mr M.S.M. Brassey SC

Instructed by: Cheadle Thompson and Haysom

For Respondent: Mr Buirski (with Mr Hulley)

Instructed by: Borman Synman & Barnard