

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case Number: JA 6/02

In the matter between:

ESKOM

Appellant

and

NATIONAL UNION OF

METALWORKERS OF SOUTH AFRICA

First Respondent

G DAVIS AND OTHERS Second to further Respondents

JUDGMENT

Du Plessis AJA:

- 1] The first respondent, a trade union, represents the further respondents who are employees of the appellant. The recognition agreement between the appellant and the first respondent provides for annual wage negotiations between the parties.
- 2] At the negotiations in 2001 the parties could not agree on the percentage wage increase. Agreement on other conditions of employment could also not be reached. On 29 June 2001 the first respondent declared a dispute in respect of the issues on which agreement could not be reached. I shall refer to this dispute as “the main

dispute”. The main dispute was referred to conciliation. A conciliation meeting took place on 12 July 2001. The dispute was not resolved and on 18 July the mediator issued a certificate to that effect.

- 3] In the meantime, on 13 July, the appellant notified its employees that it was to implement its suggested wage increases with effect from 1 July 2001 and payable at the end of July. According to the first respondent, the applicant’s decision to implement its suggested wage increase gave rise to a new dispute (“the second dispute”). The first respondent contends that the second dispute is one “about a unilateral change to terms and conditions of employment” and therefore is a dispute as provided for in section 64(4) of the Labour Relations Act, 66 of 1995 (“the Act”).
- 4] On 18 July the first respondent wrote to the appellant that it (the first respondent) had, on the same date, referred the second dispute (about the applicant’s intended implementation of the wage increase) to the Commission for Conciliation, Mediation and Arbitration (“the CCMA”). Based on its contention that the second dispute was one as provided for in section 64(4), the first respondent also required the appellant to undertake not to implement the wage increase. (See section 64(4)(a) and 64(5) quoted in paragraph [7] hereunder.)
- 5] On the following day, 19 July, the first respondent (together with other interested trade unions) gave the requisite notice in terms of section 64(1) of the Act that it intended to

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embark upon strike action in respect of the main dispute. As regards the second dispute, the appellant and the first respondent could not agree and on 20 July 2001 the CCMA certified accordingly.

6] On 23 July the first respondent sought an undertaking from the appellant that, for a period of thirty days from 18 July, it would not implement the wage increase. The undertaking was not given. Still on 23 July, the respondents applied to the Labour Court for an interdict restraining the appellant from implementing the wage increase for a period of 30 days from the date whereon the second dispute was referred to the CCMA (18 July). On 25 July the Labour Court granted an order to that effect. The chronology of events set out above shows that the application in the Labour Court was launched and the order in that court granted after the CCMA had certified that the second dispute remained unresolved. The appellant now appeals against the Labour Court's judgment and order.

7] Section 64(4) and (5) of the Act provide as follows:

- (4) Any employee who or any trade union that refers a dispute about a unilateral change to terms and conditions of employment to a council or the Commission in terms of subsection (1) (a) may, in the referral, and for the period referred to in subsection (1) (a)—
- a require the employer not to implement unilaterally the change to terms and conditions of employment; or

b if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.

(5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of service of the referral on the employer.”

8] For the appellants Mr Sutherland argued that the appellant’s implementation of its suggested wage increase constituted the use of economic power in relation to the main dispute. As such, he argued, it did not constitute a unilateral change to terms and conditions of employment. Mr Sutherland further argued that, for the same reason, the intended implementation of the wage increase did not constitute a dispute separate from the main dispute: It was an integral part of the main dispute. The argument raises several questions as to the correct interpretation of the phrase “*refers a dispute about a unilateral change to terms and conditions of employment*”. A further question that was debated in argument was whether an improvement in terms and conditions of employment can be the subject of a dispute in terms of section 64(4). It is unnecessary to express any view on these and other questions raised in respect of the correct interpretation of section 64(4) and I refrain from doing so. I shall assume for the purpose of this judgment that the appellant’s action constituted a unilateral change in terms and conditions of employment. I shall further assume that it gave rise to a second dispute, separate from the main dispute. I shall also assume that the first respondent properly referred the second dispute to the CCMA in terms of section

64(4). I shall finally assume that the first respondent was entitled to the rights set out in sections 64(4)(a) and that the appellant incurred the obligation provided for in section 64(5).

9] In terms of section 64(4) and (5) an employer may in the relevant circumstances not implement a unilateral change for “the period referred to in subsection (1)(a)” of section 64. Section 64(1)(a) provides:

“(1) Every employee has the right to strike and every employer has recourse to lock-out if—

(a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and—

(i) a certificate stating that the dispute remains unresolved has been issued; or

(ii) a period of 30 days, or any extension of that period agreed to between the parties

to the dispute, has elapsed since the referral was received by the council or the Commission ... “

The Labour Court held that there “is only one period referred to in section 64(1)(a) and that is the period of 30 days or any extension thereof which is referred to in section 64(1)(a)(ii)”. The Labour Court further held that the “reference in section 64(1)(a)(i) to a certificate stating that the dispute remains unresolved and the issue of such a certificate is not a reference to a period of time but to the happening of an event ...”.

1] I agree that the period of 30 days in section 64(1)(a)(ii) is the only one referred to by reference to a number of days, but I cannot agree that it is the only period referred to in section 64(1)(a). The primary meaning of the word “period” is “a length or portion of

time” (**The Concise Oxford Dictionary** *sv* “*period*”). Such a length of time can be expressed in a number of time units such as seconds, minutes, hours or days. It can also be expressed by reference to the events marking the beginning and the end of the period. The latter is no less a reference to a period than the former.

- 2] There are two periods referred to in section 64(1)(a). Each one commences when the dispute is referred to a council or to the CCMA. The one ends when a certificate is issued in terms of section 64(1)(a)(i). The other one ends 30 days after the referral of the dispute (section 64(1)(a)(ii)). The question is whether it is the purpose of section 64(4) to refer to only the one described in terms of a number of days. Section 64(4) refers to “the period of time” which literally means that section 64(4) pre-supposes that section 64(1)(a) in turn refers to only one period. It is unclear on such a reading to which of the two periods section 64(4) refers. The two periods in section 64(1)(a) are mutually exclusive in the sense that if the one applies, the other cannot. Therefore, a reference in section 64(4) to “the periods” would have been nonsensical. The singular “period” is used in section 64(4) because the purpose is to refer to the period which is applicable in the circumstances of each case.
- 3] The above interpretation of section 64(4) accords with the clear purpose of section 64(4) and (5) which is to retain or restore the *status quo* until the conciliation stage regarding a dispute about a unilateral change to terms and conditions of employment is over and both parties are in a position to resort to the use of economic power.

- 4] I conclude that the words “*for the period referred to in subsection (1)(a)*” where they appear in section 64(4) refer to either the period mentioned in section 64(1)(a)(i) or to the one referred to in section 64(a)((ii), as the case may be. (See **Monyela & Others v Bruce Jacobs t/a LV Construction** (1998) 19 ILJ 75 (LC) at 81B to G; **Nkutha and Others v Fuel Gas Installations (Pty) Ltd** 92000) 21 ILJ 218 (LC) at 230 paragraphs 75 and 76)
- 5] When the application was brought in this case and also when the court *a quo* issued the order, the period referred to in section 64(1)(a)(i) had expired. The second dispute had been referred to the CCMA and the latter had issued a certificate stating that the second dispute remained unresolved. It follows that, when the court *a quo* issued its order, even on the assumptions I have made, the appellant no longer had an obligation not to implement the wage increase. The court *a quo* should accordingly not have issued the order it did. The appeal must succeed.
- 6] Regarding costs, counsel were agreed that costs should follow the event. Only the first respondent opposed the appeal and it must therefore pay the costs of the appeal.
- 7] The following order is made:
- 1 The appeal succeeds.

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2 The order of the Labour Court is set aside and substituted with the following order: “*The application is dismissed with costs*”.

3 The first respondent is ordered to pay the costs of the appeal.

BR du Plessis

Acting judge of the Labour Appeal Court.

I agree.

RMM Zondo

Judge President of the Labour Appeal Court.

I agree.

DM Davis

Acting judge of the Labour Appeal Court.

Date of hearing: 22 August 2002

Date of judgment: 4 October 2002

For appellant: Mr Patel

Instructed by: Dison Ndlovu Attorneys

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For respondent: Adv R. Sutherland SC
Instructed by: Ruth Edmonds Attorneys