



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA51/15

In the matter between:-

G4S CASH SOLUTIONS SA (PTY) LTD

Appellant

and

MOTOR TRANSPORT WORKERS UNION

OF SOUTH AFRICA (MTWU)

First Respondent

NATIONAL BARGAINING COUNCIL FOR

THE ROAD FREIGHT AND LOGISTICS INDUSTRY

Second Respondent

Employees (Listed in Annexure "X")

to the Notice of Motion)

**Third to Further
Respondents**

Heard: 03 May 2016

Delivered: 26 May 2016

Summary:

Coram: Davis, CJ Musi et Sutherland JJJA

JUDGMENT

DAVIS JA

Introduction

- [1] This case concerns an appeal against the judgment of the Labour Court of 22 June 2015, in which Whitcher J ordered, *inter alia*, that the third to further respondents (respondents) were not obliged to work in excess of the six-day week provided for in their contracts of employment. The court *a quo* also ordered that warnings and dismissals which had been issued to the first respondent's members by the appellant should be set aside.
- [2] The respondents conceded that the court *a quo* did not enjoy the requisite jurisdiction to make the second order and accordingly this issue is no longer one which requires determination by this Court. The crisp issue for determination concerns the question of the alleged obligation to work on Sundays and the consequences of the refusal by the respondents to do so.

Factual matrix

- [3] It is common cause that the relevant employees were security guards, road workers and counting house employees, all of whom had been employed by the appellant. The founding affidavit contains the contract of employment entered into between appellant and the relevant employees. Clause 6 of this contract provides thus:

WORKING HOURS

- 6.1 The employee shall work a six-day week and his ordinary hours of work will be 45 hours a week.
- 6.2 The starting and finishing times of work are determined by operational requirements and may vary from day to day.

6.3 If the employee has to work more than 45 hours a week, this additional time will be counted as overtime.'

[4] Clause 7 deals with the question of overtime as follows:

'OVERTIME

7.1 The company undertakes to give the employee reasonable prior notice if overtime is to be worked, except in emergency situations when overtime shall be worked without any prior notice. The employee may not unreasonably refuse to work any overtime requested by the company.

7.2 All overtime worked shall be paid at the prescribed legislated rate.'

[5] The founding affidavit also refers to the relevant collective agreement and, in particular to Part 2, Clause 3 thereof, which provides:

'PART 2: HOURS OF WORK

3. Ordinary hours of work:

(1) The ordinary hours of work of an employee may not exceed 45 in any week.

(2) Subject to sub-clause (1), ordinary hours of work per day may not exceed-

(a) nine hours for employees who work a five-day week;

(b) eight hours for employees who work a six-day week, provided that an employee's ordinary hours of work may not exceed five hours on a Saturday.

(3) Ordinary hours of work do not include meal intervals provided for in terms of clause 5.'

- [6] Respondents alleged that during 2004, appellant required its employees to work on Sundays and public holidays in order to meet the demands of its clients. The request was made on the basis that the work would be voluntarily and would be remunerated at a fixed fee to be increased annually at G4S's discretion on 1 May. According to the founding affidavit, this payment was increased through negotiations between the parties at plant level, a point disputed by appellant. Respondents conceded that the increase was within the sole discretion of appellant. It is common cause however that appellant decided in May 2015 not to increase the amount of R 831 for Sunday work. It is further common cause that the employees refused to volunteer their services on Sundays and public holidays thereafter and were accordingly disciplined by appellant. One person was dismissed and numerous other employees received final written warnings. First respondent advised its members to continue rendering services on Sundays when requested to do so by appellant, pending a resolution of the dispute.
- [7] By the time the case was argued on appeal before this Court, the question for resolution of the dispute had been distilled to the issue of whether work on Sundays constituted a mutual interest dispute and/or a dispute concerning the interpretation and application of a collective agreement.

Appellant's case

- [8] Mr Boda, who appeared on behalf of the appellant, submitted that this Court was dealing with a mutual interest dispute which meant that, when the individual respondents refused to work on Sundays, pending an increase in the remuneration received for this work, they had engaged in a strike in order to promote a particular interest. Accordingly, he contended that the dispute was not one which fell within the jurisdiction of the court *a quo*. In terms of s64(1) of the Labour Relations Act 66 of 1995 ('the Act'), an interest dispute of this kind should have been referred to the relevant bargaining council or the Commission for Conciliation Mediation and Arbitration. It was not a

dispute of right and the court *a quo* had no jurisdictional basis on which to deal with the matter.

- [9] Mr Boda submitted that, by refusing to work on Sundays, the individual respondents have brought themselves within the scope of s213 of the Act. Section 213 defines a strike to mean:

‘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 or employee.’

In support of this submission Mr Boda referred to the decision of this Court in *National Union of Mineworker obo Employees v CCMA and Others* [2012] 1 BLLR 22 (LAC) (*NUM*).

Evaluation

- [10] The judgment of Mlambo JP in the *NUM* case, *supra*, makes clear that the definition of strike cannot be expanded seamlessly to accommodate a refusal to work within the context of the present dispute. At paragraph 16 of his judgment, the learned Judge President says:

‘The affected employees refused to engage in their normal employment duty, which was to work on a particular shift. By refusing to observe the rules of the appellant and to carry out the instructions to continue to work in terms of the contract, they had refused to work. In this case, the action was concerted, in that a number of employees had participated in a decision to withhold their labour. As to the third requirement, there was a common purpose in so far as the employees were concerned, being to obtain redress for the third respondent’s decision to withhold payment.’

- [11] In the present case, the question which must be asked is whether the relevant employees refused to engage in employment pursuant to a duty

imposed upon them which was sourced in their contracts of employment. As noted, clause 6 of the contract of employment provided that the employees shall work a six-day week and that their ordinary hours of work would be 45 hours per week. The fact that the contract provided, in addition, that overtime might be required could not be construed to mean that, in effect, the relevant employees were obliged to work a seven-day week. To the extent that there is any doubt, clause 7 clarifies the position: 'The employee may not unreasonably refuse to work any overtime requested by the company'. (My emphasis). The contract of employment made it clear that there was no obligation upon employees to work every Sunday, pursuant to which there was a corresponding right enjoyed by the appellant to demand that the relevant employees would work a seven-day week.

- [12] This conclusion means that when the employees refused to continue to work on Sundays, the refusal was not based upon any right sourced in the contract which was thus legally enjoyed by the appellant. A refusal to continue to work on Sundays did not fall within the definition of strike as set out in s 213 of the Act.

A tacit agreement?

- [13] Cognisant of this difficulty, Mr Boda submitted that, given the practice by which the individual employees had worked on Sundays, there was a tacit agreement to work on Sundays. It became the source of the right enjoyed by the appellant. Hence, the refusal to continue to work on Sundays constituted a dispute of interest regarding the amount of remuneration which the employees demanded in order to continue to fulfil their obligations sourced in the tacit agreement.

- [14] Courts are generally slow to import a tacit term into a contract. See *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532. More recently Brand JA in *City of Cape Town (CMC*

Administration) v Bourbon – Leftley NNO and Another 2006 (3) SA 488 (SCA) (*City of Cape Town*) at para 19-20 said:

‘As stated in these cases, a tacit term is based on an inference of what both parties must or would necessarily have agreed to, but which, for some reason or other, remained unexpressed. Like all other inferences, acceptance of the proposed tacit term is entirely dependent on the facts. But, as also appears from the cases referred to, a tacit term is not easily inferred by the courts. The reason for this reluctance is closely linked to the postulate that the courts can neither make contracts for people nor supplement their agreements merely because it appears reasonable or convenient to do so (see e.g. *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532H). It follows that a term cannot be inferred because it would, on the application of the well-known “officious bystander” test, have been unreasonable of one of the parties not to agree to it upon the bystander’s suggestion. Nor can it be inferred because it would be convenient and might therefore very well have been incorporated in the contract if the parties had thought about it at the time. A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would necessarily have agreed upon such a term if it had been suggested to them at the time (see e.g. *Alfred McAlpine (supra)* at 532H - 533B and *Consol Ltd t/a Consol Glass (supra)* at para [50]. If the inference is that the response by one of the parties to the bystander’s question might have been that he would first like to discuss and consider the suggested term, the importation of the term would not be justified.

In deciding whether the suggested term can be inferred, the court will have regard primarily to the express terms of the contract and to the surrounding circumstances under which it was entered into. It has also been recognised in some cases, however, that the subsequent conduct of the parties can be indicative of the presence or absence or of the proposed tacit term.’

- [15] In the present case, the version offered by the appellant was that, for the past 11 years, employees had worked on Sundays, albeit that the practice was never recorded in writing nor was it incorporated in the terms of the

respondents' contracts of employment. The practice, to the extent that it was sought to be transformed into a tacit agreement, appears to be in direct contradiction to the express terms of clauses 6 and 7 of the individual contracts of employment. Further to the extent that there was a tacit term, it would have to include the amount of the remuneration required to be paid by the appellant for the work so done on the relevant Sundays. As Brand JA made clear in the *City of Cape Town* case, *supra* that the tacit term must cover the full extent of the inferred agreement. It appears that, until 2015, the rate of remuneration had been increased on an annual basis. The fact that the appellant had refused to increase the rate in May 2015 indicates that, even if a tacit term could be inferred that the respondents were required to work on Sundays at the requisite rate of remuneration, the tacit term had been breached by the unilateral act of the appellant. The better approach, however, is that there was no tacit agreement proved by appellant which was sufficient to justify the case made by the appellant.

The applicability of the collective agreement

[16] Although not pursued in oral argument, appellant contended in its written heads of argument that the court *a quo* had erred in relying on the provisions of the collective agreement for its conclusion that the respondents were not obliged to work in excess of six days. For this reason, appellant contended that, as the dispute turned on the interpretation and application of a collective agreement, s24 of the Act was applicable; hence the court *a quo* was not clothed with the necessary jurisdiction to hear the dispute.

[17] The relevance of s24 of the Act to disputes of this kind has been luminously resolved by this Court in *Hospera SA obo Tshambi v Department of Health, KwaZulu-Natal* [2016] ZALAC 10. In his judgment, Sutherland JA held at para 16 that, when dealing with a dispute, an arbitrator is required:

To determine the true dispute between the parties. To that end, it is necessary to establish the relevant facts and construe the category of

dispute correctly. An arbitrator must make an objective finding about what is the dispute to be determined.'

- [18] What is required of a court in this case is, on the basis of the objective facts, to determine the true nature of the dispute between the parties. The dispute was set out in the founding affidavit of respondents. In terms of their contracts of employment, they contend that third to further respondents were not obliged to work a seven-day week. That the court *a quo* sought to refer to the provisions of the collective agreement in order to clarify the meaning of the relevant clauses in the individual contracts of employment did not convert the dispute between the parties from one sourced in the individual contracts to one based upon the collective agreement. Thus s24 of the LRA is not applicable to the present case.

Conclusion

- [19] In my view, there is no justifiable basis to conclude that the dispute between the parties was one of interest which would have triggered off a different dispute resolution mechanism from recourse to *the Labour Court which is empowered to deal with disputes of right*. Further, appellant did not prove, on the probabilities, that there was a tacit agreement sufficient to justify its contention that respondents were required to work on each and every Sunday and that their refusal to do so constituted a strike within the meaning of s213 of the Act.

- [20] For these reasons, the appeal is dismissed with costs.

Davis JA

C J Musi and Sutherland JJA concur in the judgment of Davis JA

APPEARANCES:

FOR THE APPELLANT:

Adv F D Boda

Intrusted by Norton Rose

Fulbright SA Inc

FOR THE THIRD TO FURTHER RESPONDENTS:

Adv E Tolmay

Instructed Kruger Attorneys

LABOUR APPEAL

COURT