

IN THE LABOUR APPEAL COURT HELD OF SOUTH AFRICA JOHANNESBURG

Reportable

Case no: JA164/2017

In the matter between:

IMPERIAL CARGO (PTY) LTD

Appellant

and

DETAWU

First Respondent

INDIVIDUAL RESPONDENTS

LISTED IN ANNEXURE “A” TO THE

NOTICE OF MOTION

**Second and further
Respondents**

Heard: 30 May 2019

Delivered: 13 June 2019

Summary: Collective agreement prohibiting strike at plant level in furtherance of demands involving cost and affecting the wage packets of employees. Union notifying employer of its intention to strike – Labour Court finding three of union’s demands fall within the impermissible demands but found that demand for re-scheduling drivers trips over weekends not prohibited and not falling within the substantive issues as contemplated in the collective agreement.

Held that: A plant level, collective agreement establishing a rule that weekend long distance trips should commence only on Saturdays or Sundays will involve substantial additional costs and increased wage packets for the employees – either in overtime payments or in substitute labour costs. Matters of this kind are reserved in terms of clause 57 of the Main Agreement for bargaining at national level. While the demand may seem cost neutral on the

face of it, as the Labour Court opined, it in effect is not. If acceded to, each driver could earn up to an additional one and a half days' wages for weekend trips. A demand that weekend long distance trips commence after lunchtime on Saturdays is therefore in substance a demand for increased remuneration or time off. While that demand may be legitimate and understandable, it comprises a substantive issue as defined by the Main Agreement, and is thus a bargaining topic to be negotiated at the bargaining council. Labour Court's judgment set aside and appeal dismissed.

Coram: Waglay JP, Murphy and Savage AJJA

JUDGMENT

MURPHY AJA

- [1] The appellant appeals against the judgment and order of the Labour Court (Whitcher J) dismissing its application for orders declaring strike action by the respondents unprotected and unlawful, and interdicting them from embarking on and participating in the strike intended to commence on 18 October 2017. The appeal is with the leave of the Labour Court.
- [2] The appellant provides road freight transport services to clients from its base in Paarl, Western Cape. The relationship between the parties is governed by the Main Collective Agreement of the National Bargaining Council for the Road Freight and Logistics Industry¹ ("the Main Agreement"). Clause 2 of the Main Agreement provides that it was binding on the parties until 28 February 2019.
- [3] In the period preceding the intended strike, the respondents made four demands. These were for: i) the employment of general workers to assist in the loading or unloading of goods; ii) the re-scheduling of weekend trips of long-distance drivers; iii) the provision of food or food allowances to drivers when they work more than three hours overtime; and iv) off days of drivers to

¹ Promulgated by the Minister of Labour in GN 725 GG 40385 of 28 October 2016.

take place in the course of their five or six day shift and to be spent at home. The first respondent, DETAWU, issued a strike notice on Friday 13 October 2017 giving notice of intended strike action in furtherance of the demands commencing on 18 October 2017. The appellant responded with an urgent application to interdict the strike on the grounds that it was unprotected and in contravention of section 65(1)(a) of the Labour Relations Act² because the respondents were bound by a collective agreement that prohibited a strike in respect to the issues in dispute.

- [4] Clause 57 of the Main Agreement deals with bargaining levels. The relevant provisions read:

‘(1) The Council is the exclusive forum for the negotiation and conclusion of agreements on substantive issues between employers and employers’ organisations, on the one hand, and trade unions on the other hand.

(2) Despite sub-clause (1), employee representatives or representative trade unions may negotiate with an employer at company level on non-substantive conditions of employment, operational procedures, bonuses or incentive schemes that are directly related to profit or productivity. A matter contemplated in this sub-clause may not be negotiated in the Council.....

(4) No trade union or employers’ organisation may call a strike or lock-out or in any other way seek to induce or compel negotiations on the issues referred to in sub-clause (1) at any level other than the Council...’

- [5] The term “substantive issues” is defined in the Main Agreement as “all issues involving cost and affecting the wage packet of employees”. Thus, industrial action may not be embarked upon at plant level in furtherance of demands involving cost and affecting the wage packets of employees. Collective bargaining and industrial action on substantive issues is reserved by clause 57(1) of the Main Agreement for centralised collective bargaining.

- [6] The appellant contended before the Labour Court that the demands over which the respondents intended to strike concerned substantive issues by virtue of the costs associated with them and did not fall into the category of

² Act 66 of 1996.

exceptions contemplated in clause 57(2) of the Main Agreement. The Labour Court agreed with that contention in relation to the demands for the employment of general workers, the provision of food or food allowances and the off days of drivers. These, the court concluded, were substantive issues which had to be negotiated at bargaining council level.

- [7] The Labour Court took a different view in relation to the demand regarding the scheduling of weekend trips by long-distance drivers – (“the second demand”).
- [8] The second demand sought to compel the appellant to rearrange its delivery timetables to allow drivers to depart later over a weekend, either on Saturday afternoon or Sunday morning, when driving long distances to make deliveries. The prevailing arrangement is that drivers will leave the depot on Thursdays or Fridays, with the aim of either arriving in time to offload at customers’ premises before lunch time on Saturdays, or to arrive at some point during the weekend, so as to be able to offload at the customer’s premises on Monday mornings. Drivers are paid their wages until they arrive at the customer, but only a subsistence allowance during the time (usually on a Sunday) that they are waiting to offload. The practical effect of the second demand, were it acceded to, would be that drivers would be entitled in terms of the Main Agreement to overtime rates for driving on Saturday afternoons and evenings, and double pay on Sundays; whereas currently the drivers normally will arrive at the destination depot by Saturday lunchtime, and then earn the subsistence allowances (but not wages at overtime rates) over the course of the weekend, while waiting to deliver the load to the client early on a Monday morning.
- [9] The appellant argued that the demanded re-scheduling would involve a significant increase in its wage bill, in the form of overtime payments. Strike action was therefore prohibited in terms of clause 57(4) of the Main Agreement which prohibits strikes and plant level bargaining in respect of substantive issues, which are defined as matters involving costs or affecting wage packets. It argued in the alternative that the issue of scheduling vehicles

and loads is one that falls within management prerogative in terms of clause 4 of the Main Agreement which provides that regular daily working day times will be set and regulated by individual employers and that the employer may unilaterally change such times on notice to employees.

[10] The Labour Court found as follows:

‘In my view this demand does not concern a substantive issue. It concerns a work practice with regard to the specific operations of the applicant – not the sector.

There is nothing on the papers to indicate that the scheduling of trips is capable of being contractually regulated at a sectoral level or can be turned into a term capable of being applied across the sectoral board.

On the applicant’s own version it is a work practice that falls within management’s prerogative.

The fact that capitulation to the demand may result in the drivers’ earning overtime on Saturday afternoons and evenings, and double pay on Sundays does not render it a substantive issue involving costs. The demand is not about overtime. There is no integral or internal cost element in the demand itself. It does not amount to a demand for an amount of money.

Employees may strike in support of a demand to change a work practice where the strike has been processed in terms of section 64(1), which was done in this case.’

[11] The learned judge, despite accepting that the impermissible demands were severable from the permissible demand, held that the strike in relation to the second demand would be protected, refused to interdict the impermissible demands and accordingly dismissed the appellant’s application in its entirety.

[12] The appellant has raised two grounds of appeal. Firstly, it submits that the Labour Court erred in dismissing the entire application and at the very least should have interdicted strike action in relation to the three impermissible demands. Secondly, it persists with its contention that the second demand is a substantive issue that is rightly a bargaining topic for negotiation at

bargaining council level. The respondents have not filed a cross-appeal against the Labour Court's finding regarding the impermissible demands. They state though that they have no intention to strike over these demands. They, however, persist with their contention that the second demand does not concern a substantive issue but is merely a call for a change in a work practice and intend to strike over it.

- [13] The respondents are correct in their contention that the right to strike in pursuit of a permissible demand did not evaporate upon the addition of the three impermissible demands.³ If the second demand is a permissible demand, the respondents may embark on a protected strike over it. But it does not follow that the appellant was not entitled to orders prohibiting a strike over the impermissible demands. The Labour Court erred in not making such orders.
- [14] The finding that the second demand was one aimed at changing a work practice (or perhaps an operations procedure as contemplated in clause 57(2) of the Main Agreement), and thus a permissible bargaining topic at plant level, fails to appreciate the substance of the demand.
- [15] Clause 4(1) of the Main Agreement provides that regular working day times will be set and regulated by individual employers, basically as a matter of managerial prerogative. It does not reserve the issue of working day times for plant level bargaining. Only non-substantive conditions of employment and operational procedures, being issues without cost or wage packet implications, are reserved by clause 57(2) for plant level negotiations.
- [16] The current practice is for weekend trips to commence on Thursdays or Fridays, resulting in minimal liability for overtime pay in respect of them. Clause 3 of the Main Agreement provides that ordinary hours of work may not exceed nine hours a day for employees who work five days per week and eight hours per day for employees who work six days per week provided that an employee's ordinary hours of work may not exceed five hours on a

³ *Transport & Allied Workers Union of South Africa obo MW Ngedle and Others v Unitrans Fuel and Chemical (Pty) Ltd* [2016] 11 BCLR 1440 (CC) para 34

Saturday. Clause 14 of the Main Agreement requires the employer to pay double the hourly rate to employees who work on Sundays or to grant time off in lieu of payment. The appellant has thus organised its work schedule to minimise the hours of work on Saturdays and Sundays. The employees have no right to work overtime, but if required by the appellant to do so, they normally will earn overtime rates.

[17] The second demand seeks to establish a right to be paid overtime or time off in lieu for weekend trips, as a matter of course, by re-scheduling the commencement times of the trips. A plant level, collective agreement establishing a rule that weekend long distance trips should commence only on Saturdays or Sundays will involve substantial additional costs and increased wage packets for the employees – either in overtime payments or in substitute labour costs. Matters of this kind are reserved in terms of clause 57 of the Main Agreement for bargaining at national level. While the demand may seem cost neutral on the face of it, as the Labour Court opined, it in effect is not. If acceded to, each driver could earn up to an additional one and a half days wages for weekend trips. A demand that weekend long distance trips commence after lunchtime on Saturdays is therefore in substance a demand for increased remuneration or time off. While that demand may be legitimate and understandable, it comprises a substantive issue as defined by the Main Agreement, and is thus a bargaining topic to be negotiated at the bargaining council.

[18] In the premises, the second demand was impermissible and the Labour Court erred in not interdicting a strike in relation to it.

[19] The appellant does not seek costs.

[20] The appeal is upheld and the order of the Labour Court is set aside and substituted with the following order:

‘1. It is declared that the intended strike action by the respondents constitutes an unprotected strike.

2. The respondents are interdicted and restrained from embarking on and participating in a strike in relation to the demands forming the basis of the strike notice dated 13 October 2017.'

I agree

JR Murphy
Acting Judge of Appeal

I agree

B Waglay
Judge President

K Savage
Acting Judge of Appeal

APPEARANCES:

FOR THE APPELLANT:

Adv A Redding SC

Instructed by Cliffe Dekker Hofmeyer Inc

FOR THE RESPONDENTS:

Adv JH Groenewald

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