IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Reportable

CASE NO: J750/10

In the matter between:

ROAD ACCIDENT FUND	Applicant
AND	
SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION (SATAWU) obo MEMBERS	1st Respondent
L M S MELLO N.O	2nd Respondent
HOFMEYR N.O	3rd Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	4th Respondent

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JUDGMENT

Molahlehi J

Introduction

[1] The applicant seeks an interim order declaring as unprotected and unprocedural the strike which the first respondent and its members intent embarking on. The requirements for an interim interdict are: a clear right or a right *prima facie* though open to some doubt, a well grounded apprehension of irreparable harm if the interim relieve is not granted and ultimately relieve is granted, the balance of

convenience in favour of granting the interim relieve, and the access of any other alternative remedy.

Background facts

[2] The applicant is the Road Accident Fund ("RAF") a juristic person established in terms of the Road Accident Fund Act 56 of 1996. The first respondent South African Transport & Allied Workers Union (SATAWU), is a trade union registered in terms of the Labour Relations Act No 66 of 1995 (the LRA). The second and the third respondents are commissioners appointed in terms of section 117 of the LRA to perform the dispute resolution function under the auspices of the CCMA.

[3] The issue that gave rise to the dispute between the parties arose from the planned introduction of a New Operating Model ("NOM") by the applicant. The NOM is a system used for processing payment of claims of victims of road accidents. The need to introduce the NOM system according to the applicant arose because of the changes which had been introduced by the Act. In contemplating the impact of the introduction of the NOM the applicant issued a notice in terms of s 189 of the LRA to the first respondent. The notice was however withdrawn because it was not contemplated that the introduction of the NOM would lead to job loses and to the changes to the terms and conditions of employment. The notice was in fact withdrawn on the advice of the CCMA. The parties agreed to continue with the consultation process despite the withdrawal of the s 189 notice. The consultation in the present instant concerned issues related to transformation. In this respect the parties agreed to approach the CCMA for assistance with the

intervention in terms of s 150 of the LRA. Section 150 intervention may be utilised even when there is no referral of the dispute to the CCMA.

[4] It would appear that the respondent was not satisfied with the progress made in the s 150 facilitation and thus referred a dispute to the CCMA on the 29 December 2009.

[5] The facts giving rise to the dispute are recorded in the referral form in the following terms:

> *"The parties are involved in negotiations in an attempt to secure conditions of employment and other substantive issues for the new RAF."*

[6] The demand of the respondent is set out in item 6 of the referral form in the following terms:

> *"The employer to make a commitment in a form of a signed agreement that there would be no change in the conditions of employment."*

[7] Subsequent to the referral of the dispute the CCMA issued a notice of set down on the 19th January 2010, which indicated that the dispute would be conciliated by commissioner Fadal and the dispute was therein described as *"a section 64 (1) Matters of Mutual Interest dispute, under case number GAJB 424-10."*

[8] The parties held a meeting the following day after the issuance of the notice of the set down of the conciliation hearing and that was on the 20th January 2010. The meeting was facilitated by commissioner Mello. The parties agreed in that meeting that the consultation process from which the respondent withdrew during December 2009 would resume and a task team would be constituted to look at the issues raised in the letter of the respondent dated 23rd December 2009. The

conciliation proceedings which had been scheduled for the 4th February 2010 was then cancelled and the task team held its first meeting on that day.

[9] The second meeting of the task team was held on 12th February 2010. According to the applicant the task team deliberated on the issues it was tasked with and an agreement was concluded on a number of issues.

[10] In its founding affidavit the applicant criticises the CCMA for unilaterally setting the conciliation hearing down for the 17th March 2010 despite the agreement reached between the parties on the 20th January 2010.

[11] The applicant attacks the legality of the planned strike action by the respondent and its members on the grounds that the conciliation proceedings which took place on the 17th March 2010, was irregular in that commissioner Mello who facilitated the s 150 of the LRA intervention conducted the conciliation instead of commissioner Hofmeyer, who was in any case present during the proceedings. The essence of this complaint is that the commissioner mentioned in the notice of set down is commissioner Hofmeyer and not commissioner Mello and therefore Mello was in law not the appointed commissioner to conciliate the dispute.

[12] The applicant contended further that the attendance of commissioner Mello at the conciliation was irregular and unprocedural. It was for this reason that the applicant objected and demanded that commissioner Mello should recuse himself during the conciliation proceedings.

[13] The other point upon which the applicant relied on in attacking the legality of the planned strike is that the dispute which had been referred to the CCMA on the

29th December 2009 was suspended by agreement between the parties and therefore there was no dispute to be conciliated.

[14] After raising the above points which as indicated are the bases for challenging the legality of the strike, the commissioner issued a verbal ruling to the effect that the conciliation would preceed.

[15] On the 31st March 2010, commissioner Mello issued a certificate of outcome which indicated that the dispute remained unresolved as at the 29th March 2010. The applicant contended that the certificate was null and void because it was in respect of a dispute that had been suspended.

[16] On the same day that the certificate of out come was issued, the 31st March 2010, the respondent issued a 48 hours notice to the applicant indicating its intention to go on strike. The relevant part of the strike notice for the purposes of this judgment read as follows:

> *"We demand that the employer must not proceed in going live as from the 1st April 2010 without the above demands been addressed and an agreement that would bind parties in chatting a way forward been signed. The South African Transport and Allied Workers Union ("SATAWU") believes that the strike can be resolved if Road Accident Fund ("RAF") can come out clearly on how the process of absorptions in the new operating models will as a guarantee that the conditions of employment which includes salary, provident fund, medical aid etc will remain the same. SATAWU also demands that the employer must spell out in place that ensures that the jobs of our members are protected. We are attaching*

the certificate of non resolution for the Commission for Conciliation, Mediation and Arbitration that demonstrates and states that the matter remains unresolved."

[17] The applicant contends that the above notice contains new demands which were not included in the referral of the dispute to the CCMA. The example given in this respect is that the respondent demands that the applicant should spell out plans to ensure that the jobs of its members are protected.

[18] Mr Soni for the applicant argued that the 30 days period provided for in section 64 (a) (ii) of the LRA would only give the right to strike to the union only when there was an attempt at conciliation. It was further contended on behalf of the applicant that the court should adopt the purposive interpretation approach to the provisions of s 135 of LRA. The emphasis in this respect was on the object of securing labour peace by the LRA.

[19] The other argument raised by Mr Soni was that s 64 and s 135 should be read as requiring the party that has referred the dispute to the CCMA to be compelled to participate in a properly scheduled conciliation process. In relation to the conditionality in s 64 (a) (ii) of the LRA, it was submitted that the right to strike would only arise if there has been an attempt at conciliation.

[20] The other ground upon which the intended strike action is attacked is that the parties had established a task team to deal with matters related to the issues in dispute.

Evaluation

Was there compliance with the requirements of section 64 (1) (a) (i) of the LRA?

[21] It is important in answering this question to look at the purpose of s 64 (1) of the LRA. The court in *SA Transport & Allied Workers Union &Others v Equity Aviation Services (Pty) Ltd (2006) 27 ILJ 2411 (LC)* at paragraph [35] held that:

> *"The provisions of s64 (1) (b) need to be interpreted and applied in a manner which gives best effect to the primary objects of the Act and its own specific purpose. That needs to be done within the constrains of the language used in the section. One of the primary objects of the Act is to promote orderly collective bargaining.*
>
> *Section 64 (1) (b) gives expression to this object by requiring written notice of the commencement of the proposed strike. The section's specific purpose is to give an employer advance warning of the proposed strike so that an employer may prepare for the power-play that will follow. That specific purpose is defeated if the employer is not informed in the written notice in exact terms when the proposed strike will commence."*

[22] In *Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & Others (2004)25 ILJ 2135 (LAC)*, the court dealt with right to strike and observed in this respect as follows:

> *"[29] Section 23 (1) (c) of the Constitution provides that '[e]very worker has a right to strike.' Like all fundamental rights contained in the Bill of Rights in our Constitution, the right to strike can be limited by a law of general application provided that the requirements of s36 of the Constitution are met. The Act is an Act of general application.*

[30] Section 64 (1) of the Act is an Act confers on very employee 'the right to strike .... if certain conditions prescribed therein have been met. It is sufficient to say that the first condition is that the issue in dispute – that is the demand or grievance over which the strike is called – must have been referred either to a council with jurisdiction or the CCMA, as the case may be, for conciliation and either a certificate must have been issued to the effect that the dispute remains unresolved or a period of 30 days must have elapsed from the date of the referral of the dispute for conciliation."

[23] In terms of section 64 (1) (a) of the LRA:

"(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 Commissioner 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 Commissioner; and after that"

[24] The Labour Appeal Court in dealing with a comparable issue that arose in terms s 64 (4) of the LRA in *Eskom v NUMSA & Others (2002)12 BLLR 1153 (LAC)* the court at paragraph [11] held as follows*:*

"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 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) 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 applied in the circumstances of each case."

[25] It is common cause that the first respondent had in-compliance with the provisions of s 64 (1) (a) of the LRA referred the dispute to the CCMA. The issue raised by the applicant is that the first respondent has not acquired the right to strike because there was no proper compliance with the provisions s 64 (1) (a) (i) of the LRA, in that there was an irregularity in relation to the appointment of the commissioner who purported to conciliate the dispute. The complaint is based on the ground that the commissioner who conciliated the dispute is not the one mentioned in the notice of set down by the CCMA.

[26] In terms of s 135 (5) of the LRA the CCMA must appoint a commissioner to resolve the dispute through conciliation. The appointed commissioner must

attempt to resolve the dispute through conciliation within 30 days of the date it received the referral, unless the parties agree to extend the 30 day period.

[27] In my view s 135 (5) of the LRA must be read with s 117 of the LRA which provides that the governing body of the CCMA must appoint, *"as commissioners as many competent persons as it considers necessary to perform the functions of commissioners by or in terms of this Act or any other law."*

[28] There is nothing in s 135 (5) of the LRA that the conciliating commissioner must be the one whose name appears in the notice of set down. If this was the case or such interpretation was to be given to the provisions of s 135 (5) of the LRA it would make the function of the CCMA impracticable if not impossible. Thus in my view the commissioner referred to in s 135 (5) is any commissioner properly appointed by the governing body of the CCMA, which for that matter, may occur long before even a particular dispute that that commissioner is called upon to conciliate is referred to the CCMA. In other words commissioners in the CCMA are appointed to generally perform the dispute resolution function of the CCMA not necessarily to perform that function in relation to a specific dispute. The status of the commissioner who issued the certificate of outcome in the present instance, it seem fair and reasonable to assume that he is a commissioner appointed by the government and probably before this dispute arose. The commissioner was thus competent to perform conciliation functions as envisaged in terms of s 135 of the LRA.

[29] There is some suggestion in the founding affidavit of the applicant that the commissioner who issued the certificate of outcome was conflicted because he

was intimately involved in the facilitation conducted in terms of s 150 of the LRA. There is no merit in this submission particularly if regard is had to the fact that the same commissioner who performs conciliation function in a given matter can also perform the arbitration function which is largely adjudicative in nature.

[30] I now turn to deal with the applicants' contention that *"unilateral set down"* of the dispute was irregular because the dispute had been "placed on ice". As I understand the concept of "placing the dispute on ice", it meant that the dispute had been suspended and not withdrawn. The dispute was "placed on ice", in a letter addressed by the first respondent to the applicant dated 25th January 2010. The relevant parts of the letter read as follows:

> *"**RE: TERMS OF REFERRENCE AS SUBMITTED BY SOUTH AFRICAN TRANSPORT & ALLIED WORKERS UNION (SATAWU)***
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> *In the light of fact that South African Transport & Allied Workers Union (SATAWU) had agreed with the recommendations from Commission for Conciliation Mediation and Arbitration (CCMA) facilitator to defer the six demands that relates to New Road Accident Fund (RAF) Operating Model and as result the dispute that was declared concerning Dispute of Mutual Interest is put on ice."*

[31] In the mean time the CCMA schedule the conciliation proceedings for the 4th February 2010. The conciliation proceedings scheduled for that day was cancelled by agreement between the parties, at the first meeting of the task team. The pre-amble to the terms of reference for the task team is important in relation to the view that the concept "*placing dispute on ice"* did not mean that dispute as

referred to the CCMA on the 29th December 2009 was not withdrawn. The preamble to the terms of reference reads as follows:

> *"The parties to this body of terms of reference having agreed the formation of Task Team as recommended by the CCMA. SATAWU on its part further agrees to differ and suspend its dispute Matters of Mutual Interest scheduled for the 4th February 2010, case number GHB 424 -010. The task team shall commence with its work on the 4th February 2010 and shall have completed its task by the end of February 2010."*

[32] Accepting that the dispute was suspended and not withdrawn it then means that the first respondent as the referring party could resuscitate the suspended dispute. The dispute was resuscitated by the first respondent in an email date 8th March 2010 which reads as follows:

> *"Dear Sipho*
>
> *Please note that SATAWU at its own right had decided to resuscitate the dispute that was put on ice. Please note that this email is serving as a notice to enable to attend the conciliation process as schedule we hope that the Terms of Reference may be acceptable at CCMA as they can they be used as the basis of engagement and way of finding a workable solution to the impulse*
>
> *We hope you find the above in order*
>
> *Regards."*

[33] The dispute having been resuscitated it was for the CCMA to decide as to the date to which it was to be scheduled for a hearing. In my view when the dispute

was resuscitated there was no need for the CCMA to obtain the consent of any of the parties to set the matter down for a hearing.

Is there compliance with the provisions of section 64 (1) (a) (ii) of the LRA?

[34] If for whatever reason the requirements of s 64 (1) (a) (i) of the LRA is not satisfied within the period of 30 days, the right to strike which the union may have acquired from firstly declaring a mutual interest dispute and thereafter referring it to the CCMA, does not fall away. The fact that the CCMA may have not handled the conciliation process properly or that the commissioner who conducted the conciliation process was for whatever reason disqualified to do so, is immaterial and has no barring in as far as the lapse of 30 days in s 64 (1) (a) (ii) of the LRA is concerned. The 30 days period arises as an event independent of any other processes or procedural step that may have happened prior to its occurrence. The occurrence of 30 days elapse is an event that removes the procedural limitation imposed in evoking the right to strike by a union. In other words the union acquires permission in law to exercise that right to strike which it acquired from the time a proper referral of the dispute was made, including all other procedural aspects related there.

[35] The above view has its support in the case of *INGO Strautmann v Silver Meadows Trading 1999 (Pty) Ltd Trading as Mark and Ben Sun Cost and others unreported case number D412/07, Bombardier Transportation (Proprietary) Limited v Lungile Mtiya N.O & Others unreported case number JR 644/09 (LC) and Goldfields Mining South Africa (Kloof Mine) v National Union of Mine Workers & Others (2009) 12 BLLR 1214 (LC) including authorities referred*

therein. Although these cases dealt with the issue of a certificate of outcome in the context of arbitration awards the principle enunciated therein is apposite the present case.

[36] In *Bombardier Transport,* Van Niekerk J, confirmed what he had said in dealing with the legal status of the certificate of outcome in *Goldfields* in the following terms at paragraph [13] of that judgment:

> *"Two broad approaches appear to have emerged. The first is to regard the matter as one concerning jurisdiction, and to require a conciliating commissioner to determine the dispute about the reason for dismissal at the conciliation stage. On this approach, the certificate of out come (at least in so far as it categorises a dispute and indicates the forum to which it should be referred) represents a jurisdictional ruling. The second approach is to attach no jurisdictional significance to the certificate of outcome, and to regard the certificate as no more that a record that on a particular date, a dispute referred to the CCMA in particular terms remained unresolved. On this approach, while a conciliating commissioner will normally indicate the nature of the dispute in the certificate of outcome, the categorisation or description of the dispute has no bearing on the further conduct of the proceedings. In particular, the forum for any subsequent proceedings initiated by the referring party is the determined by what the employees alleges the dispute to be, and irrespective of the terms in which the certificate was completed."*

[37] The Learned Judge went further in *Bombardier Transport* and at paragraph [12] of his judgment to say:

> *"In my view, for the reasons recorded below, the LRA clearly adopts the literal approach. In other words, a certificate of outcome has no legal significance beyond a statement that the dispute referred to conciliation has been conciliated and was resolved or remained unresolved, as the case may be. In so far as the performance certificate make provisions for a commissioner to categorise the dispute and to indicate the means by which or the forum in which it is ultimately to be resolved, this are not functions contemplated by the Act, and they have no legal significance.*

[38] I am in agreement with the view expressed in the above case that the wording of s 135 (5) of the LRA contemplates that if the 30 days have elapsed from the date from which the CCMA received the referral of the dispute the dispute may be referred to arbitration or adjudication by the court. In the context of mutual interest dispute, the elapse of the 30 days period from the date of the referral to the CCMA, removes the procedural constrain that had been placed on the right to strike or imposed a lock out by any of the parties as the case may be.

[39] The status of the certificate of outcome in law is correctly stated by Van Niekerk J in the above case at paragraph [14] as follows:

> *"[14] In other words, a certificate of out come is no more than a document issued by a commissioner stating that on a particular day, a dispute referred to the CCMA for conciliation remained unresolved. It does not confer jurisdiction on the CCMA to do anything that the CCMA is not*

empowered to do, nor does it preclude the CCMA from exercising any of its statutory powers. In short a certificate of outcome has nothing to do with jurisdiction. If a party wishes to challenge the CCMA jurisdiction to deal with an unfair dismissal dispute, it may do so, whether or not the certificate of outcome has been issued. Jurisdiction is not granted or afforded to it by a CCMA commissioner issuing a certificate of out come. Jurisdiction either exists as the fact or it does not."

[40] The other issue upon which the applicant relies on in challenging the legality of the intended strike is that the respondent has in its notice to embark to the strike changed its demand which it had stated in the referral form. The demand in the referral form is stated as follows:

"The employer to make a commitment in a form of an agreement that there will be no change in the conditions of employment."

[41] The relevant part in the notice of the planned strike action relating to the demand read as follows:

"We demand that the employer must not proceed in going live as from the 1st April 2010 without the above demands being addressed any agreement that will bind the parties in chatting the way forward being signed. South African Transport and Allied Workers Union ("SATAWU") believes that the strike can be resolved if Road Accident Fund ("RAF") can come out clearly on how the process of absorbing the New Operating Model as well as the guarantee that the conditions of employment which includes salaries, provident fund, medical aid ETC will remain the same. SATAWU also

demands that the employer must spell out the plans in place that ensures that the jobs of our members are protected. We are attaching the certificate of none resolution from the commission for conciliation, mediation and arbitration that demonstrate and state that the matter remains unresolved."

[42] In my view, the demand in the notice of intention to embark on the strike action by the first respondent is not different to the one in the referral form. The essence of the demand in the notice of the intended strike is that the applicant should not implement the NOM without giving an undertaking that it would not change the terms and conditions of employment of the first respondent's members. The demand in the notice has to be understood in the context of the summary of the dispute in the referral form which is recorded therein as follows:

"The parties are involved in an attempt to secure conditions of employment and other substantive issues for the new RAF."

[43] In the light of the above I am of the view that the applicant has failed to show that it has a *prima facie* "though maybe in doubt" right not to be faced with a strike action.

[44] I am also of the view that in the light of the existing relationship between the parties which they may need to be managed in to the future, there is no reason in law and fairness to allow the cost to follow the result.

[45] Accordingly the following order is made:

1. The application is dismissed.
2. There is no order as to costs.

Molahlehi J

Date of Hearing : 7th April 2010

Date of Judgment : 13th April 2010

Appearances

For the Applicants : Adv V Soni (SC)

Instructed by : Maserumule Inc

For the Respondents: Adv P Kennedy (SC)

Instructed by : Cheadle Thompson & Haysom