

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

Case No. J2292/10

(Strike interdict: demands)

In the matter between:

SOUTH AFRICAN AIRWAYS (PTY) LTD

Applicant

and

SOUTH AFRICAN TRANSPORT AND

ALLIED WORKERS UNION

First Respondent

KOTSEDI & OTYHER

Second and Further Respondents

JUDGMENT

GUSH J

1. The applicant in this matter seeks the confirmation of an order granted by this court on the 16th November 2010.

2. The applicants brought an urgent application on the 16th November 2010 seeking an order calling upon the respondents' to show cause on the 30th November 2010 why an order should not be granted:
 - 2.1. "Interdicting and restraining the respondents from participating in industrial action in relation to the strike notice issued on 10th November 2010; and
 - 2.2. Interdicting and restraining the respondents from instigating or promoting industrial action by any of the second to further respondents in relation to the strike notice issued on 10th November 2010"
3. The order was granted and operated as an interim order pending the return date which was the 30th November 2010. By the 30th November 2010 the matter was opposed and in the interim the respondents had filed an answering affidavit and the applicants a replying affidavit.
4. The background to the application is that the first respondent had sent a letter to the applicant stating:

"RE: NOTICE OF OUR CONTEMPLATED STRIKE ACTION

Pursuant to various certificates of non- resolution issued by the CCMA, SATAWU would like to give 48 hours notice of its contemplated strike action in order to advance the following demands.

1. *Phasing out of levels 2-5 and accordingly replace them with level 6-9 (entry level)*
2. *Abolition of performance Management system.*
3. *Phasing out of the contracted companies after their respective expiry dates.(sic)*

4. *Suspension/removal and disciplinary processes against Simon Ngwenya...*
5. *FIFA 2010 World Cup incentive bonus of R10,000 per employee.*
6. *Removal of the external consultants from the internal disciplinary hearings.*
7. *Inconvenience of usd 50,00 per sector for any flight operating short(sic)*

Should the employer fail to address the above demands within 48 hours, SATAWU will commence a Strike action on Monday the 15th November 2010. (sic)”

5. In response to the 1st respondent’s letter the applicant replied indicating that it believed that the issues were not matters of mutual concern and asked for an undertaking that the 2nd and further respondents would not embark on strike action failing which the applicant would seek to interdict the strike action.
6. The 1st respondent’s reply sought to justify and to some extent explain the demands upon which the respondents had set out in the notice of intended strike action including referring to certificates issued by the CCMA dealing with some of the demands and in respect of the 3rd demand listing the companies that the respondent demanded “be phased out”. The respondents confirmed that they intended proceeding with the strike as planned.
7. The applicant responded by launching the urgent application. In its founding affidavit and in support of the relief sought the applicant averred variously that:
 - 7.1. the respondents had not referred the 5th 6th and 7th demands to the CCMA as required by S64(1)(a) of the Labour Relations Act 66 of 95 (LRA)
 - 7.2. That no certificate of non resolution had been issued in respect of these disputes;
 - 7.3. None of the respondents’ demands related to matters of mutual interest;

- 7.4. The 1st demand is covered by a collective agreement which provides:
“There will be no further negotiations on wage increases until the 2011 negotiations as stipulated in the agreement” and that the demand is no more than a disguised wage demand
 - 7.5. The second demand is dealt with in a collective agreement which governs inter alia the development and implementation of a “performance payment scheme”;
 - 7.6. The 4th demand is neither legal nor fair;
 - 7.7. The 5th demand is contrary to the applicant’s policy regarding incentive bonuses;
 - 7.8. Regarding the 6th demand that the applicant has contractual obligations to the external consultants and may not unilaterally or prematurely cancel such contracts.
8. In its answering affidavit in support of its opposition to the confirmation of the rule the respondents’ Mashego, a full time shop steward and employee of the applicant:
- 8.1. Correctly pointed out that the absence of a certificate did not preclude the 2nd and further respondents from embarking on a protected strike if the 30 day period referred to in S64(1)(a)(ii) had elapsed;
 - 8.2. Conceded that the dispute regarding the 5th demand was not properly referred to the CCMA and that it was no longer the intention to strike in respect of that demand.
 - 8.3. Stated that the issue in respect of the 6th demand had been referred to the CCMA and that a certificate had been issued;
 - 8.4. Conceded that the demand regarding the payment of the USD 50, (the 7th demand), had been not been referred as a demand for payment but as an

issue concerning the applicant's refusal to rectify or realign awkward flight schedules;

- 8.5. Denied that the 1st demand was a disguised wage demand or that it was governed by a collective agreement. Mashego admitted however that the collective agreement referred to 2011 negotiations and that although he disputed that the demand was a wage demand the respondents were only seeking its implementation with effect from the 1st April 2011;
- 8.6. Denied that the 2nd demand was governed by the collective agreement headed "*PERFORMANCE GRATUITY AGREEMENT*"; and
- 8.7. Indicated that the 2nd and further respondents did not intend striking over the 4th demand.

9. The applicant's replying affidavit took the matter no further save for:

- 9.1. Pointing out that the certificate issued in respect of the 7th demand related to a dispute referred for conciliation that "*The employer party refuses to rectify and/or realign the cabin crew flight schedules*" as opposed to the demand for "*Inconvenience of usd 50,00 per sector for any flight operating short*";
- 9.2. Reiterating the applicant's contention that clause 6 of the "*WAGE AGREEMENT 2008-2011*" precluded the parties from negotiating wage increases until the expiry of the agreement on the 31st March 2011; and
- 9.3. Suggesting that the contractors referred to in the 6th demand were in fact employees and not external contractors.

10. The applicant argued that for the following reasons the respondents' demands were impermissible, incapable of implementation and/or a demand that had not been referred for conciliation.

- 10.1. Regarding the 1st demand the applicant's view was that it was a wage issue and covered by the wage agreement;
- 10.2. The 2nd demand was covered by the collective agreement dealing with the performance payment scheme;
- 10.3. The 3rd demand was not a demand that could reasonably be contemplated by the applicant let alone implemented;
- 10.4. The 6th demand was incapable of implementation as the so-called "*external consultants*" were in fact not consultants but fixed term employees; and
- 10.5. The 7th demand was a dispute that had not been referred to conciliation.

11. The respondents argument was that:

- 11.1. The 1st demand did not constitute a wage matter and it was therefore not the governed by the collective wage agreement; alternatively it was a dispute involving promotion; further alternatively, as raised by the deponent to the answering affidavit, whilst not conceding that it was a wage issue, the respondent only sought that the demand be implemented in on the 1st April 2011;
- 11.2. The 2nd demand was not connected to the "*PERFORMANCE GRATUITY AGREEMENT*" in that that agreement was confined to a "*once off payment*" and that the agreement was of "*historical interest only*";
- 11.3. The 3rd demand was capable of implementation as the respondents had listed the companies they had in mind;
- 11.4. The 6th demand was a valid interest dispute and in the absence of copies of the contracts the applicant's averments that the persons in question were employees had no factual foundation;
- 11.5. The 7th demand viz "*Inconvenience of usd 50,00 per sector for any flight operating short*"(sic) was the same as the demand referred to conciliation

viz. “The employer party refuses to rectify and/or realign the cabin crew flight schedules”; and

11.6. The demands made by the respondents were despite being conveyed as a series of demands in one communication were in fact seven different and severable demands.

12. In the unreported judgment of Van Niekerk in J DIGISTICS (Pty) LTD and SATAWU and Others¹ (upon which judgment both parties relied) the learned judge applied the principle enunciated by Landman J in the matter of SAMANCOR & Another and NUMSA² viz that if one of a number of disputes is impermissible the strike upon which all the demands is based the strike is wholly impermissible until the impermissible dispute is abandoned or as Van Niekerk J put “the single bad apple taints the entire barrel”³.

13. Firstly despite the averment that the respondents’ demands were 7 separate distinguishable it is clear that they were conveyed in the same notice and as such constituted the “entire barrel” and must be dealt with accordingly.

14. I have no doubt that the 1st demand is to all intents and purposes a wage demand particularly given the respondents statement that this should take effect only on the 1st April 2011. The effect of the demand will simply be to award to those employees who occupy grades 1 – 5 an increase in wages. The wage agreement provides that there will be no further negotiations on wage increases until 2011 negotiations. In the absence of any indication that this dispute arose in the course of the 2011

¹ Case Number J1316/2010

² (1999) 20 ILJ 2941 (LC) at p2945 and CERAMIC INDUSTRIES t/a BETTA SANITARYWARE vs NATIONAL CONSTRUCTION BUILDING & ALLIED WORKERS UNION and Others (1997) 18 ILJ 716 (LC)

³ Digistics supra para 14

negotiations this demand is covered by the wage agreement and the demand is impermissible. If it was a promotion dispute as suggested by the respondents then in any event the demand would not constitute a dispute of interest.

15. Likewise the 2nd demand is a demand for the “*Abolition of performance Management system*” in the face of a performance gratuity agreement signed and agreed to by the respondents that specifically records their agreement surrounding payments for performance, a performance payment scheme that applies for the same period covered by the wage agreement and that a performance payment scheme was under development. I am accordingly satisfied that this demand too is the subject of a current collective agreement which on the face of it has neither been challenged nor cancelled.

16. The 3rd demand that the applicant “*Phas[e] out of the contracted companies after their respective expiry dates*”.(sic) (which requires some liberal interpretation to understand) is despite the somewhat belated listing of these companies (which in itself given the companies on the list is problematic) is not a demand with which that the applicant can reasonably be expected to comply.

17. The 7th demand is by no stretch of the imagination, despite the respondents’ attempt to explain it, the dispute referred to conciliation by the respondents. A demand for “*Inconvenience of usd 50,00 per sector for any flight operating short*”(sic) is simply not the same as a complaint that “*The employer party refuses to rectify and/or realign the cabin crew flight schedules*”. The respondents accordingly neither have a certificate issued by the CCMA that the dispute is unresolved nor has the 30 day period expired and therefore should they embark on strike action over this dispute the strike will be unprotected.

18. What remains then is only the 6th demand which may be a permissible demand. The Applicant initially suggested in its founding affidavit that this demand could not be complied with as it was contractually bound to “*the external consultants mentioned*”. The demand was clear: it was the “*external consultants from the internal disciplinary hearings*” the respondents’ wanted removed. In the absence of any explanation it remains unclear why the applicant only in its replying affidavit identifies the persons as employees employed on fixed term contracts.
19. The respondents urged me to grant an order similar to that granted by Van Niekerk J in the DIGISTICS matter should I find that a strike in support of some of the demands would be unprotected viz. make an order that the 2nd and further respondents are not precluded from engaging in strike action in respect of those remaining demands once the respondents have notified the applicants of the abandonment of those demands upon which the respondents cannot embark on a protected strike.
20. In the circumstances that out of a list of 7 original demands and the extent to which the respondents had to explain or modify them at least 6 are either no longer of concern or do not permit the applicants to embark on protected industrial action and that the demands were made as a collective demand, it is inappropriate for the court to have to select for the respondents from their shopping list what they may or may not take industrial action over. The applicant is at least entitled to know exactly what the concerns or demands are in order to weigh up whether it should capitulate or resist.

21.I am of the view therefore having regard to the circumstances of this matter, the nature and the extent of the demands that the following is the appropriate order.

21.1. The rule is confirmed;

21.2. There is no order as to costs.

GUSH J

Date of hearing: 30th November 2010

Date of judgment: 3rd December 2010

Appearances:

For the applicant: Mr. T Motau SC; Instructed by Cliffe Dekker Hofmeyr
Attorneys

For the first second and further respondents: Mr. T. M. G. Euijen; Instructed by
Cheadle Thompson Haysom Attorneys