

NOT REPORTABLE / NOT OF INTEREST TO OTHER JUDGES

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO J 584/2011

In the matter between:

PIKITUP JOHANNESBURG (PTY) LTD

APPLICANT

and

SOUTH AFRICAN MUNICIPAL WORKERS' UNION

1ST RESPONDENT

THE PERSONS WHOSE NAMES ARE LISTED IN

ANNEXURE "A" TO THE NOTIC OF APPLICATION

2ND RESPONDENT

JUDGMENT

AC BASSON, J

- [1] This is an urgent application by the first applicant Pikitup Johannesburg (Pty) Ltd (hereinafter referred to as “the applicant”) to declare the strike by the second to further respondents which commenced on 7 April 2011 to be an unprotected strike in terms of section 68 of the Labour Relations Act 66 of 1995.

The parties

- [2] The applicant is Pikitup Johannesburg (Pty) Ltd. The first respondent is the South African Municipal Workers (hereinafter referred to as “SAMWU”). The second and further respondents are members of SAMWU. I will refer to the second respondents as the “individual respondents”. The applicant is engaged in the removal and disposal of garbage in the Greater Johannesburg Metropolitan District. The applicant employs some 2 600 employees of which approximately 80% are members of SAMWU. SAMWU is recognized by the applicant and engages with the applicant in collective bargaining, *inter alia*, over matters of mutual interest.

Background facts

- [3] Due to the urgency of this matter, I intend to give only brief reasons for my order. Most of the facts are not in dispute. What is in dispute is whether or not the applicant has acceded to the demands of SAMWU. If this Court finds that the applicant has acceded to the demands, the strike will be unprotected.

- [4] At the end of January 2011, SAMWU referred a dispute to the South African Local Government Bargaining Council (hereinafter referred to as “the Bargaining Council”). A series of demands are listed in the referral. The dispute was set down for conciliation on 14 February 2011 and thereafter postponed to 22 February 2011, 9 March 2011 and 14 March 2011.
- [5] SAMWU previously served a strike notice dated 23 February 2011 on the applicant. The strike did not commence and SAMWU suspended the strike.
- [6] At the commencement of the conciliation proceedings the applicant raised a point *in limine* in terms of which it argued that a number of the demands referred to the Bargaining Council were disputes of right and not matters of mutual interest. The commissioner requested the parties to lead evidence in order to determine what the issues in dispute between the parties are.
- [7] On 3 April 2011 the arbitrator issued a comprehensive ruling and concluded as follows:

“6. RULING

I hereby determine that:

6.1 the parties have deadlocked and there are disputes on the following:

6.1.1 *the outsourcing of services within the respondent,
other than the incinerator and composting site;*

6.1.2 *the failure to appoint the employees from labour
brokers on a permanent basis.*

6.1.3 *the failure to appoint internal applicants to the post of
drivers;*

6.1.4 *the failure to launch an investigation into all tenders
the respondent [the applicant] had entered in to, save
for the contract dealt with in a letter by the
AMD.....*

6.2 *A certificate must be issued pursuant [to] section 135(5)(a)
reflecting that the aforementioned issues remained unresolved as
at the date thereof.” (I will refer to this ruling simply as “the ruling”).*

[8] A certificate of non-resolution was thereafter issued to the effect that the matters reflected in the ruling remained unresolved as at 4 April 2011 and that SAMWU could therefore resort to strike action on these demands:

[9] On 4 April 2011 SAMWU issued a strike notice in terms of which it is recorded that a strike notice was issued on 17 March 2011 but that SAMWU decided not to commence with the strike but to suspend it. The notice further records that, despite discussions, the issues have not been settled. The employer is now informed that the workers will be embarking on strike action on 7 April 2011. In respect of the demands the notice states the following:

“Our member’s demands and/or grievances relate to those issues set out in paragraph 6.1 of the SALGBC ruling dated 3 April [2011]”.

- [10] On 9 April 2011 Bowman Gilfillan Attorneys (the attorneys for the applicant) addressed a letter to SAMWU in which acknowledges that the applicant has received a copy of the strike notice dated 4 April 2011 and that it is also in possession of the ruling dated 3 April 2011 by the Bargaining Council (*supra*). The letter further lists the four demands as set out in paragraph 6 of the ruling (*supra*). SAMWU is then informed that the applicant, with immediate effect, unconditionally accedes to all of the demands. More in particular, it undertakes not to outsource any service other than the incinerator and composting site. In respect of the employees employed or formally employed by Labour Brokers, the following is stated:

“4.2 our client currently has no employees coming from an labour broker and has no intention of utilising services from any labour broker”.

In respect of the remainder of the demands, the applicant also acceded to the demands. The letter further states that, in light of the unconditional undertaking to accede to all of the demands, the issues subject to the current strike action have therefore been resolved. As a consequence the reason for the workers wanting to strike has therefore disappeared.

- [11] On 11 April 2011 and in response to this letter, Cheadle Thompson and Haysom Inc (SAMWU’s attorneys) wrote to the applicant’s attorneys

stating, *inter alia*, that it is denied that the applicant has unconditionally acceded to the demands which are the subject matter of the strike. The letter further states as follows:

“Furthermore, we do not accept that you have correctly set out our client’s demands, grievances or disputes which form the subject-matter of the strike. In particular, we record that SAMWU did not merely demand that Pikitup appoint labour brokered employees on a permanent basis. SAMWU also demanded (and continues to demand) that your client permanently employ all employees of third party contractors which it used and still uses. In addition, our client has always asserted that the investigation into the tenders must be conducted in an objected and transparent manner, with the least amount of interference by Pikitup.”

The argument

[12] As already pointed out, the applicant contention is that the strike became unprotected because the applicant has acceded to the four demands which form the subject-matter of the strike. The respondents dispute this and contend that the applicant has not acceded to two of the demands most notably the one in respect of the permanent employment of those workers who were previously employed by the Labour Brokers (and who are now employed on a three year fixed term contract) and those who are currently employed by Third Party Contractors. (I will return to this issue hereinbelow.)

- [13] I have also already pointed out that the arbitrator had identified four issues as being the issues in dispute in his ruling. It is the second issue (in dispute) that is the bone of contention in this application. The applicant submits that the dispute was identified by the commissioner as being *the failure to appoint the employees from labour brokers on a permanent basis*. As already pointed out, it is the applicant's case that it has already acceded to the demand. The respondents' case is that the applicant has not acceded to this demand.
- [14] It is further the applicant's case that the dispute that now forms the basis of the strike notice is different from the one that was identified by the arbitrator in paragraph 6.1 (more in particular 6.1.2 of the ruling) in that what is now being demanded is that the applicant "*permanently employ all employees of third party contractors which it used and still uses*". In this regard the applicant argues that this is not the demand that was recorded in paragraph 6 of the ruling and, more importantly, this is not the demand that was included in the second strike notice.
- [15] SAMWU's argument is that, although the ruling states that the parties have reached deadlock on (*inter alia*) the failure of the applicant to appoint the employees from labour brokers permanently, "*[t]he applicant and the first respondent both understood that the demand that labour brokered employees be employed permanently also related to the employees of so-called 'third party contractors'. In fact, the term third party contractors is a fiction created by the applicant. These so-called third party contractors are*

in fact labour brokers". SAMWU therefore submits that the demand in respect of the employees of the Labour Brokers and the demand in respect of the Third Party Contractors should be viewed in its proper context. Mr. Van der Riet invited the Court to have regard not only to the ruling of the arbitrator but also to the minutes of the various meetings that were held between the parties leading up to this dispute.

- [16] It appears from the ruling that the issue before the arbitrator was that all employees employed by Labour Brokers (LB's) (and who are now employed on the so-called Expanded public Works Programme on a three year fixed term contract) **and** those employees from Third Party Contractors ("TPC's) should be absorbed in the employment of the applicant. In this regard the arbitrator specifically records that the respondents' demand is that the applicant must --

"appoint these employees on a permanent basis (see the demand as framed in the list of demands). Some of these employees were given fixed term contracts under the auspices of Expanded Public Works Programme ("EPWC). The applicant made a demand on the 8th December 2010, on which there was collective agreement as per pages ninety to ninety one (90 – 91) of the relevant minutes, that EPWP workers, in line with the original demand of 8th March 2010, be appointed permanently, It is common cause that the EPWP employees were formerly employed by LBs."

[17] I interpose here to point out that it appears from the papers that the contracts with the Labour Brokers have been terminated during the early part of 2010. During March 2010 the applicant placed the employees who were previously employed by Labour Brokers on the Expanded Public Works Programme ("EPWP") which is a government programme aimed at providing poverty and income relief through temporary work for the unemployed. These employees employed through EPWP were, however, required to sign a three year fixed term contract. It is further appears from the ruling of the arbitrator that the demand that the applicant permanently employ these employees were specifically raised before him. The demand that the applicant permanently employ employees of Third Party Contractors (TBC's) were likewise specifically raised during the proceedings. The arbitrator was therefore alive to the fact that SAMWU's demand was that the employees who were previously appointed by the Labour Brokers (and who were appointed on fixed term contracts), be appointed permanently:

"While management undoubtedly made laudable efforts at improving the conditions of the said employees from Lb's, its endeavours, bona fide as they might be, fall short of the demand made. The applicant's demand is that the respondent must "appoint these employees on a permanent basis" (see the demand as framed in the list of demands". Some of these employees were given fixed term contracts under the auspices of Expanded Public

Workers Programme (EPWP).... In line with the original demand of 8th March 2010, be appointed permanently. It is common cause that the EPWP employees were formerly employed by LBS”.

[18] In order to determine whether the applicant has acceded to SAMWU's demands, it is necessary to determine what the demand is. In arriving at a conclusion, the Court also had regard to the minutes of the meetings that were held between the parties leading up to this dispute:

- (i) The minutes of a meeting held in *September 2009* (under point 4.10) reflects that the issue of the absorption of employees of Labour Brokers in Pikitup was on the table as far back as September 2009.
- (ii) The minutes of the meeting of *12 March 2010* specifically records that the demand was that management do away with Labour Brokers and that all temporary employees should be appointed permanently. The applicant's response was that it will employ 665 employees from Labour Brokers on a three year contract basis under the Expanded Public Workers Programme.
- (iv) The following is recorded in the minutes of the Local Labour Forum held on 17 March 2010:

“Organized labour also requested that all employees who are performing any work for Pikitup under Labour Brokers and third party contractors be absorbed.

Organized Labour claimed on the Local Labour Forum held on the 18/02/2009 the (sic) was an agreement that all employees will be absorbed under Labour Brokers and Third Party contractors.

....

Organized Labour insisted that a requested (sic) was made that Labour Brokers and Third Party Contractors be cancelled and employees be absorbed."

At this meeting it was therefore specifically noted that the demand for permanent employment extended to both employees previously employed by Labour Brokers and those employed by Third Party Contractors.

- (v) The minutes of the Local Forum held on 8 December 2010 records the following:

"5.3 EPWP: ORGANISED LABOUR.

- *Called for the company to employ EPWP workers permanently.*
- *Stated that it has become apparent that the company is substituting permanent employees with EPWP workers and that the company is not imparting any skills to the PEWP workers.*

MANAGEMENT

- *Concurred with labour on the conditions of EPWP but stated that although more is required to be done, the company can only afford this movement for now, and as to what happens after the expiry of the three-year term will be dictated by the reality at that time."*

[19] The applicant, however, submits that the demand as it stands now, namely that the applicant must employ all Third Party Contractors employees on a permanent basis, is an expansion of the demand. SAMWU's rejects the response received from the applicant namely that it (the applicant) *"has no employees coming from any labour broker and has no intention of utilising services from any labour broker"*. SAMWU submits with reference to the ruling that it is clear that the parties had to lead evidence on these two issues before the arbitrator. Because the parties have not reached agreement on these two issues the respondents are therefore entitled to embark on protected strike action. The fact that the arbitrator only refers to labour brokers is therefore not conclusive: Both parties understood that the demand that labour brokered employees be employed permanently also relates to the employees of so-called "Third Party Contractors". SAMWU therefore submits that the fact remains that the applicant has not employed up until now the employees that were previously employed by Labour Brokers. Consequently the applicant has therefore not acceded to the demand to employ permanently these employees. Instead during March 2010 it placed all employees who were

previously employed by Labour Brokers on Expanded Public Workers Programme and required them to sign a three year fixed term contract.

[20] I am in agreement with SAMWU that it is clear from the arbitrators ruling that the demand all along was that employees previously employed by Labour Brokers and those employed by Third Party Contractors be employed permanently. This much is also clear from the minutes of the meeting of 17 March 2010 where it was specifically demanded that those employees performing work for the applicant through Labour Brokers and Third Party Contractors, be permanently and directly employed by the applicant. The same demand was also expressed at the meeting on 11 September 2009 and 8 December 2010. The fact that the applicant no longer use employees from Labour Brokers and that these employees have been employed through the EPWP on a three year fixed term contract, does not, in my view, change the substance of the demand which is that the workers previously employed by Labour Brokers be employed permanently.

[21] In the event it is concluded that the demand contained in the strike notice is not a new or expanded demand but a demand that was mooted all along and to which the applicant has not yet acceded to. The strike is therefore not unprotected and the application falls to be dismissed. I have decided not to make an order as to costs in light of the fact that there is an ongoing relationship between the parties.

[22] In the event the following order is made:

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

AC BASSON, J

Date of proceedings: 15 April 2011

Date or order: 18 April 2011

For the applicant:

Adv van As. Instructed by Bowman Filfillan

For the respondent:

Mr van der Riet SC. Instructed by Cheadle Thompson & Haysom