

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case number: J2345/10

In the matter between:

TRANSNET LIMITED

Applicant

And

SOUTH AFRICAN TRANSPORT AND

ALLIED WORKERS UNION

1st Respondent

THE PERSONS LISTED IN ANNEXURE "A"

2nd Respondents

Judgment

Molahlehi J

Introduction

- 1] The applicant on the return day in this matter sought to have the interim order which was made by Bhoola J on the 21st November 2010 confirmed. The order made by the learned Judge declared the strike which the respondents had planned to for the 22nd November 2010 to be unlawful and unprotected in terms of section 64 (1) (a) and (b) read with section 65 (3) (a) (i) and (c) of the Labour Relations Act 66 of 1995 (the LRA).

Background facts

- 2] This matter arose from two disputes which the respondents had referred to the bargaining council concerning:
- a) The alleged changes to the terms and conditions of employment
 - b) The demand to have the area manager employed by the applicant

dismissed.

- 3] In relation to the first dispute the respondents contend that the applicant had contrary to the established practice at one of its depots introduced a shift roster without consulting with and obtaining the agreement of the shop stewards. It is apparent from the papers that the change in question occurred at the Kazerne depot.
- 4] It seems common cause from the papers that the practice at Kazerne was that management would always consult with the shop stewards and also reach an agreement with them before introducing any change to the shift roster. This practice apparently came about because the previous complaint by the first respondent that changes to the shift roster was always implemented to favour members of another union – UTATU.
- 5] It is common cause that during April 2009, the parties concluded a variation agreement in terms of the Basic Conditions of Employment Act 75 of 1997. The variation agreement was later extended to March 2011. The agreement provides under its area and scope that:

“Unless otherwise specifically in this or any other agreement, the terms of this agreement shall be applicable to all bargaining unit employees who are employed by Transnet Freight Rail in the Republic of South Africa, irrespective of whether they are represented by a Trade Union or not . . .”

- 6] In terms of its objectives the variation agreement provides as follows:

“This agreement is aimed at establishing mutually acceptable basic conditions of employment with due regard to legislative requirements and to vary by agreement those areas of the Act in terms of Section 49 that will allow operational flexibility without compromising the health and safety of employees.”

- 7] Clause 5 (10) of the variation agreement provides as follows:

“Shifts will be arranged after consultation with the employees and their representatives in accordance with the provisions of this agreement and

depending on operational requirements”

8] The variation agreement has to be read with the collective bargaining agreement signed by the parties. The agreement does not, contrary to the practice that was in place at Karzene, require consent of the shop stewards before management can change and implement a shift roster. In terms of broader principles the agreement provides:

- a. Employees are required to work a rotational shift system;
- b. The applicant is to consult with the unions in designing its shift system;
- c. The scheduling of employees in terms of the shift roster is the prerogative of the applicant.

9] After the conclusion of the variation agreement the applicant informed the shop stewards that management was responsible for the formulation of the shift roster. It is apparent that the employees at Karzene depot were not happy with what they were told. They expressed their anger and disapproval by embarking on a work stoppage on the 23, 29 and 30 July 2010.

10] Thereafter the first respondent referred a dispute to the bargaining council concerning the issue that gave rise to the industrial action. The respondent demanded that the applicant should reverse its decision regarding the changes to the shift roster in terms of section 64 (4) of the Labour Relations Act of 1995.

11] As concerning the demand that the applicant should discipline its manager based at Karzene, the second respondents issued its strike notice on 25 August 2010. On receipt of the strike notice the applicant arranged for a meeting with the first respondent. At that meeting the first respondent complained about the disciplinary action which the applicant intended taking against its members at Karzne depot for alleged acts of sabotage that occurred on 04 and 15 August 2010. The other issue discussed at that meeting was the demand that the manager at Karzne be removed from his position. The applicant says that the

first respondent made this demand without substantiating the reasons for such a demand which was that the manager was incompatible. When pressed to substantiate the allegation of incompatibility, the first respondent referred the applicant to its members. It would appear that the first respondent sought during this meeting to trade off the dismissal of its members for sabotage with the demand to have the manager removed.

The lawfulness of the planned strike action

12]The applicant raises a number of issues as to why it believes that the second respondents are not entitled to embark on a strike action and that any action in that regard is unlawful and unprotected. The applicant firstly contends that the notice it received from the respondents indicating their intention to embark on an industrial action is vague and does not comply provisions of s 64 (1) of the LRA in that it does not indicate whether the strike will be confined to Kazerne or cover all the other depots of the applicant. In this respect the applicant relies on the decision of *Ceramic Industries t/a Betta Sanitory* [1997] 6 BLLR 697 (LAC), at 702 where it was held that:

“In determining whether there has been compliance with section 64(1)(b) of the Act an interpretation must be sought, as stated earlier, which best gives effect to the broader purpose of the Act and the specific purpose of the section itself. Section 64(1) (a) sets out the first requirement to be met before embarking on a protected strike viz an attempted conciliation of the issue in dispute before collective action is taken. Section 64(1) (b) sets out the next requirement: notice of the proposed strike to the employer. Its purpose is to warn the employer of collective action, in the form of a strike, and when it is going to happen, so that the employer may deal with that

situation. By their very nature strikes are disruptive, primarily to the employer, but also to employees and, sometimes, to the public at large. One of the primary objects of the Act is to promote orderly collective bargaining. Section 64(1) (b) assists in that orderly process. A failure to give proper warning of the impending strike may undermine that orderliness. This might, in turn, frustrate labour peace and economic development, other important purposes of the Act (section 1). Compliance with the provisions of the section is thus called for.

The specific purpose of warning employers of a proposed strike may have at least two consequences for the employer. The employer may either decide to prevent the intended power play by giving in to the employee demands, or, may take other steps to protect the business when the strike starts. For the former the notice in the present case might suffice, as a minimum period of 48 hours is given to deliberate on whether to accede to the demands or not. For the latter, however, the notice is deficient, because the employer does not know when, after 48 hours, the proposed strike will commence. The effect is that one of the objects of the section will not have been achieved. As stated in *Maharaj and others v Rampersad* 1964 (4) SA 638 (A) at 646E:

“In deciding whether there has been a compliance with the injunction the object sought to be achieved by the injunction and the question of whether this object has been achieved is of importance.”

The language and purpose of section 64(1) (b) require that a specific time for the commencement of the proposed strike be set out in the written notice. The legislature was anxious that attention be paid to the “commencement” of the strike. The use of an exact time expressed in hours as a minimum of the notice to be given seems to indicate that the longer period envisaged by the phrase “at least” should also be expressed in an exact manner. The manner in which the time of the commencement of the strike is expressed may, however, differ depending

on the nature of the employer's business. Strikes can occur which involve the whole workforce and others which merely involve one or more shifts. In a shift system notice of the exact time of the proposed strike in respect of particular shifts may be necessary."

The decision in Ceramic Industries was confirmed by the Labour Appeal Court in Fidelity Guards Holdings (Pty) v PTWU & others [1997] 9 BLLR 1125 (LAC).

13] In their answering affidavit the respondents say that the strike would take place at Kazerne depot only. They do not dispute that the notice is silent about whether or not the strike would be confined to Kazerne only. As stated earlier it is common cause that the applicant had several depots across the country.

14] I agree with the applicant that the terms of the proposed strike must be determined by reference to the content of the strike notice, and accordingly failure to indicate the place of the contemplated strike has resulted in the applicant being unable to make informed contingency plans for the strike. The fact that the applicant could infer from the facts and the circumstances of what had happened after the conclusion of the variation agreement does not in my view remedy the defect in the strike notice.

15] The facts and circumstances of the present case indicate very clearly that it was essential for the respondents to indicate in their notice whether or not the strike was to take place in the whole area of operation of the applicant or would be confined only to Kazerne depot. Failure by the respondents to indicate in clear terms as to whether the strike action would be confined to Kazerne means that the applicant was not given a proper warning and thus the object section 64(1) (b) was defeated.

16] The second point raised by the applicant as to why the planned industrial action by the respondents should be regarded as unlawful and unprotected is that since issuing the shift roster for the period 18 August 2010 it never received any unhappiness about that change from the respondents.

17] It was further submitted on behalf of the applicants that the dispute could not

have arisen on the 23rd August 2010 because the roster for August, September was issued on August 2010 and not the 23rd August 2010.

18] The applicant further argued that even if it had failed to consult in changing the shift roster that would not have amounted to a change in the terms and conditions of employment. In support of this contention the applicant says that the employees were shifted based in terms of their employment contract and the variation agreement.

19] In my view the right to strike of the respondents in the circumstances of this case turns around the reading of clauses 32 and 33 of the variation agreement read with section 23 of the LRA. Clause 32 (1) of the variation agreement reads as follows:

"This agreement supersedes all other agreements regarding Service Conditions and aspects contained herein and which was concluded prior to the signing of this agreement."

And clause 33 (1) reads as follows:

"Any dispute regarding the interpretation or application of the clauses as obtained in this agreement, will be dealt with under the dispute resolution mechanism of the Transnet Bargaining Council."

20] It has not been disputed that the variation agreement constitutes a collective agreement which is binding on the parties. In terms of section 23 of the LRA, a collective agreement binds for the whole period of the collective agreement. The section provides further under subsection (3) that a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.

21] The limitation to the right to strike is provided for under the provisions of section 65(3) (a) (i) of the LRA, which provides that no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if that person is bound by any arbitration award or collective agreement that regulates the issue in dispute.

22] The above in my view indicates that the issues over which the respondents are seeking to strike upon are covered by a collective agreement that is in operation and binding on all the parties. It is for this reason that I agree with the applicant that the intended strike action by the respondent is unlawful and should be prohibited.

23] The contention of the respondents that the practice at Kazerne of always obtaining the consent of the shop stewards before changing the shift roster is a matter as I understand it to do more with the interpretation and the application of the variation agreement. In this respect the issue is, it would seem to me, whether or not the silence of the variation agreement with regard to the practice at Kazerne, means that practice is still in place and binding on the parties. It may well be that the suggestion that the silence of the variation agreement about practice means that the collective agreement did not change the practice relied upon by the applicant in seeking to interdict the strike action. However, the meaning and the implication of the silence of the variation agreement with regard to the practice at Kazerne can only, in my view, be determined in the interpretation and application of that collective agreement. It is trite that the interpretation and application of collective agreements does not rest with the province of this court but rather with that of the bargaining council or the CCMA as the case may be.

24] In my view the respondents are not on the proper reading of section 65(3) (a) (i) of the LRA entitled to embark on a strike action because the issue upon which they intend striking about is governed by a collective agreement which is in place and is enforceable between the parties. If their assertion is that the variation agreement does not have an impact on the practice at Kazerne, then, in my view, what they are asserting is the interpretation and application of a collective agreement which can be resolved by means of an arbitration award as envisaged in the same section and therefore the law has taken their right to strike away on that basis.

The demand for the removal/ discipline of the area manager

25] The demand in relation to the removal or discipline of the manager is formulated in the referral form as follows:

“DISCIPLINE THE MANAGER OR REMOVE HIM (FROM) WORKING WITH OUR MEMBERS.”

26] In general, the law requires an employer to act fairly towards its employees. Before instituting a disciplinary hearing it is necessary for the employer to conduct some preliminary enquiry on the allegations that may have been made against the employees. Conducting a disciplinary enquiry when there is no basis for it has a detrimental impact on the employee's integrity, dignity, job security and career development. It is therefore important for the union to state the basis upon which their demand that the manager should be disciplined is based upon. A demand for the removal of an employee unaccompanied by substantiation of the allegations upon which disciplinary action is demanded should take place amounts to saying that the employer must convene a disciplinary action for the sake of it and dismiss an employee for no reasons or for that matter dismiss the employee without him or her knowing and having the opportunity to defend himself or self against whatever the allegations may be. This clearly is a demand that an employer does something that our law prohibits and therefore it is by definition unlawful.

The above point is supported by what was said by the Supreme Court of Appeal in the case of *Ntshangase v MEC for Finance: KWAZULU-NATAL & Another* (2009) 30 ILJ 2653 (SCA) whose facts are of course different to those of the present case in that in that case the court was dealing with the issue of whether the decision of the disciplinary hearing was reviewable by the court. The observation which is apposite the present matter is made by the court at paragraph [18] of the judgment where the following is stated:

“[18] Undoubtedly the second respondent (the employer) has an interest in ensuring that fair labour practices are upheld in its employment relationships. The same holds true for its employees. All actions and/or decisions taken pursuant to the employment relationship between the second respondent and its employees must be fair and must account for all the relevant facts put before the presiding

officer . . .”.

In the present instance the respondents were seeking to have the applicant to convene a disciplinary enquiry against the manager and to appear before a chairperson of such a disciplinary hearing without having facts upon which it could rely on in making accusations of incompetence against the manager.

27] The applicant in the founding affidavit says that there is no allegation that the area manager has committed misconduct for which he should be disciplined. The respondents in their answering affidavit fail to state the details of and the substance of the allegations against the manager. All that the respondents say is that they deny the contents of what is said by the applicant and put it to prove thereof. They further say:

“On the meeting of 2nd September 2010 and on previous meeting, the problems including the management style of the Area Manager and the fact that the Area Manager is not compatible with the work force in the Kazerne.”

28] As indicated above the respondents have put forward a bare denial in almost all of the allegations made by the applicant. They do not deal with the fundamental aspects of their case which is that they had never lodged a grievance against the area manager and that they had not set out what the nature of the problems they had with the manager. In my view, regard being had to the possible and serious consequences that may follow out of a disciplinary action they needed to say more than simply saying that the problem they had with the manager was his style of management. The essence of the applicants' demand in the manner it is formulated require the applicant to act contrary the provisions of section 23 of the Constitution.

29] In answering to the averment of the applicant at paragraph 40 of the founding affidavit, that the demand does not require the applicant to comply with fair procedures in dealing with the manager the respondents at paragraph 63 of the answering affidavit again make a bare denial and put the applicant to prove thereof.

30] In light of the above discussion I am of the view that the applicant has made out a case that on the facts and the circumstances of the matter it ought not to be faced with a strike action by the first respondent and its members. I do not however believe, taking into account the relationship between the parties that it would be appropriate to allow the costs to follow the results.

31] In the premises the following order is made:

1. The interim order made on the 22nd November 2010 declaring the planned strike action of the respondents to be unlawful and unprotected in terms of section 64 (1) (a) and (b) read with section 65 (3) (a) (i) and (c) of the Labour Relations Act 6 of 1995, is confirmed.
2. There is no order as to costs.

Molahlehi J

Judge of the Labour Court of South Africa

Date of Hearing: 09 February 2011

Date of judgment: [20](#) April 2011

Representation

For the applicant: Mr P Maserumule of Maserumule Inc.

For the respondent: Mr X Ngako of Ruth Edmonds Attorneys.

LABOUR COURT