

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

**REPORTABLE**

**Case No.: J32/2011**

**SCAW WIRE AND STRAND, a division of  
SCAW METALS SA (PTY) LTD**

**Applicant**

**And**

**NATIONAL UNION OF METAL WORKERS  
OF SOUTH AFRICA AND OTHERS**

**Respondent**

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**Reasons for the Order**

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**Molahlehi J**

**Introduction**

[1] On the 4<sup>th</sup> January 2011 this Court made an order in the following terms:

- “1. The applicant’s non-compliance with the rules relating to service and time periods is condoned and the matter is dealt with as one of urgency in terms of Rule 8 and on short notice in terms of section 68(2) of the Labour Relations Act 95.*
- 2. A final order is issued with immediate effect in the following terms:*
  - 2.1 declaring the industrial action which the respondent intends to embark upon on Monday 17 January 2011 or thereafter to be unlawful and unprotected strike action;*
  - 2.2 Interdicting and restraining the respondents from embarking on strike action and any unlawful conduct in this regard, in support of the unlawful demand made which arises from a dispute referred by the respondents to conciliation on the 17<sup>th</sup> November 2010;*
  - 2.3 Interdicting and restraining the respondents, including officials, office bearers and members of the first respondent, from proceeding with, calling for, supporting, encouraging or in sighting its members to*

- engage in industrial action on the 17<sup>th</sup> January 2011, or thereafter;*
- 2.4 *Interdicting and restraining the respondents from making any unlawful demands of the applicant, in particular the demand which is subject to the dispute referral of 17 November 2010;*
- 2.5 *directing the first respondent to take all reasonable steps to advise its members that the intended strike action is unprotected and persuade them not to participate in the strike action.*
3. *Ordering that the cost of this application be paid by the respondent jointly and severally the one paying the other to be absolved.*
4. *Directing that this court be served on the first respondent by way of facts.”*

[2] The application which led to the granting of the order was brought on an urgent basis. The application was unopposed and after enquiring and being satisfied as to the service of the papers on the respondents, the matter was considered on the basis of the applicant's papers only. This meant that the court had only one version before it. The essence of the court order is that the strike which the applicant are alleged to have intended to embark upon on the 17<sup>th</sup> January 2011, was declared to be unlawful and unprotected.

### **Background facts**

- [3] The dispute which the respondents referred to conciliation and to which a certificate of outcome was issued arose from the outcome of a disciplinary inquiry related to the use of alcohol at the workplace.
- [4] The policy for regulating use and abuse of alcohol of the applicant draws a distinction between voluntary and random alcohol testing of employees. The policy further gives the applicant the power to randomly test its employees in as far as the use of alcohol is concerned. Once selected an employee has no other option but to submit to the testing for refusal would constitute misconduct.
- [5] On the 31<sup>st</sup> May 2010 Mr Mavudla, an employee of the applicant and a member of the union was referred for alcohol testing in the morning. According to the applicant he tested positively for alcohol and was sent home for that reason. However at midday his manager Mr du Sart requested Mr Mavudla to return to work which he did and apparently

on his return to work at about 13h00 he incorrectly stated in a letter that he had tested negatively for alcohol when he returned to work at 13h00. The same applies to Mr du Sart who incorrectly indicated to the applicant that Mr Mavundla was tested for alcohol when he returned to work at 11h52 and the results was negative.

- [6] Arising from the above the union demanded that both Mr Mavundla and Mr du Sart be charged with breaking the policy of the applicant. The applicant obliged by charging both for misconduct. The outcome of the disciplinary hearing was that both employees were found guilty of misconduct but however different sanctions were imposed on them. In the case of Mr du Sart the chairperson of the disciplinary enquiry recommended that he be counseled and gave Mr Mavundla a final written warning.
- [7] The union was apparently not happy with the outcome of the disciplinary hearing and accordingly referred a further dispute to the bargaining council. In the referral form the union categorised the dispute to be concerning; *“failure to comply with the provision of company procedures”*

And as concerning the outcome required, the union stated as follows; *“comply with the provisions of the procedure consistently.”*

- [8] The parties could not reach a consensus on how the dispute could be resolved and accordingly the conciliating commissioner issued a certificate of non-resolution.
- [9] The applicant contended that because the union failed to provide particulars as to in what way it had failed to apply the procedure consistently it was unable to consider the union's demand and to formulate an appropriate response. In this regard the applicant addressed a letter to the union on 15<sup>th</sup> December 2010 requiring further details. The letter which the applicant addressed to the union reads thus:

*“RE: MUTUAL INTEREST CERTIFICATE ISSUED: CASE NO- MEGA31304*

*With reference to the certificate of outcome of non-resolution issued on the 13<sup>th</sup> December 2010 please clarify us the exact nature of your demand relating to the companies alleged “failure or and refusal to comply with the provisions of the companies disciplinary code and grievance procedures consistently.”*

*We understand for your referral to the MEIBC and the conciliation meeting that you claim that we have applied our disciplinary code and grievance procedure inconsistently. Please urgently advise us as to the following:*

- 1. In what way have we applied our code or procedure inconsistently;*

2. *In respect of whom have we applied our code or procedure inconsistently;*
3. *Against whom have we applied our code or procedure inconsistently;*
4. *What is it that you demand that the company does in order to apply its code and procedure consistently.*

*The company reiterates that it remains willing to attempt to resolve this matter, to the extent that it is able to and on the basis that the demand made is a lawful one. At this end, we request that you urgently respond to us in this regard.”*

- [10] The union did not according to the applicant respond to the above letter and accordingly another letter was addressed to the union dated 11 January 2011, wherein the union was requested to furnish its response by 10h00 on the 12<sup>th</sup> January 2011. Again no response was received from the union. The union having failed to meet the deadline for responding on the issue raised, the applicant addressed a further letter to them on the 12<sup>th</sup> January 2011 wherein it was indicated that their demand was unlawful.
- [11] The applicant says it thereafter received information that the union was planning to embark on a strike action on the 17<sup>th</sup> January 2011. The applicant then sent a letter to the union dated the 13<sup>th</sup> January 2011, wherein it sought an undertaking from the union that no strike action would take place on the 17<sup>th</sup> January 2011. As there was again no response from the union the applicant decided to launch this application.
- [12] As indicated above the matter was unopposed and after satisfying myself that the union was properly served with the application, I proceeded to entertain the applicant's case. However, before entertaining the merits of the case, the court had to consider first the condonation application which was made by the applicant in prayer one of the notice of motion.
- [13] The first enquiry in relation to the condonation application has to deal with the provisions of Rule 8 of the rules of the court. Rule 8 of the rules of the court provides as follows:
- “(1) *A party that applies for urgent relief must file an application that complies with the requirements of rule 7(1), 7(2), 7(3) and, if applicable, 7(7).*
  - (2) *the affidavit in support of the application must also contain.....*
  - (8) *the reasons for the urgency and why urgent relief is necessary:*
    - (b) *the reasons why the requirements of the rules were not*

*complied with, if that is the case; and*

*(c) if a party brings an application in a shorter period than that provided for in Section 68 (2) of the Act, the party must provide reasons why a shorter period of such notice should be permitted.”*

- [14] Turning to the general principles governing the granting of an interdict on an urgent basis, it is trite that the applicant must show that the matter needs to be considered on an urgent basis, that there is no other appropriate relief, that he or she will suffer irreparable harm and prejudice if the interdict was not to be granted. The applicant has also to show that the balance of convenience favors the granting of the interdict. In an application for a final order the applicant must further show that he or she has a real right which needs to be protected.
- [15] In as far as urgency is concerned I accepted that the applicant had shown good cause why the matter needed to be considered on an urgent basis. In this respect I took into account that a certificate of outcome of conciliation and the several letters that the applicant address to the respondent regarding both the demand and the information that the applicant had received regarding the threat of the strike taking place on the 17<sup>th</sup> January 2011. In the absence of any other information to the contrary I had no reason to doubt the version of the applicant.
- [16] As concerning the 48 hours notice required in term of section 68(2) of the LRA, it is clear from the applicant's papers that notice given to the respondent was less than 48 hours. However taking into account the facts and the circumstance of this matter I was persuaded that good cause was shown as to why the notice which was less than 48 hours should be permitted.
- [17] I now turn to the merits of the application. There are several questions I need to ask myself in this regard. The first question which is pertinent and which I will seek to answer first is whether, or not the applicant had a right in the circumstances of this case, not to be faced by a strike action.
- [18] The procedure to follow for employees to embark on a lawful strike action is set out in section 64(1) (a) of the LRA. For the strike to be lawful and protected the union must first ensure that the dispute is referred to the Commission for Conciliation Mediation and Arbitration or relevant bargaining council and thereafter a certificate be issued indicating that the dispute remains unresolved or the 30 days have lapsed since the referral was made. Thereafter, once these requirements have been satisfied the union must give the

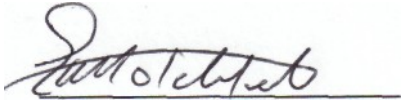
employer a 48 hour notice of the intended strike action.

- [19] The other requirement for the strike to be lawful and protected is that the demand which the strike is to be based upon must be lawful. In *Ceramic Industries Ltd T/A Betta Sanitary Ware v Natinal Construction building & Allied Workers Union (2) (1997) 18 ILJ 671 (LAC)*, the court had to deal with a situation very similar to the present where, the union demanded that three of the employees be disciplined or be dismissed for victimizing a shop steward. The Labour Court had found that the dispute as framed by the union was not justiciable or arbitrable and therefore the union was on the basis of that entitled to embark on a protected strike action. On appeal the Labour Appeal Court held that the underlying dispute in matters of this nature is to be determined by the grievance that gave rise to the demand and not necessarily by the remedy sought. Thus in terms of that decision the prohibition in section 65 (1) (b) & (c) of the LRA depends on the determination of “the issue in dispute”. See *Grogan Workplace (10<sup>th</sup> Edition page 380-381)*.
- [20] Another case which is referred to in Grogan’s work is *TSI Holdings (Pty) Ltd v National Union of Mine Workers of SA & others (2006) 27 ILJ 1483 (LAC)*, where the union demanded the dismissal of a supervisor who had used racist and derogatory language against their members. In analyzing the real dispute the Labour Appeal Court held that because the union demanded that the employer should dismiss without offering an employee a fair hearing such a demand was unlawful.
- [21] Similarly in *Metro Bus (Pty) v SAMWU (2009) 9 BLLR (LC)*, this court had to deal with a demand by the union that one of the employees be suspended pending the disciplinary enquiry. The employer in that case conducted an investigation and came to the conclusion that it would not be proper to suspend the employee. In agreeing with the approach adopted by Metro Bus the court held that:
- “On the papers before me I conclude that Metro Bus did comply with the relevant requirements relating to a fair suspension and decided that suspension was not appropriate. The decision was not challenged at the time and therefore a reasonable inference to draw, taking into account the time lapse, is that SAMWU did not have issue with the manner in which Metro Bus dealt with the issue. For this reason the strike action based on this demand would be unprotected and therefore SAMWU is interdicted from embarking on a strike based on the demand that Mr Ngcobo be suspended would constitute an unprotected strike”.

See also *City of Johannesburg v SA Municipal Workers Union & others* (2010) 31 ILJ 1175 (LC).

[22] In the present case, my view that the demand that Mr Mavundla be disciplined and dismissed is not in the circumstance of this case a lawful demand, given the fact that disciplinary action has already been taken against Mr Mavundla and a sanction imposed.

[23] It was on the basis of the above reasons that the above court order was made.



**Molahlehi J**  
**Judge of the Labour Court of South Africa**

Date of hearing: 14 January 2011

Date of judgment: 25 May 2011

For the Applicant: Kate Savage of Bowman Gilfillan Inc

For the Respondent: No appearance