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IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: J1064/11

In the matter between:

SOUTH AFRICAN AVIATION AND ALLIED WORKERS UNION Applicant

and

AIRPORT COMPANY OF SOUTH AFRICA
(PTY) LIMITED First Respondent

NATIONAL EDUCATION, HEALTH AND
ALLIED WORKERS UNION Second Respondent

Date of hearing: 3 August 2011

Date of judgment: 3 August 2011

JUDGMENT

VAN NIEKERK, J:

1. This is an urgent application brought this morning in terms of which the applicant, the South African Aviation and Allied Workers Union, seeks the following relief:

"That a *rule nisi* be issued calling on the response to show cause why:

2.1 The first and second respondents should not be interdicted and restrained from commencing with the intended negotiations from 3 August 2011 pending proper verification of Applicant's membership of the First Respondent."

2. The application must be viewed in its context. There is a dispute between the applicant and the first respondent in relation to the verification of the membership of the applicant's members employed by the first respondent. That dispute has its roots in a settlement agreement concluded under the auspices of the Commission for Conciliation Mediation and Arbitration (the CCMA) on 3 May 2011.

3. In terms of that agreement, the applicant and the first respondent agreed that the applicant would submit what is referred to as 'joining forms and resignations' to the first respondent by 5 May 2011; that the first respondent would then conduct a verification exercise in respect of both the joining forms and the resignations by no later than 13 May; and finally, that the parties would meet before 20 May 2011.

4. The applicant contends that the first respondent is in breach of the agreement. However, the applicant's case goes somewhat further. As I understand them, the applicant's contentions are that should a proper verification exercise be done, it will be found that the applicant represents 50% plus 1 of the respondent's employees.

5. The applicant then makes a curious leap of logic to contend that it on this basis, it is entitled to bargain with the first respondent on the basis that the collective agreement between the first and second respondents provides that the second respondent, having met a threshold of 50%+1, is the sole bargaining agent of employees in the bargaining unit.

6. In short, the applicant's claim appears to be that the second respondent is no longer a representative of the first respondent's employees and that given the 50% plus 1 threshold established by the recognition agreement between the first and second respondents, the applicant is entitled, on an urgent basis, to be substituted as the bargaining representative of the first respondent's employees.

7. I deal first with the question of urgency. The averments in the founding affidavit in regard to urgency rest entirely on the contention that wage negotiations between the respondent are to be conducted on 3, 4 and 5 August, and that the applicant would be irretrievably prejudiced should those negotiations continue.

8. This the fact of a pending wage negotiation is denied. The deponents to the answering affidavits filed on behalf of the respondents state that no negotiations have been scheduled for the period referred to and that the meeting which is to take place today, which the applicant

contends is a wage negotiation is a internal meeting of the second respondent's officials.

9. The denial of any wage negotiation commencing later today has not been contested. The applicant has failed to file a replying affidavit, and the court is accordingly bound to find that as a matter of fact, there is no meeting scheduled between the first and second respondents for today and that the meeting is an internal NEHAWU meeting of the respondent.

10. The applicant's representative, during his reply, handed up a copy of an email in terms of which members of what is referred to as the NBC, are to be released from work in order to attend a meeting scheduled for 3 to 5 August 2011. That may be so, but there is nothing in the document handed up to the court to indicate, or to call into question, the version deposed to by the deponents to both answering affidavits, i.e. that the meeting is an internal function and has nothing to do with the collective bargaining process.

11. That being so, the basis of any urgency disappears and the matter therefore falls to be removed from the roll on the basis that it is not urgent. In any event, in my view, the applicant has failed to establish that it is entitled to the relief that it seeks. It is trite that in proceedings such as this, the applicant must make out a proper factual and legal basis and show *inter alia* that it has a *prima facie* right, though open to some doubt that it is a well grounded apprehension that it may suffer irreparable harm

if interim relief is not granted and that the balance of convenience favours the granting of an interim interdict and that it has no other satisfactory remedy.

12. I deal first with the question of a *prima facie* right. The applicant, as I have indicated, appears to through the agency of these proceedings, seek bargaining rights with the first respondent. It is trite that in terms of the Labour Relations Act, there is no enforceable duty to bargain. The Act adopts a system that is sometimes referred to voluntarism. In *National Police Service Union and Others v National Negotiating Forum and Others*,¹ the Court said:

"The LRA adopts an unashamedly voluntarist approach, it does not prescribe to parties who they should bargain with, what they should bargain about or whether they should bargain at all. In this regime the courts have no right to intervene and influence collectively bargained outcomes. Those outcomes must depend on the relative power of each party to the bargaining process. That power is underpinned by the organisational rights conferred by Part A of Chapter III of the Act and the right to collective actions conferred by Chapter V."

13. Although that matter concerned the withdrawal of recognition of a

¹ (1999) 20 ILJ 1081 (LC) at para 52.

union that was party to a bargaining forum, the principle remains valid. Effectively, what the applicant seeks from this Court is an order declaring the applicant to be the bargaining representative of the respondent's employees. There can be no other reason for the relief that is sought, i.e. to interdict and restrain the first respondent from commencing wage negotiations with the second respondent..

14. For the reasons given above, in the absence of any statutory right to bargain and in the absence of any agreement by the first respondent to bargain collectively with the applicant, there is no *prima facie* right, in fact there is no right at all which can legitimately found in this application.

15. Further, in regard to the availability of alternative remedies, to the extent that the applicant seeks to have this court conduct a verification exercise, that is not the function of this court. Section 21 makes it clear that disputes of that nature are to be dealt with by the CCMA.

16. If it is the applicant's case – and this not entirely clear from the papers before me -- that the respondent is in breach of the settlement agreement concluded between the parties on 3 May 2011, that is a matter that must be dealt with in terms of section 24 by an arbitrator if necessary.

17. In short, for the reasons that I have outlined, the application is not urgent, and even if it is, the applicant has manifestly failed to establish

any right to interim relief. The application accordingly falls to be dismissed.

18. With regard to costs, Mr Wilken, who appeared on behalf of the first respondent, submitted that the application was frivolous and that a punitive order for costs was warranted. Section 162 of the LRA confers a broad discretion on the court to make orders as to costs, according to the requirements of the law and fairness. I take into account that those representing the applicant are union officials and not necessarily legally trained, that however does not exculpate them entirely from their ineptitude. The fact remains that the respondents have brought to this court by the applicant on short notice - these papers were filed yesterday afternoon - to face a case which has no foundation whatever. In those circumstances, it seems to me that neither respondent should be denied its costs and that it is appropriate that an order for costs should be made on the ordinary scale.

19. I therefore make the following order:

1. The application is removed from the roll for lack of urgency.
2. The applicant is to pay the costs of these proceedings.

VAN NIEKERK J

Appearances:

For the applicant : Union Official

For the first respondent : Mr St E Wilken, Tabacks Attorneys

For the second respondent: Ms S Gaibie, Cheadle Thompson and
Haysom Inc.