

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case Number: J 1934/11
Reportable

In the matter between:

NATIONAL UNION OF MINEWORKERS

First Applicant

NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA

Second Applicant

and

ESKOM HOLDINGS SOC LIMITED

Respondent

Date of hearing: 14 September 2011

Date of Judgment: 19 September 2011

JUDGMENT

MOSHOANA AJ

Headnotes: *Interdict of an implementation of a final wage offer pending the outcome of interest dispute arbitration.*

Introduction

[1] This is an urgent application seeking to interdict the implementation of a wage offer. I would have needed more time to write this judgment however, it does seem that difficult matters only come on urgent basis. Nonetheless, the Court had to with the

limited time at its disposal make this judgment. What made matters worse is that both counsel did not file heads on the issues to be canvassed in this judgment. The Respondent did file heads though but those became superfluous in a sense after the Applicants had changed tack. I was informed by Adv Bruinders SC, appearing for the Applicants that there is no authority that he was able to lay his hands on to support their case. Of course this added salt to the wound given the fact that the Court was sitting as an urgent court. Both parties did not quibble about facts. To a large extent this judgment would pay little regard to the facts of this case.

Brief exposition of the facts

[2] The Respondent is an essential services provider. It has been declared as such on 12 September 1997. In 1998, the parties concluded a Minimum Services Agreement, which was ratified by the Essential Services Committee. On or about 12 May 2000, parties entered into a Recognition Agreement. On or about 7 December 2004, the parties arrived at a consent award in terms of which certain of the clauses of the Recognition agreement were varied and or were made redundant.

[3] On or about 19 April 2011 and in accordance with the Recognition Agreement, the Applicants together with the Respondent commenced annual wage negotiations for the financial year 2011. The negotiations continued until 4 August 2011. In terms of the Recognition Agreement, they were to be completed on 31 May 2011. The Respondent blames the Applicants for the delay. On 4 August 2011, the Respondent presented its final offer. The Applicants were to react to that offer on 12 August 2011. The Applicants failed to react to the offer. Meanwhile the Respondent had put systems in place for the implementation of its final offer. On 26 August 2011, the Respondent notified the

Applicants that it would implement its final offer with immediate effect. That prompted a referral to the CCMA, since *negotiations failed to yield results*. The dispute was conciliated on 7 September 2011. On 8 September 2011, the Respondent requested the dispute to be resolved through arbitration. The Respondent suggested terms of reference for the requested arbitration. The arbitration is yet to be held. On 9 September 2011, correspondence was exchanged seeking undertakings not to implement. No undertaking was given. The Applicants sought to refer a fresh dispute in terms of Section 64 (4) of the Labour Relations Act (LRA)¹, seeking that the implementation should not happen as it amounts to a unilateral change of conditions of employment.

[4] On 12 September 2011, the Applicants launched these proceedings and sought the following orders:-

1. Dispensing with the time periods set out in the rules for the conduct of proceedings in the Labour Court and allowing this application to be heard as one of urgency;
2. Interdicting the respondent from implementing its final wage offer, pending the outcome of the mutual interest dispute referred to arbitration by ESKOM and the applicants, alternatively pending the expiry of the 30 day period contemplated in section 64(4) of the Labour Relations Act 66 of 1995;
3. Directing the respondent to pay the costs of the application;
4. Granting further and/or alternative relief.

¹ 66 of 1995.

[5] The respondent opposed the application in all respects.

Arguments

[6] At the outset, Bruinders SC for the Applicants advised the Court that the alternative relief as set out above was no longer being pursued. What was being pursued was an interdict to implement the final wage offer pending the mutual interest dispute arbitration. Put it differently, the Applicants were seeking interdict *pendete lite*. He formulated a question to the following effect: *Can Eskom unilaterally implement its final offer before the arbitration has determined the wage dispute?* He emphasised the fact that the Applicants cannot strike and somehow their hands are tied. The only way is for them to be assisted by this Court using its interdictory powers. He argued that allowing the Respondent to implement before the arbitration is tantamount to undermining the collective bargaining process.

[7] In dealing with the important requirement of clear or *prima facie* right, he contended that there is no discernable right, but he pegged his submission on principles more than right. He continued to argue that that principle is to be found elsewhere in the LRA, the Recognition Agreement and the Consent Award. He contended further that the Respondent agreed to go to the CCMA in the event of a dispute. He elevated the conduct of the Respondent in agreeing to go to the CCMA, whilst on the one hand implementing to an “injustice”. Quiet interestingly he sought of piggy begged on a submission made by his opponent in this matter in the matter of *Eskom v NUM and Others*,² when he is quoted to have said:

² (2002) 23 ILJ 2208 (LAC).

“Mr Sutherland argued that the appellant’s implementation of its suggested wage increase constituted the use of economic power in relation to the main dispute.”

In that piggy beg style, he submitted that the unilateral implementation in this matter amounts to economic power, which in his submission is prohibited by section 65 of the LRA. He submitted that the LRA and the Constitution require orderly collective bargaining, which the Respondent by implementing its last offer was not observing. The Respondent has an unfair advantage before the arbitration, so the argument went.

[8] He referred the Court to the well known case of *NUM v ERGO*³ and submitted that the similar situation had arisen in this matter as it was in that case with a slight differentiation. He lamented that what the Respondent did was not sound industrial relation and the Court ought to intervene. He accused the Respondent of bargaining in bad faith since, in his submission, the pending arbitration is part of collective bargaining. He argued that in employment contracts as well as collective agreements, good faith is implied. In substantiation of that argument he referred the Court to some judgments of this Court. He however in his case relied on the provisions of the Recognition Agreement, in particular the Introduction and Preamble section, this part: “In the interests of Eskom, its employees and the country, the parties to the Agreement consequently commit themselves:

- To this Agreement,
- To co-operate in a spirit of mutual regard and respect,
- To continually promote sound industrial relations through good faith

³ 1992 (1) SA 700 (AD).

bargaining, consultation and information sharing.

[9] In his submission, the Respondent is in breach of this clause by wanting to implement before completion of the arbitration process as agreed. He correctly conceded that the offer was not conditional and that the right to proceed to arbitration is not being threatened and remained intact. Having made those concessions, he however retorted by submitting that if there is no intervention by the Court, the Applicants will turn into lame ducks at arbitration if the offer has been implemented.

[10] On the other hand, Sutherland SC for the Respondent submitted that a different case than the one set out in the founding papers is being argued. He further submitted that the interdict requirements have not been met. He submitted that although he does not remember the submission referred to earlier in this judgment, he does not believe that unilateral implementation is exercise of economic power. The LRA refers to strike and lockout and nothing else. It is that which an employer and an employee in essential services are prohibited to embark in terms of section 74 of the LRA. By abandoning the section 64(4) case, the Applicants *threw bath water with the baby* as it were. He submitted that no right in the LRA that has been violated. Reliance on *NUM v ERGO* is misplaced as it was decided before the current Act. The old Act legislated on the duty to bargain, whereas the current Act does not.

Analysis

[11] As alluded to above, it is difficult to write a seminal judgment as it were on a matter as important as this one emanating from an urgent court. This matter raises very important issues for the Labour Law community and certainly the parties in this dispute.

I am just hoping that another opportunity will present itself where this Court can fully ventilate these important issues. Nonetheless, I am seized with this matter and I have to attempt to help the parties to the best of my ability in this limited time. Enough about moaning and whingeing. I have fundamental difficulties with the Applicants' case. In the first instance, I agree with Sutherland that this being an interdict, the requirements ought to be met. In *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality*,⁴ Corbett J as he then was, in an attempt to formulate Van Der Linden set the following requirements for interlocutory interdict, which I see it to be one in this matter:

- The right which is the subject matter of the main action and which he seeks to protect by means of an interim relief is clear or if not clear, is *prima facie* established, though open to some doubts;
- That, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
- That the balance of convenience favours the granting of interim relief; and
- That the applicant has no other relief.

[12] When the Court asked Bruinders SC, which right in the main action is he seeking to protect, he retorted by saying there is no main action. If I properly understood this matter, the right in the main action, being the impending arbitration in my view, should

⁴ 1969 (2) SA 256 (C).

be that its last offer is an acceptable one and by implementing the Respondent's last offer, the Applicants' right will be harmed. If the Applicants' case is being misunderstood, then it appears to me that they have failed to even demonstrate any right as argued by the Respondent's representative. Put it differently, if the Applicants are saying a final offer cannot be implemented pending the arbitration, and then the Applicants have to show why the Respondent cannot. The argument by Bruinders SC that the fact that the LRA does not say the employer can, suggests that the employer cannot is without merits. The Applicants approached this Court; it is their duty to exhibit the right before they can receive any protection. It does not help the Applicants to argue in reverse.

[13] A further difficulty lies in the manner in which the case has been pleaded. It is now trite law that a party must fully set out its case in its founding papers (See in this regard *Afrox Ltd v Laka and Others*⁵). It is therefore imperative for the Court to engage in a comparison exercise. I do so hereunder.

Case as pleaded

[14] Nica Rakau deposed to an affidavit in support of the present application. Therefore, it is his evidence as set out in the founding affidavit that should make or break as it were the Applicants' case. As an opening gambit, he testified that implementation amounts to unilateral variation of terms and conditions of employment. He went further to say such is prohibited by section 64 (4) of the LRA. Relying on that section, he said the Respondent cannot implement until 8 October 2011 or extended agreed periods. Most importantly he said:

⁵ [1999] 5 BLLR 467 (LC).

“(22) Unilateral implementation is not economic power contemplated in the Recognition Agreement. There the only economic power contemplated is the use of protected strike and lock-outs-where there is an MSA ratified by the ESC.”

Having said that he stated that unilateral implementation is not permitted by the LRA or the Recognition Agreement. In punting for urgent hearing of the matter he said, Eskom was intending to implement its final offer after the 48 hour period contemplated in section 64 (4).

[15] Regard being had to the above evidence, it is clear that the Applicants moved from a premise that the implementation they sought to interdict amounted to unilateral change within the contemplation of section 64 (4), when the application was conceived. It is now an open secret that that case was abandoned. What is left then?

Case as argued

[16] The case as argued has been set out in details above and for fear of being diatribe, it is not necessary to repeat it here. Suffice to mention that in the case argued, the unilateral implementation is only seen as a usage of economic power and no more unilateral change of terms and conditions within the contemplation of the section 64 (4). The case argued was only foreshadowed in the replying papers. The question, this Court was implored to answer is raised in paragraph 6.7 of the reply. It is a formulation, though liberally couched as submitted by Sutherland SC, the Respondent was also willing to adopt. The imminent difficulty for the Applicants with that formulation is that in

stating that the Respondent cannot, the Applicants present only broad reasons, one of which was abandoned. Those are The LRA does not permit unilateral implementation of a final offer where parties are compelled to go to compulsory arbitration over interest dispute and that the Respondent is in breach of the *substratum*, spirit and a tacit term of the Recognition Agreement that does not permit simultaneous referral to arbitration and unilateral implementation. This the Applicants set out in the replying papers. Although I did not hear the Respondent's representative complaining about that, it is not proper unless explained why not set out in the founding papers, for a party to set its case in reply. Nonetheless, even if the Court was to seek recourse from these, the statements remain broad and unhelpful.

[17] The LRA has about 213 sections and various Schedules. It does not accord to a party to make a bald allegation that some conduct offends the LRA. Ironically, on the abandoned case a particular section was set out. The very reason why the Applicants chose a linguistically styled approach by referring to breach of *substratum* can only suggest that there is no specific provision upon which breach can be relied on. In argument the *Introduction and Preamble* clause was mentioned. If that was the clause breached why not say so in the papers?

[15] In my view, the Applicants presented two diametrically different cases and on that basis alone they ought to fail. Even if I am wrong in that conclusion, I refuse the application on many other grounds, some of which have been traversed above and others to follow here under.

Is implementation of last offer an exercise of economic power?

[16] The Applicants seem to acknowledge that use of economic power is traditionally to embark on a protected strike or lock-out. On the contrary, the LRA prohibits strike and lockout in essential services (Section 65 (1) (d) (i) read with Section 74). I am not about to attempt a classical definition of the term economic power. However in my view, implementation of a final offer in a negotiation set up is far from being one. Before me Sutherland, the author of the term did not own up to it. On the contrary, he submitted that the economic power contemplated is one which is disruptive of service. To that I agree. Economic power should be strike and or lock-out and nothing else. The negotiations in this matter commenced in April 2011. Parties cannot negotiate forever. There comes a point where one of the parties says-this is it, take it or leave. When that stage comes, it is bizarre in my view to suggest that muscles are being flexed.

[17] Economic power should be something more than that. In my judgment, implementation of the last offer is not an exercise of economic power. At the very best, it amounts to unilateral change of terms and conditions of employment. It is not disruptive at all. Accordingly, I am unable to uphold Bruinders SC's argument on this point. One wonders why in 2000, when the Recognition Agreement was signed, the Applicants understood perfectly well that the term "economic power" relates to strike and lockout and nothing else. Such is clear from the defunct part 7 headed "Rules for economic power".

Can the Court interfere in collective bargaining, particularly where parties have deadlocked?

[18] Both representatives seem to be *ad idem* that going to arbitration is part of

collective bargaining. I disagree. Arbitration is a process where a deadlock is broken. Likewise mediation is a process intended for that. On the other hand collective bargaining simply means negotiation at the collective level. Whilst negotiations are continuing, there will be no dispute to be resolved through any agreed process. Parties bring their own mental faculties to bear in order to find each other. Once they fail to find each other in negotiations parlance they deadlock and should find a deadlock breaking mechanism. Arbitration is one such mechanism. Once the parties reach an impasse, there is a temporary cessation of the bargaining process due to lack of success of the parties' negotiating efforts. During the pre-impasse period, the duty to bargain in good faith necessarily operates to preclude the employer from undertaking unilateral change, in order that bargaining be given suitable opportunity to succeed. However, once the impasse is reached both the bargaining process in good faith are superseded by the overriding need for more drastic measures to resolve the impasse. Lawful unilateral action constitutes one such measure, and may be utilised only once the parties have exhausted the duty to bargain in good faith. Interest arbitration was never designed to displace collective bargaining; it was intended to be a substitute only of particular forms of industrial warfare such as strike and lockout. (See Stuart S. Mukamal "Unilateral Employer Action Under Public Sector Binding Interest Arbitration"(1986) vol 6 Journal of Law and Commerce)

[19] The American system has a different system than ours. In terms of Section 8 (a) 5 of the National Labour Relations Act, it is an unfair labour practice for an employer to refuse to bargain collectively with the representatives of his employees. This section led the National Labour Relations Board to develop the so-called *per se* test. In the American system, the Respondent's conduct may fall under the *per se* test. The

National Labour Relations Board in one of its Annual Reports had the following to say:

“The duty of the employer to bargain with the statutory representative of his employees includes the duty to refrain from taking unilateral action with respect to matters as to which he is required to bargain, and from making changes in the terms and conditions of employment without consulting the employees’ representative.”

[20] In America, the Applicants could probably have a leg to stand on. However, the Board found that there are exceptions to the *per se* test. One such exception is an impasse being reached. In an impasse, it was generally accepted that an employer may take unilateral action. This is the deadlock situation I alluded to above. (See Gary V Dubin and Anthony C Gooch “Notes and Comments Unilateral Action As A Legitimate Economic Weapon: Power Bargaining By The Employer Upon Expiration Of The Collective Bargaining Agreement”: (1962) vol June *New York University Law Review*)

[21] In South Africa, the 1956 Act, under which *NUM v ERGO supra* was decided; the unfair labour practice regime recognised a duty to bargain. To the extent that *NUM v Ergo* is an authority on the duty as argued by Bruinders SC, a simply answer to that submission is that the 1956 Act has come and gone. The position that obtains now has been succinctly put by my Brother Van Niekerk AJ, as he then was, in *National Police Services Union and Others v National Negotiating Forum and Others*.⁶ There he correctly held as follows:

“All of these submissions overlook an important policy

⁶ (1999) 20 ILJ 1081 (LC) at para 52-53.

consideration that underlies the LRA. The LRA adopts an unashamedly voluntarism approach-it does not prescribe to the 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...To set aside the derecognition of the Union and to grant an order, even on an interim basis, that the Union remains recognised in terms of the collective agreement constituted by the regulations, would be an unwarranted interference in a collective bargaining relationship. The NNF was entitled to take the decision it did.”

I say no more. I fully agree with the sentiments expressed above. Although in that judgment my brother Van Niekerk J now, was dealing with organisational rights, which incidentally was an analogy I invited both Counsel to comment on, the principle remain the same.

[22] A year later my Brother Francis AJ as he then was echoed the sentiments I expressed earlier in *ECCAWU and Others v Southern Sun Hotel Interests (Pty) Ltd*⁷ and said:

“The problem that I have with the relief is that it fails to take into account that deadlock was reached between the parties...Negotiations had taken place prior...and after the parties had reached a deadlock, the applicants referred the dispute to the CCMA...Bargaining was no longer taking place.”

He went further to say:-

⁷ (2000) 21 ILJ 1090 (LC) at para 22.

“Although the concept of the duty to bargain in good faith was recognised in relation to the unfair labour practice jurisdiction of the 1956 Labour Relations Act, this is not the approach adopted in the current Act. Accordingly, the duty which existed under the 1956 Act, under the unfair labour practice jurisdiction, has not been incorporated into the current Act. There is no legal duty, implied by the Act, or any other law, to the effect that there is a duty to bargain in good faith.”⁸

I fully agree with the view above. In the selfsame passage, my Brother expressed a view in *obiter* that if it is shown that it was implied in a recognition agreement, perhaps, the Court might have upheld the case for the applicant. In my view, once an impasse has been reached, it matters not whether the duty is implied in a recognition agreement or some other collective agreement. Once an impasse is reached, which is the case in the present matter; there is no room for forcing bargaining process. To do so will be to undermine the very voluntarism and non interference principle underpinned by the current Act. Much as Bruinders SC’s submissions are attractive and capable of persuading an American Judge, like the Applicants as he submitted my hands are tight at the back. I am a creature of statute, the current LRA; any sympathy with the Applicants’ position should be guided by the enabling legislation. Perhaps there must a lobby to bring the duty back into the LRA. Accordingly, this Court cannot interfere using its interdictory power for two principal reasons in my view. The first is that the LRA does no longer cater for the duty, therefore no right be it clear or *prima facie*. The second is that the parties have deadlocked, bargaining time is over.

⁸ Ibid at para 27.

Does the Constitution help?

[23] As always in a matter like this, it is appropriate to see if the Constitution could in any event help the Applicants since the current LRA does not. Section 23 (5) of the Constitution of the Republic of South Africa, provides as follows:-

“Every trade union, employers’ organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining.” [My emphasis]

The constitutional right is that of engaging. Clearly the National legislation contemplated is the LRA. What does engage mean? Does it rekindle the duty to bargain? The dictionary meaning of the term engage is to involve. Therefore the right available to a trade union is to be involved in collective bargaining. How to be involved the answer lies in the LRA. The Applicants before me did not seek direct reliance to the right in section 23 (5).

[25] There is authority that where there is legislation dealing with the right, a party cannot claim direct reliance to a right in the bill of rights. In *SANDU v The Minister of Defence and others/ Minister of Defence and Others v SANDU*,⁹ the SCA found that the term engage is open to at least three interpretations. It may mean that contemplated national legislation to regulate collective bargaining must impose a duty to bargain on employers, or it may mean that the national legislation must provide a framework for collective bargaining, or it may merely mean that legislation may not prohibit collective bargaining.

⁹ [2006] 11 BLLR 1043 (SCA).

[26] In the end the SCA found that the South African Law does not recognise a legally enforceable duty to bargain (See Collective Labour Law-John Grogan 2007). The position of the SCA was confirmed by the Constitutional Court in *SANDU v Minister of Defence*.¹⁰ The solution according to the Constitutional Court is to challenge the constitutionality of the LRA in so far as the alleged right to bargain in good faith is concerned. In light of the above, any reliance on the constitutional right would have equally failed if attempted.

Conclusion

[27] In summary, my conclusions in this matter are that the application does not satisfy the requirements of an interdict, the most important of which being clear or *prima facie* right, the case as pleaded has been abandoned and the case argued has not been properly pleaded, implementation of the last offer is not tantamount to exercise of economic power, the parties have deadlocked and there is no constitutional right available to the Applicants.

[28] In the premises, I make the following order:-

1. The application is dismissed, with no order as to costs.

¹⁰ [00000000000002007] 9 BLLR 1909 (CC) at page 1931 at paragraph 52.

G. N MOSHOANA AJ

Acting Judge of the Labour Court

Appearances

For the Applicants: ADV T BRUINDERS SC Instructed by Cheadle,
Thompson and Haysom Braamfontein.

For the Respondent: ADV R SUTHERLAND with **ADV F BODA** Instructed
by Cliffe Dekker Hofmeyr Sandton.