IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case Number: J 1934/11

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: 21 September 2011

Date of Judgment: 23 September 2011

JUDGMENT-LEAVE TO APPEAL

MOSHOANA AJ

Headnotes: *Application for leave to appeal the judgment and order of this court.*

Introduction

[1] On 19 September 2011, I handed down a judgment dismissing the Applicants' application to interdict with no order as to costs. After I read the order, Mr Daniels, who appeared for the Applicants to note the judgment informed the Court that he holds instructions to apply for leave to appeal. Since there were no grounds at the time to

advance the application for leave, an agreement was reached that the application will be moved on 21 September 2011 at 9h30. The Applicants will have an opportunity to put together grounds upon which the application will be moved. On 20 September 2011, the Applicants' filed a notice of application for leave to appeal setting out grounds upon which leave is sought. The application was heard in an open court on 21 September 2011 and judgment was reserved until Friday 23 September 2011.

Grounds of appeal

[2] The Applicants hold a view that another court may come to a different conclusion. The view is premised on the following grounds:

1. There is a reasonable likelihood that the appeal court will find that the *court a quo* erred in finding that: (a) the applicants presented an entirely different case in argument which was not pleaded, and (b) applicants' case in their papers which they argued are diametrically opposed. Among other things:

1.1 The appeal court may find that the applicants' abandonment of the remedy in section 64 (4) of the LRA did not imply acceptance that ESKOM's unilateral implementation of its final offer was not a unilateral change to conditions of employment;

1.2 The appeal court may well find that the applicants pleaded in their founding papers that:

2.1.1 The respondent was bound by virtue of the Recognition

Agreement to bargain in good faith and its unilateral implementation of its final offer was a breach of such provision;

2.1.2 ESKOM's unilateral implementation of its final offer amounted to economic power and this was not contemplated in the Recognition Agreement or the LRA.

1.3 The appeal court may find that failure to make specific reference in the papers to the preamble of the Recognition Agreement, where the parties explicitly record their commitment to good faith bargaining, is, in the context and circumstances, irrelevant. The appeal court may find that this is irrelevant, among other things, because it is a tacit or implied term of the Recognition Agreement that the bargaining will happen in good faith and this was pleaded.

2. There is a reasonable likelihood that the appeal court will find that the *court a quo* erred in finding that ESKOM's unilateral implementation of its final offer does not amount to the exercise of economic power because it is not "disruptive of service". The appeal court may well find that:

2.1 The unilateral alteration of terms and conditions of employment must be understood as a form of economic power.

2.2 The court *a quo* failed to adequately consider the fact that the LRA only makes mention of unilateral implementation (i.e. unilateral changes to conditions of service) in section 64 (4) and 64 (5) of the LRA, tends to indicate that an employer's unilateral implementation of its final offer amounts to economic power.

2.3 The language used and purpose of section 64 (4) of the LRA must be understood as follows: an employer's unilateral implementation of its final offer is "permitted" (though not lawful) only when the playing fields are levelled and both parties are in a position to exercise economic power *simultaneously*;

3. The is a reasonable likelihood that the appeal court will find that the *court a quo* erred in finding that there can never be "lawful unilateral action" in the context of changing terms and conditions of employment and contracts of employment. The appeal court may well find that:

3.1 The term "unilateral" in section 64 (4) of the LRA must be interpreted as meaning without consent.

3.2 Where employers unilaterally change workers' conditions of employment and their contracts of employment, they will invariably act unlawfully and the remedy provided in section 64 (4) of the LRA does not alter the fundamental principle. Section 64 (4) of the LRA merely provides a means of immediate retaliation through protected strike action.

3.3 The mere fact that the LRA permits strike action in the context of an employer's conduct in affecting unilateral changes to the terms and conditions of employment does not mean that this is a "dispute of interest" that cannot be challenged as unfair or unlawful.

4. There is a reasonable likelihood that the appeal court will find that the *court a quo* erred in finding that ESKOM's unilateral implementation of its final offer, after deadlock has been reached, is not bad faith bargaining;
5. There is a reasonable likelihood that the appeal court will find that the *court a quo* erred in finding that interest arbitration, in the context of essential services, is not an extension of collective bargaining;
6. There is a reasonable likelihood that the appeal court will find that, in the present circumstances, the applicants and their members have a right to proceed to arbitration without the prior exercise of economic power by the employer;
7. There is a reasonable likelihood that the appeal court will find that permitting an employer to unilaterally implement its final offer before interest arbitration, conducted in terms of section 74 of the LRA, could or would impact on the outcome of the arbitration or the credibility of the arbitral process is paramount.
8. There is a reasonable likelihood that the appeal court will find that permitting an employer to unilaterally implement its final offer before an interest arbitration, conducted in terms of section 74 of the LRA, could or would impact on the outcome of the arbitration or the credibility of the arbitration process;
9. There is a reasonable likelihood that the appeal court will find that

ESKOM's unilateral implementation of its final offer in the present circumstances (i.e. before interest arbitration and where there is no minimum service agreement) amounts to an exercise of economic power that is not contemplated by the LRA or the Recognition Agreement.

10. There is a reasonable likelihood that the appeal court will find that ESKOM's unilateral implementation of its final offer, pending interest arbitration, undermines the applicants as collective bargaining agents and is in breach of workers' right under the Recognition Agreement and LRA.

[3] Regard being had to the grounds set out above, it is clear that a number of grounds were repeated. However, the Applicants' grounds can be summarised to be that implementation of final offer amounts to exercise of economic power and another court may come to a conclusion that such is not permissible having regard to the LRA and the Recognition Agreement.

The applicable test

[4] The traditional test will always be that of a reasonable possibility of another court coming to a different conclusion. It ought to be emphasised at this stage that the appeal court would ordinarily be guided by the same facts and or legal arguments at the *court a quo*. I n very limited circumstances, which do not arise in this matter a court of appeal may receive further evidence. All that the appeal court will be required to do if leave is

granted is to on the same facts decide that the appellant is entitled to the relief sought, in this case an interdict. Leave to appeal will be granted only when, there is reasonable prospects of success, the matter is of substantial importance and not trifling and practical effect or results can be achieved by the appeal.

Argument

[5] When the application was moved, Bruinders SC placed too much emphasis on the point that there is no judgment of this Court and or any other court that has answered the question-can an employer be allowed to implement its final offer whilst interest arbitration is pending? On that basis alone, this Court should readily grant leave to appeal. In addition, and relying on what he termed an *obiter dictum* of the Constitutional Court in *In re Certification of the Constitution of the Republic of South Africa, 1996,*[1] he submitted that exercise of economic power includes unilateral implementation of final offer and another court may come to the conclusion that this Court erred when it found that it does not amount to exercise of economic power. He further referred the Court to *Rex v Milne and Erleigh (3)*[2] *and Machele OT v Mailula*[3] all of which held that if the matter is complex and raises novel issues leave should be readily granted. This matter is one such in his submission.

[6] Sutherland SC handed up concise heads, which the Court found helpful, in preparing this judgment at a short space of time. In short he submits that the test as espoused above is not met and leave should be refused.

1 [1996] 10 BCLR 1253 (CC).
2 1950 (4) SA 599 (W).
3 2010 (2) SA 257 (CC).

Analysis

[7] The first question to be answered is has the test being met? If the answer is in the affirmative, then leave should be granted. If in the negative, leave should be refused. I am very much concerned with the following important factor-are there reasonable prospects of success on appeal? I am not persuaded otherwise. In the absence of a clear right, I do not see how another court can grant the relief of an interdict. It is trite law that one of the important elements of an interdict is a clear right or a *prima facie* one if interim interdict is sought. The interdict sought in this matter is of a final nature although is pending the arbitration. In my view, the passage quoted from the *Certification* judgment does not support the proposition that implementation of final offer is an exercise of economic power to be equated to a strike and lockout. All the court was alluding to was what is in the power of an employer as compared to an employee. Most importantly, the Court added lockout amongst the list-*exclusion of workers from the workplace*. The fact that the Court mentioned amongst others the power to unilaterally implement new terms and conditions of employment does not in any manner whatsoever suggest that such a power is tantamount to economic power as the parties to the collective agreement in this matter understood it or as section 65 reads with 74 understood strikes and lockouts. Ironically, section 64 (4) and (5) provides a perfect remedy for that power. The Applicants chose to abandon or not use that remedy at all. Accordingly, another court cannot reasonably come to a conclusion different to the one this Court arrived at.

[8] Does this matter raise a novel point of law? In my view, this matter only raises

an interesting question which no one thought of raising at any point before this matter. Broadly, the principle underlying that question has been raised before and decided. One example that comes to mind is that of derecognising a union whilst the issue of representivity is still to be decided upon. Similarly, this Court, in the judgments quoted in the earlier judgment found that a derecognition can go ahead nonetheless. Burdening an appeal court with a matter that is interesting but is unlikely to produce a different result is inappropriate (*See Goodwin Stable Trust v Duohex (Pty) Ltd and Another.*[4]

[9] In *Rex v Milne supra*, the court granted leave on the basis that the matter raises novel points of law. This matter does not raise novel points of law; therefore the rule does not apply. All in all a court of appeal in answering the interesting question would still need to fall back to the established principles of the granting of an interdict. The court of appeal would still be required to ask and answer a further question of the duty to bargain in good faith, which question has been authoritatively answered by this Court and the Constitutional Court. In the *Machele* matter, the passage relied on was when the Constitutional Court was quoting the High Court. The Constitutional Court granted leave to appeal on a different basis.

[10] I am also concerned that the appeal even if upheld would not achieve practical results for the Applicants. The Applicants are seeking to achieve a temporary relief as it were pending the outcome of interest arbitration. I n terms of Section 139 of the LRA, interest arbitrations should be finalised within 30 days of conciliation. It must follow that

4 1999 (3) SA 353 (C).

by the time this matter is considered by in the appeal court, the arbitration would have taken place and the order would be of no practical effect to any of the parties. An appeal against an interim interdict is inappropriate unless is final in effect (*See International Trade Administration Commission v SCAW South Africa (Pty) Ltd).*[5] Even if the appeal court finds that an interdict should have issued, such an outcome would have no practical effect to the Applicants once the arbitration process has completed. Of course coupled with the practicality rule is the fact that there is nothing that prevents the Applicants to request the respondent not to pay the 7% increase to their members pending the outcome of the arbitration. I am sure that the respondent can only be too happy to oblige. Such would not require a court order. The mootness rule is such that a court of appeal should not be used by parties to answer abstract questions (See *Multichoice (Pty) Ltd v Bemawu).*[6]

[11] Interestingly, in the *Bemawu* judgment, there were very interesting questions of law, which the appeal court refused to deal with owing to the mootness rule. By the time the appeal, if granted, is to be heard, there will be no live dispute. Therefore, if leave to appeal is granted, it would not lead to a just and reasonably prompt solution to the real issues between the parties. The real issue between the parties is the *quantum* of the offer and nothing else. Much as Bruinders SC seeks to elevate the dispute to this important matter, the issue clearly about power play which the LRA clearly, by not legislating the duty to bargain, kept the courts away from.

5 2010 (5) BCLR 457 (CC).
6 Case Number JA 6/2010 (LAC) delivered on 25 August 2011.

[12] In light of the above, I do not deem it appropriate to deal with each of the grounds set out in the notice of application. There is sufficient basis to refuse the application as alluded to above.

Conclusion

[27] In my view, the test for leave to appeal has not been met and accordingly, I make the following order:-

1. The application for leave to appeal is refused, with no order as to costs.

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G. N MOSHOANA

Acting Judge of the Labour Court

Appearances:

For the Applicants: **ADV T BRUINDERS SC** Instructed by Cheadle, Thompson andHaysom Braamfontein.

For the Respondent: **ADV R SUTHERLAND SC** Instructed by Cliffe Dekker Hofmeyr Sandton.