

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Not Reportable
Case Number: J 1018/11

In the matter between:

EXXARO RESOURCES LTD

First Applicant

EXXARO COAL MPUMALANGA (PTY) LTD

Second Applicant

EXXARO COAL (PTY) LTD

Third Applicant

EXXARO REDUCTANTS (PTY) LTD

Fourth Applicant

EXXARO SANDS (PTY) LTD

Fifth Applicant

EXXARO TSA SANDS (PTY) LTD

Sixth Applicant

FERROALLOYS (PTY) LTD

Seventh Applicant

and

NATIONAL UNION OF MINEWORKERS

First Respondent

SOLIDARITY

Second Respondent

PERSONS ON ANNEXURE "A" TO "M"

Third/Further Respondents

Date of Hearing: 29 September 2011

Date of Judgment: 19 October 2011

JUDGMENT

MOSHOANA AJ

Headnotes: *Application for interdicting a strike-return day, confirmation of the rule.*

Introduction

[1] On 10 June 2011, Acting Justice Cawe issued a *rule nisi* returnable on 1 July 2011. Justice Francis struck the matter from the roll due to non pagination of the Court file on the return day. On 26 August 2011, Justice Lagrange extended the rule to 29 September 2011. On this day, the matter was fully argued. The Court reserved its judgment. This matter turns on a very narrow issue of whether the issue in dispute forming the subject matter of the proposed strike is one that the First Respondent can refer to either this Court or Arbitration within the contemplation of Section 65 (1) (c) of the Labour Relations Act (LRA)?¹ The factual inquiry is limited to what the true and real issue in dispute is? The Applicants contend that the real and true dispute is one that the First Respondent can refer to this Court therefore not strikeable. The First Respondent contends that the true and real dispute is not one that this Court can adjudicate upon therefore strikeable. Second Respondent and its members are not opposing the order. Only the First Respondent and its members are opposing the confirmation of the rule.

Background facts

[2] The Applicants have embarked on a restructure project named the "Siyaya Project", with a view to improving productivity and reducing costs. If and when implemented, certain jobs will disappear, certain jobs will diminish and new jobs will be

¹ 66 of 1995.

created. It was clear that the restructure will cause some redundancies, however it was also unclear whether retrenchments will follow. Nonetheless on 2 November 2010, the Applicants issued a Section 189 (3) notice. Since then consultations ensued. A Facilitator was appointed to assist the consulting parties. Various consultative meetings were held with the assistance of the Facilitator. The last consultative meeting was held on 6 May 2011. It was in this meeting that the First and Second Respondents made allegations that the consultative process was flawed and not meaningful.

[3] On 6 May 2011, the First Respondent referred a dispute to the CCMA. It characterised the dispute as follows: "Employer has decided to implement solutions leading to retrenchments without a proper consultations with organised labour". The desired outcome was the following: "The employer not to implement the solutions until proper consensus-seeking consultation has been finalised". The Second Respondent also referred a similarly worded dispute. The disputes could not be resolved by the CCMA.

[4] On 8 June 2011, the First Respondent served a strike notice with an intention to commence action on 13 June 2011. Owing to the rule issued on 10 June 2011, the strike action could not commence. On 7 June 2011, the Applicants had issued a note wherein the employees were advised of agreements reached on 6 May 2011 and the process to unfold. On the same day, the First respondent responded to the note and amongst others recorded the following: "We will, as we have always done, ensure that we use all the legal means at our disposal to ensure that no single worker is retrenched

to enrich a few people” (My emphasis). Further it recorded: “Lastly, the only suitable solution employees will give you is that no one must be retrenched, not now, not next year and not ever”. (My emphasis)

Contentions of the Parties in argument

[5] It may be appropriate to highlight the First Respondent’s contentions first, given the view I intend taking at the end. Those are:

- Sections 189 and 189A of the LRA are irrelevant to this case because as the applicants themselves state, no notice of dismissal has been issued.
- There is thus no part of the restructuring dispute that is presently capable of adjudication by this Court
- The dispute over restructuring and implementation of the Siyaya project remains one of mutual interest at this stage.
- The NUM has made it plain that it disputes the underlying rationale and need for the implementation of the Siyaya project. The demand is that it not be implemented. In so far as this was ever unclear, it is made clear in the answering affidavit. Just to mention at this stage, the answering affidavit states the following: “Our demand is that the employers must agree not to implement the Siyaya plan without our consent.”

In short the submission is that Section 65 (1) (c) of the LRA does not prohibit the proposed strike action, since the dispute is one of mutual interest. The dispute is about

the rationale as spelled out in the letter of 15 April 2011. Accordingly, the rule ought to be discharged with costs.

[6] On the other hand, the Applicants persisted with the submission that Section 65 (1) (c) of the LRA is being offended if the real and true dispute is flashed out. It was submitted that it is the duty of this Court to establish the true and real dispute in order to decide whether Section 65(1) (c) of the LRA finds application.

Evaluation

[7] This is one of those matters that call upon a judge to decide what the parties' dispute is. Ironically, parties should know what they are disputing each other about otherwise there is no "dispute". Nonetheless the LAC made it plain that this duty is a statutory one imposed upon this Court by Section 65 (1) (c) of the LRA. See *Coin Security Group (Pty) Ltd v Adams and Others*²) and *Ceramic Industries Ltd t/a Betta Sanitaryware v NCBWU and Others* (2).³)

[8] The exercise is conducted by having regard to the surrounding circumstances, the correspondence, negotiations and affidavits exchanged between the parties. (See *TSI Holdings (Pty) Ltd and Others v NUMSA and Others*.⁴ It is accepted that strikers are entitled to develop and vary their demands during the course of the strike. (See *City of Johannesburg Metropolitan Municipality v SAMWU and Others*⁵)

² [2000] 4 BLLR 371 (LAC).

³ (1997) (18) ILJ 671 (LAC).

⁴ (2006) 27 ILJ 1483 (LAC).

⁵ (2009) 30 ILJ 2064 (LC).

What is the issue in dispute?

[9] In order to properly deal with this question, in my view, the starting point should be Section 64 (1) of the LRA. The section guarantees the right to strike if the issue in dispute has been referred to the Council or the CCMA. The Act defines an issue in dispute in relation to strike to mean any of the three, which forms the subject matter of the strike. Those are a demand, grievance or the dispute. In other words, an issue in dispute can take a form of a demand, a grievance or a dispute as in disagreement as it were. In the matter before me, it is plain that there is a demand. It is important to mention that it is the demand that should be the subject matter of the strike. Put it differently, the strike must be about that demand. If the demand is met the strike is bound to end.

[10] Therefore, whenever reference is made of an issue in dispute in Section 65(1) (a)-(c) of the LRA, it must be the one referred to in Section 64 (1). The issue in dispute as required by Section 64 (1) must be referred to the Council or CCMA. Therefore that, in my view, makes the referral document an important source to determine the issue in dispute. I must add that a strike notice also plays a vital role thereafter. In this matter, the First respondent spelled out its demand in no uncertain terms in the referral document to be one of no implementation of solutions leading to retrenchments until proper consensus-seeking consultation has been finalised. It follows axiomatically that had the Applicants acceded by not implementing a solution that leads to retrenchments as alleged that would have been the end of the demand. Put it differently, the issue in

dispute would have dissipated and there would have been no need to issue a strike notice.

[11] A proper reading of the letter of 15 April 2011 reveals that the issue was about the envisaged retrenchments and not the rationale of the project as argued. Nonetheless, closer to the issuing of the strike notice, Blaai made it abundantly clear that what they seek to avert is the proposed retrenchment - the letter of 7 June 2011, W13. The demand as set out in the answering affidavit does not feature anywhere other than in there. It seems clear to me that this was an afterthought.

[12] Regard being had to the statement in the closing paragraph of the letter of 7 June 2011, if the Applicants accedes to not retrench a single worker “now, next year or ever”, the workers would not have deemed it necessary to “come and tell the Applicants themselves in the comfort of their Tshwane office” (to strike and or march). In light of the above, I have no hesitation in my mind that the employees were to strike about a possible retrenchment. Therefore the true and real dispute is that of avoiding retrenchments.

Is the issue in dispute one justiciable in this court?

[13] The approach adopted by *Euijen* for the First Respondent is that of saying since there is no dismissal yet, then the adjudication issue does not arise. That approach is very simplistic in its nature and should not be favoured by this Court when faced with a matter like the present one. The answer lies in Section 65 (1) (c). The section makes

reference to a right to refer and not should refer. Therefore the inquiry is whether the issue in dispute is capable of being resolved by the Labour Court? It is abundantly clear that the concern of the First Respondent is not that the Applicants have no right to retrench but they must do so after having followed a fair procedure-consulted with it.

[14] Section 189A (13) makes it plain that should an employer not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application. Failure to consult is tantamount to not following a fair procedure, which was clearly the demand of the First Respondent. Follow procedure, consult with us they lamented. It must follow that to the Applicants to whom 189A applies; the right exists for the First Respondent to refer to the Labour Court. Therefore, striking over such a demand is not permitted by Section 65(1) (c).

[15] In my view, even those employees of the Applicants not covered by Section 189A cannot strike on the issue in dispute because in terms of Section 191 of the LRA, a dispute about dismissal based on operational requirements can be adjudicated by this Court. It is too technical and fanciful in my view to place emphasis on the fact that until dismissed, that right does not arise. It must have been the intention of the Legislature to allow this Court and other forums an opportunity to resolve dispute and to avoid labour unrests. This Court had interfered in uncompleted hearings and retrenchments for that matter using its powers under Section 158 of the Act. In such instances, when the interests of justice so demand, this Court could issue an injunction even before dismissal. In my view, there is no difference justifying a different approach. Such would

mean that Section 189 employees can strike on procedural issues when Section 189A employees are gagged and directed to this Court. A proper and better view, which in my view is consistent with the purpose of the LRA, is to say both are gagged because of the same provisions-Section 65(1) (c).

[16] I therefore conclude that the issue in dispute is justiciable in this Court. That brings me to an irresistible conclusion that the proposed strike action is prohibited by Section 65 (1) (c) of the LRA and therefore interdictable.

The issue of costs

[17] What then remains is the issue of costs. Both representatives argued that costs should follow the results. I see no reason why such should not be the case.

Conclusion

[18] In the result, I make the following order:-

1. The Respondents are restrained and interdicted from participating, promoting and inciting a strike action against any of the Applicants or act in contemplation or furtherance of such a strike action.
2. The First Respondent to pay the costs of this application.
3. This order to be served by delivering a copy by hand and by telefax to the First Respondent's Head Office at 7 Rissik Street Johannesburg Fax (011)

833 0367. On the Second Respondent and its members by the same means at DF Malan Drive Eendracht Kloofsig, Centurion, fax (012) 664 6531.

4. This order to be placed at the main gates and or notice boards of the Applicants' premises.

G. N MOSHOANA

Acting Judge of the Labour Court

Appearances:

For the Applicants: ADV AJ FREUND SC Instructed by Brink Cohen Le Roux Inc Johannesburg.

For the Respondent: ADV T M G EUIJEN Instructed by Cheadle Thompson and Haysom Braamfontein.