REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case number: J 2939/11

In the matter between:

ADT SECURITY (PTY) LTD	Applicant
and	
THE SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS' UNION	First Respondent
THE PERSONS WHOSE NAMES APPEAR IN ANNEXURE "A"	Second Respondent

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***EX TEMPORE* JUDGMENT**

LAGRANGE J

[1] The *ex tempore* judgment below, as edited, was handed down on 14 December 2011.

[2] This is an application to interdict a strike by employees of the applicant company on the basis that the strike is unprotected. It is common cause that the respondent union did follow the standard procedure for calling protected strike action in the

sense that it referred a dispute of mutual interest to the CCMA and after obtaining a certificate of outcome issued a strike notice giving 48 hours notice of the strike due to commence the following day.

[3] I am satisfied that given that the applicant was unaware that a certificate of outcome had been issued and it only became aware of this on 29 November and arranged to hold a meeting with the union on 13 December 2011 as soon as it became aware of a possible impending strike, that the matter is sufficiently urgent for the Court to hear it on this basis.

[4] The demand raised by the respondents is that salaries paid to armed response officers in Port Elizabeth should be the same as those in Gauteng and Cape Town.

[5] Both parties are either a member of a party or a party to a so-called "negotiating framework agreement for the national bargaining forum for the private security sector". The preamble to that agreement states that despite the fact that terms and conditions of employment within the sector had traditionally been determined by Sectoral Determinations published under the Basic Conditions of Employment Act, the parties acknowledged that they have traditionally negotiated terms and conditions within the private sector at national level amongst each other so that any agreement reached between them would reflect a

broadly held consensus which could be adopted by the Minister of Labour as the basis of future sectoral determinations.

[6] The agreement goes on to state that: "the parties to this agreement agree that in future or national level negotiations on terms and conditions of employment and other related matters of mutual interest in the private security sector will take place in accordance with this agreement."

[7] Clause 8.5 of the agreement provides that: "unless otherwise agreed, no party or member of the party to this agreement shall raise for negotiation with any other party or member of such party to this agreement any issue that has been tabled, traded off or negotiated in the course of any round of negotiations until the commencement of the next round of negotiations in terms of this agreement."

[8] Essentially, the applicant is arguing that the demands made for parity between wages in different regions is a national issue on which cannot be determined in isolation through negotiation between the union and the applicant company alone. It is evident that the sectoral determination based on the negotiations does make provision for wage differentiation between different geographical areas.

[9] The union contended that clause 8.5 has no application because the issue in question cannot be classified in terms of any of the types of issue described in that clause. The union also contends that the framework agreement was not negotiated in the context of a bargaining Council for which the Minister might extend a collective agreement. Lastly, there is nothing in the negotiating framework agreement that expressly forbids plant level bargaining, nor prevents strike action arising from a dispute at plant level.

[10] It seems to me that the essential question raised by this application is whether the demand made is one that ought to be tabled at the National negotiations, which are currently underway in the negotiating forum, and whether it is open to the respondents to embark on strike action on the issue in question if it is.

[11] The only provision in the LRA which might apply in prohibiting the union and its members from participating in a protected strike in these circumstances is section 65 (3) (a) (i), which states that:

> "*Subject to a collective agreement, no person may take part in a strike or a lockout or in any conduct in contemplation or furtherance of a strike or lockout-*
> *(a) if that person is bound by-*
> *(i) any arbitration award or <u>collective agreement that regulates the issue in dispute;</u> or...*"

(My emphasis)

[12] The first point to make is that this Court has held in **Fidelity Guards v PTWU and others [1997] 11 BLLR 1425 (LC) at 1433** that the word 'regulates' also includes creating a process for resolving the issue. As I understand this means that if there is a procedural agreement which deals with the process for negotiating the issue in question, that agreement would regulate the issue for the purposes of **section** 65 (3) (a) (i). It would seem to me at least on a *prima facie* view that a demand to equalise wages in one region with a another is an issue of national relevance, and accordingly if the demand in question has not been tabled in the forum which the parties have agreed should deal with such issues, a strike in contemplation of a demand that has not been tabled in that forum, and would amount to a strike over a demand which parties have agreed ought not to be negotiated at the level of an individual employer, and in that sense would be a strike over an issue regulated by the National negotiating framework agreement.

[13] Secondly it also appears that in terms of the preamble to the collective agreement that the parties have acknowledged that they negotiate terms and conditions in the sector at national level.

[14] Another argument raised by Mr Baloyi who appeared for the respondent was that a demand in respect of actual wages could

not be equated with a demand over minimum wages, which appears to be part of the demand presented to the applicant. In the case of ***Cape Gate (Pty) Ltd v National Union of Metalworkers of SA & Others*** **(2007) 28 *ILJ* 871 (LC)** at paragraphs [36] and [37] of the judgement, the court held that it would be contrary to the purpose of a provision in a collective agreement providing that a national forum should be the sole negotiating forum, to allow demands to be tabled in respect of actual wages at plant level. However it must be said that the provisions of that agreement were far more stringent. Thus Clause 37 of the main agreement in that case read as follows:

> "*37. Levels of bargaining in the industry*
>
> *(1) Subject to sub-clause (2) -*
>
> *(a) the Bargaining Council shall be the sole forum for negotiating matters contained in the Main Agreement;*
>
> *(b) during the currency of the Agreement, no matter contained in the Agreement may be an issue in dispute for the purposes of a strike or lock-out or any conduct in contemplation of a strike or lock-out;*
>
> *(c) any provision in a collective agreement binding an employer and employees covered by the Council, other than a collective agreement concluded by the Council, that requires an employer or a trade union to bargain collectively in respect of any matter contained in the Main Agreement, is of no force and effect.*
>
> *(2) Where bargaining arrangements at plant and company level, excluding agreements entered into under the auspices of the Bargaining Council, are in existence,*

the parties to such arrangements may, by mutual agreement, modify or suspend or terminate such bargaining arrangements in order to comply with sub-clause (1). In the event of the parties to such arrangements failing to agree to modify or suspend or terminate such arrangements by the date of implementation of the Main Agreement, the wage increases on scheduled rates and not on the actual rates shall be applicable to such employers and employees until the parties to such arrangement agree otherwise.

(3) The provisions of this clause shall apply equally to any trade unions not party to this Agreement."

[15] So too, the relationship between centralised and employer level bargaining in the *Fidelity Guards* matter was much more explicitly distinguished. The following passages from pages 1428-9 of the judgment illustrates this:

"*14.5*

Clause 10 of the constitution of the national bargaining forum provides that 'All parties to this council accept the principle of industry-wide bargaining and, accordingly, all parties agree to negotiate, on an annual basis, substantive issues of employment in respect of employees in the industry'.

14.6

Clause 10.3 provides that 'The parties agree that any issues or matters which have been negotiated between them shall not be negotiable at regional or company level'.

14.7

The first respondent, in terms of this collective agreement, is free to negotiate plant level conditions of employment only *with non-parties to the national bargaining forum. As long as the first respondent has chosen to bargain at a particular level in respect of particular subjects, it may not retreat and launch negotiations at another level with the same party (being the applicant).*

14.8 Therefore, as far as the national industry bargaining forum is concerned, the first respondent is a party to the agreement, and continues to be a member of the said forum."

Conclusion

[16] I believe that the applicant has made out a *prima facie* case that the national negotiating framework agreement binds the parties to conduct negotiations on the issue in question at the National negotiations conducted in terms of that agreement. Accordingly, the dispute concerns an issue that is regulated by the same agreement in the sense meant by section 1 and a dispute over regional wages which arises in the context of those *national* negotiations could well give rise to protected strike action.

[17] However, the employer in this instance is entitled to refuse to negotiate closing regional wage gaps outside of the context of those national negotiations. A strike arising from a refusal to exceed to demands at the level would be a strike in respect of an issue regulated in the sense meant by section 65 (3) (a) (i) and consequently would be unprotected.

Order

[18] Accordingly, it is ordered that:

1.1 **Declaring** that the strike by the second to further Respondents ("the individual respondents") which is due to commence on Thursday 15 December 2011 ("the strike") to be an unprotected strike in terms of the Labour Relations Act, 66 of 1995 ("the LRA");

1.2 **Declaring** that the anticipated action of the Second to Further Respondents referred to in annexure "**A1**" constitutes unlawful strike action pending the outcome of the national wage negotiations;

1.3 **Interdicting** and restraining the Second to Further Respondents referred to in annexure "**A1**" from participating in any strike action;

1.4 **Interdicting** and restraining the first Respondent ("the Union") from encouraging and/or inciting the individual respondents to participate in such a strike;

1.5 **Ordering** the Second to Further Respondents referred to in annexure "**A**" to comply with their contractual obligations owed to the Applicant;

1.6 **Ordering** the Union and such individual respondents who oppose this application to pay the costs of this application, jointly and severally, the one paying the others to be absolved.

2. Directing that the relief set out in prayers 1.1 to 1.6 above operate as an interim order with immediate effect.

3. Ordering that service of this order be effected as follows:

3.1 on the Union per telefax at its head office and its regional office;

3.2 on the individual respondents by a duly appointed official of the Applicant reading out this order to such of the individual respondents who are present at the Applicant's place of business and by affixing copies of this order on prominent notice boards at the Applicant's place of business and handing copies of this order to such of the individual Respondents who may request a copy of this order.

4. The provisions of paragraphs 1 to 3 hereinabove shall operate with immediate effect, as an interim order, pending the final order being made on the return date 26 January 2011 of the Rule *Nisi* as aforesaid.

5. The issue of costs is deferred to the return date.

6. Either party may anticipate the return day on supplemented papers, if necessary, on three court days' written notice.

ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing: 14 December 2011

Date of judgment: 14 December 2011

Applicant's representative: H. Schensema for Routledge Modise t/a Eversheds attorneys

Third Respondent's representative: M.M. Baloyi for Baloyi Attorneys