



REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG

Case no: J 112/12

In the matter between:

SA POST OFFICE LTD

Applicant

and

**TAS APPOINTMENT AND
MANAGEMENT SERVICES CC**

First Respondent

N T NGIDI CONSULTING (PTY) LTD

Second Respondent

MARULA STAFFING (PTY) LTD

Third Respondent

EMPLOYEES LISTED IN ANNEXURE

Fourth to further Respondents

“A” TO THE NOTICE OF MOTION

Heard: 09 February 2012

Delivered: 13 February 2011

Summary: (Urgent interdict – return day - unprotected strike of labour broker employees – locus standi of labour broker client to launch interdict)

JUDGMENT

Background

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- 1] On 23 January 2012, an interim interdict was granted by this court on an urgent basis declaring the strike action of the fourth to further respondents to be unprotected strike action in terms of the Labour Relations Act 66 of 1995 ("the LRA"). The strikers were interdicted from continuing with the strike and prohibited from interfering in a variety of ways with the business of the applicant as well as restrained from coming within 500 metres of the applicants premises.
- 2] The strikers were not employees of the applicant, the Post Office, but employees of various subcontractors providing labour to the Post Office to perform mail-sorting duties at approximately 23 depots in Gauteng province. The first to third respondents were the subcontractors whose employees were on strike. Only one of them, the first respondent opposed the application, while the others essentially played a passive role in the proceedings.
- 3] The strikers' main demand was that they be made permanent employees of the applicant instead of remaining subcontracted workers. Prior to the strike commencing they did not refer any dispute to the CCMA nor did they give any notice of the strike before it commenced. No new evidence contradicting these factual assertions made by the applicant originally was before the court on the return day. Accordingly, there is no reason to doubt that the strike was an unprotected one in terms of section 64 (1) (a) and (b) of the LRA.
- 4] On 8 February 2012, the applicant filed a supplementary affidavit in which it claimed that the interim court order had not been heeded and the strike had spread to other depots. In so far as the applicant has

made out a case that the strike action is ongoing, the need for a final prohibitory interdict has been established, subject to overcoming the objections raised by the fourth to further respondents on the return day.

Legal argument and analysis

- 5] On the return day, the application was very belatedly opposed by the individual respondents, who were represented *pro bono* by an attorney, Mr D.Cartwright. The opposition was based on a single legal question, namely whether or not this court was entitled to grant an interdict of this nature in a case where the applicant was not the strikers' employer. He characterised the point as a jurisdictional one, whereas the applicant's counsel Mr Halgryn, SC, argued it really concerned the question whether the applicant had *locus standi* to bring the application.
- 6] Mr Cartwright argued that if the applicant were permitted to approach the court and succeed in obtaining an interdict, then any third party whose business was affected by an unprotected strike could also approach the court for similar relief, even where the strikers' employer chose not to interdict the strike action. Essentially, he argued that the LRA only provided recourse for the strikers' own employer in a primary strike.
- 7] The applicant's counsel argued that there were three legal bases on which it could rely to establish its legal interest in the matter. The first ground on which the applicant contends it has a legal right to approach this court is a common law right not to have its business or the performance of its other employees' duties unlawfully interfered with, as well as the right to be protected against unlawful damage to its property.
- 8] The second ground relied on is that the applicant can approach this court in terms of section 68(1)(a), which makes provision for interdictory relief to be granted where employees embark on unprotected strike action, read with sections 157 and 158, which set out this court's

jurisdiction and powers. Section 68(1) reads:

“68 Strike or lock-out not in compliance with this Act

(1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction-

(a) to grant an interdict or order to restrain-

(i) any person from participating in a strike or any conduct in contemplation or in furtherance of a strike; or

(ii) any person from participating in a lock-out or any conduct in contemplation or in furtherance of a lock-out;

(b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct, having regard to-

(i) whether-

(aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;

(bb) the strike or lock-out or conduct was premeditated;

(cc) the strike or lock-out or conduct was in response to unjustified conduct by another party to the dispute; and

(dd) there was compliance with an order granted in terms of paragraph (a);

(ii) the interests of orderly collective bargaining;

(iii) the duration of the strike or lock-out or conduct; and

(iv) the financial position of the employer, trade union or employees respectively.”

- 9] It is notable that the section does not specifically refer to the party which is entitled to seek such relief. It merely gives this court exclusive

jurisdiction to make such an order. It does not describe class of potential applicants who may seek an order interdicting unprotected strike action or unlawful conduct in furtherance of a strike.

- 10] It stands to reason that the party applying for such an order needs to demonstrate not only that the strike is one that is not protected in terms of the LRA as defined in section 67 (1), but also that the strike action has infringed one or more of that party's legal rights, in order to establish its *locus standi* to bring the application. If it were not the case, the floodgate of litigation which the strikers say would ensue, would not be a fanciful prospect. Thus, for example, it is not difficult to envisage a whole range of parties whose business interests may be materially prejudiced by unprotected strike action. But the mere fact that a business may suffer directly or indirectly as a consequence of an unprotected strike, does not necessarily give rise to a valid delictual claim. Most commonly the typical applicant in this sort of matter is the strikers' own employer, and it will simply be assumed - usually without it having to be stated - that the strikers are in breach of their obligation to render their services, and because the strike is unprotected their conduct amounts to an actionable breach of the employment contract. In these cases, the legal nexus between the parties is so close and direct and the act of striking goes to the root of the employees' primary legal obligation to the employer under the employment contract, there can be no doubt about the employers *locus standi* to bring an application to end the unprotected strike to protect its contractual rights arising from the employment contract.
- 11] Factors which reinforce the view that a party wishing to interdict a strike is not relying on section 68(1)(a) *per se* but on an infringement of another right by the strikers are other provisions of sections 67 and 68. Thus, section 67 (2) of the LRA specifically deems that participation in a protected strike or conduct in furtherance of that strike cannot constitute a breach of contract or a delict. This provision effectively provides immunity to participants in protected strikes against common law claims based in delict or on breach of contract, subject to the proviso that their

conduct does not constitute an offence (see section 67(8) of the LRA). Also, Section 68(1)(b) accords exclusive jurisdiction to this court to order compensation for any loss arising from unprotected strike action. What both these provisions implicitly recognise is that strike action can amount to a breach of contract, or a delict under the common law. Section 67(2) restricts the scope for bringing contractual or delictual claims against participants in a protected strike, and section 68(1)(b) appears intended to reserve the adjudication of any damages claim arising from the infringement of contractual or delictual rights arising from unprotected strike action or conduct solely for the Labour Court. By virtue of these provisions therefore, this court has a limited and exclusive jurisdiction over common law claims when contractual or delictual liability might arise from strike action which is unprotected, and certainly in instances where conduct committed in support of a strike, whether protected or not, constitutes an offence.

- 12] Consequently, the purpose of section 68 (1) of the LRA is more about the assignment of an exclusive power to this court to grant interdictory relief to parties that can establish they have a distinct cause of action based on contract or delict than the creation of a distinct statutory right to interdict unprotected industrial action. Therefore it seems that the second basis on which the applicant relies is not a separate ground establishing *locus standi*, but simply refers to the mechanism for preventing industrial action which entails a breach of common law rights.
- 13] During argument, applicants counsel referred to other instances in which this court had granted similar relief to the interim order in this matter in unopposed urgent applications and in which interim orders had been confirmed. He agreed that because no reasons were given in those instances it was difficult for this court to assume the issue now raised by Mr Cartwright was pertinently before the court on those occasions, but nonetheless persisted in arguing that if this court denied the applicant the relief it was seeking, it would necessarily mean the reasoning in all those other cases was wrong. While I accept the facts

in those matters may have been indistinguishable, in essence, from the facts in this matter, I do not think it follows that a different decision in this case would necessarily mean those judgements were wrong, in the absence of knowing which legal issues were before the court. After the hearing the applicant filed a copy of heads submitted in an earlier case also involving an unprotected strike by employees of labour brokers which supplied it with labour, in which it had been successful in obtaining an interdict.¹

- 14] In the argument before this court the applicant also submitted that the LRA recognised the tripartite nature of the labour broker arrangement in section 198, which deals with temporary employment services and certain situations in which the temporary employment services client could be held jointly liable with the service for any contraventions by the service of certain statutory instruments. That may be so, but it does not tell us about all the legal ramifications of that relationship. It was also argued that employees of a labour broker owe some kind of fiduciary obligation towards the client. I am not aware of any legal authority for the existence of such an obligation nor was I referred to any.
- 15] The essential features of the legal relationship between the labour broker, the client and the labour brokers' employees are well-known. The labour broker contracts with the client to provide certain types of labour to perform work for the client, but the persons who are engaged to perform the work are employed by the labour broker and not the client. The client thereby obtains the services of persons to perform the work it requires without having to employ them. In this instance, the applicant called upon the first to third respondents to provide replacements when the existing staff went on strike. The first respondent claims it did provide replacement labour in the form of casual staff for all the affected positions, but they were unable to render services to the applicant because of disruption by violent mobs.
- 16] There is undisputed evidence that the conduct of the strikers included

¹ *SA Post Office Ltd v TAS Appointment and Management Services CC*, J1493/11 (unreported decision, date unknown)

acts of assault and intimidation of permanent and replacement workers, the invasion of the applicant's various premises and malicious damage to the applicant's property. These various actions all amounted either to an unlawful interference in the applicants' employment contracts with other employees, or breaches of the employer's property rights, or criminal offences, or alternatively a combination of one or more of these types of infringement. Moreover, the combination of the strikers' withdrawal of their own labour together with preventing the applicant from being able to make use of replacement labour clearly interfered with the fulfilment of the labour brokers' contractual obligations to the applicant to the obvious detriment of the applicant. Withholding their own labour did not, in and of itself, prevent the labour brokers from fulfilling their obligations as the first respondent's answering affidavit demonstrates. But combined with the obstruction of the provision of replacement labour it did.

- 17] In these specific circumstances therefore, confirmation of the rule which both prohibited the strike and the other unlawful conduct associated with it appears justified. In passing it would appear that the police may have adopted an attitude that without an interdict they could not always take action against the strikers. If this is the case, it is completely erroneous. The police do not need a court order to intervene when faced with conduct which is *prima facie* criminal in nature, simply because that conduct takes place in the context of industrial action.

Order

- 18] The rule issued by this court on 23 January 2012, and extended on 09 February 2012 until today is confirmed.
- 19] The fourth to further respondents are ordered to pay the applicant's costs, being jointly and severally liable therefor, the one paying the others to be absolved.



R Lagrange, J
Judge of the Labour Court of South Africa

APPLICANT: L Halgryn, SC instructed by Routledge Modise t/a
Eversheds
FOURTH TO FURTHER D Cartwright
RESPONDENTS: