



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No J 56/12

In the matter between:

MEGA EXPRESS (PTY) LIMITED

Applicant

and

THE EMPLOYEES WHOSE NAMES

ARE LISTED IN ANNEXURE A TO THE

NOTICE OF APPLICATION

First to Further Respondents

Heard: 13 January 2012

Delivered: 14 March 2012

Summary: UNPROTECTED STRIKE The applicant launched this urgent application for an order restraining and interdicting the respondents from proceeding their unprotected strike pending the outcome of the arbitration the respondents had referred to the SARPBC. The order was granted because the

respondents' collective refusal to do night work for the purpose of having their dispute against the applicant resolved constitutes strike action. The respondents' strike was unprotected because their dispute was based on issues governed by a collective agreement which has a dispute resolution clause. After the certificate of the non-resolution of the dispute at the conciliation stage was issued the respondents should have referred their dispute to arbitration and awaited the arbitration award. Strike action over a dispute which has to be referred to arbitration in terms of the LRA is unprotected in terms of section 65 of the LRA.

COLLECTIVE AGREEMENT: A collective agreement remains binding for its duration on members of a registered trade union which is a party to it even after those members have resigned from the trade union if they remain employees of the employer party to the collective agreement.

INTERIM INTERDICT: Employment of other employees to perform the duties of employees who have embarked on an unprotected strike does not constitute alternative relief for purposes of determining the grant of an urgent interdict as it does not constitute alternative remedy for the violation of the applicant's right by the respondents.

JUDGMENT

LALLIE J

[1] The applicant approached this Court on an urgent basis for an interim interdict. After arguments were presented on behalf of both parties on 13 January 2012 the following order was granted:

‘1 Pending the outcome of the dispute referred by the Respondents to the South African Road Passenger Bargaining Council under case number 11-01, an order is made in the following terms:-

1.1 The withholding of the services by the Respondents with effect from 9 January 2012 and collective refusal by the Respondents to work any shift scheduled before 6h00 and after 18h00 each day is declared to be unprotected strike as contemplated in section 68 of the Labour Relations Act 66 of 1995 ("the LRA");

1.2 The Respondents are interdicted and restrained from participating in such an unprotected strike;

1.3 The Respondents are directed to work in accordance with their current terms and conditions of employment with the Applicant pending the referral to arbitration and final adjudication of the dispute that has been referred to the South African Road Passenger Bargaining Council under case number 11-01;'

[2] The order also provided for the manner in which its service was to be effected on the first to further respondents (respondents). The following are the reasons for the order. The reason the applicant launched this application is that from 9 January 2012 the respondents collectively refused to work any shift scheduled before 06h00 and after 18h00. The respondents having, through their attorney, addressed a letter to the applicant demanding the following undertakings from the applicant:

2.1 payment of an acceptable shift allowance;

2.2 suitable transportation (or payment of a suitable transportation allowance) for each employee to and from home; and

2.3 calculation and payment of the allowances to the respondents no later than 31 March 2012 with effect from the date of employment of each employee.

[3] The basis of the respondents' demand was that by requiring the respondents to arrive at work at 03h30 and to work after 18h00 without receiving a shift allowance the applicant acts in contravention of section 72 of the Basic

Conditions of Employment Act (the BCEA).¹ In addition, the respondents alleged that in the absence of the allowances, they were under no obligation to arrive at work before 06h00 and to work after 18h00.

- [4] The main reason for this application therefore is that the applicant sought an order declaring that by collectively refusing to work before 06h00 and after 18h00 the respondents were participating in an unprotected strike as contemplated in section 68 of the Labour Relations Act (the LRA).²

Background

- [5] The applicant conducts business as a bus operator part of which is to convey passenger to and from Gautrain stations in terms of a contract it entered into with the Bombela Consortium. It employs 402 employees. The 320 respondents are employed by the applicant as driver conductors. The applicant operates a two shift system. The first shift starts at 04h30 and the last one finishes at 22h00.
- [6] On 7 April 2011, when some of the respondents were members of the South African Transport and Allied Workers Union (SATAWU), SATAWU, Transport & Allied Workers Union of South Africa (TAWU), Transport & Omnibus Workers Union (TOWU) the employee party concluded the Main Collective Agreement (agreement) with the South African Bus Employers Association (SABEA), under the auspices of the South African Road Passenger Bargaining Council (SARPBC) which governs the terms and conditions of employment of employees in their industry. At the time of the conclusion of the agreement, the applicant was and is still a member of the SABEA. The agreement is valid from 1 April 2011 to 31 March 2012. Some respondents terminated their membership from SATAWU subsequent to the signing of the agreement. The applicant argued that notwithstanding the resignation, the agreement is still binding on them. The respondents held a different view, they believed that the agreement might be binding on the respondents.

¹ 75 of 1997.

² 66 of 1995.

[7] The following clauses of the agreement are relevant to the present dispute:

‘8

(3) Meal intervals – An employer shall not require or permit an employee to work continuously for more than five hours without a meal interval of not less than 30 minutes during which interval such Employee shall not be required or permitted to perform any work, and such interval shall not form part of the ordinary hours of work or overtime.

(6) Spreadover – In the case of a member of the Operating Staff the ordinary hours of work, including the meal interval where applicable, and all overtime, shall on any one day be completed within a spreadover of 14 hours.

12. NIGHT-SHIFT ALLOWANCE

A night-shift allowance of five rand (R5.00) per hour will be payable to Employees for actual hours worked between 20:00 and 03:00 (including meal breaks) applicable until 31st March 2013.’

Did the respondents’ conduct constitute an unprotected strike?

[8] The applicant relied on the following submissions in substantiating its version that the respondents had embarked on an unprotected strike:

[8.1] The Main Collective Agreement was binding on the respondents for its duration, that is, from 1 April 2011 to 31 March 2012. It provides for the scheduling of shifts and the payment of a night shift allowance of R5.00 per hour to employees for actual hours worked between 20h00 and 03h00.

[8.2] The applicant denied having acted in contravention of section 17 (2) of the BCEA on the grounds that a collective agreement can vary, replace or exclude any basic conditions of employment other than those specified in section 49 of the BCEA.

- [8.3] The applicant denied that section 17 of the BCEA places a duty on it to provide transport to and from the place of residence of the employees. It submitted that it is sufficient that transport is available before 06h00 and after 18h00 in the form of taxis.
- [8.4] The collective refusal by the respondents to work complete shifts allocated to them in support of their demand for transport to and from their places of residence constituted a strike as defined in section 213 of the LRA.
- [8.5] As the respondents' dispute was about the interpretation and application of a collective agreement, they should have referred it to arbitration in terms of section 24 of the LRA instead of taking the law into their hands by unilaterally and collectively withdrawing their labour before 06h00 and after 18h00.
- [8.6] The respondents should also have referred a grievance to the SARPBC.
- [9] The respondents denied having embarked on an unprotected strike on the following grounds:
- [9.1] The Main Collective Agreement is not binding on them as some of them were never members of the employee party to the agreement. It could possibly be binding on about 180 respondents who were members of SATAWU at the time it was signed. The respondents further submitted that the applicant's failure to identify those respondents who were at some stage members of SATAWU was fatal.
- [9.1] The agreement is of no relevance or application as it was conceived for the conventional bus operations and could not have been formulated to deal with the terms and conditions of service that apply to the respondents as their job functions had not yet come into existence. It was also signed before the full bus service operation in support of the

Gautrain had been rolled out.

- [9.2] The respondents' refusal to do night work does not constitute strike action on the grounds that the applicant is acting in contravention of section 17 of the BCEA by not providing them with transport to and from work when they do night work. Transport is also not available to the respondents at the commencement and conclusion of night work. Section 49 of the BCEA does not take away the rights held by the respondents. The agreement is silent on the issue of transport for night work. The respondents therefore contend that they cannot act unlawfully by refusing to do work they are not required to do in terms of the law.
- [10] In determining whether the respondents' conduct constituted an unprotected strike, I considered whether the agreement was binding on them because clause 39 of the agreement is the dispute resolution clause. It provides for resolution of disputes through conciliation, mediation and/or arbitration. Section 24 (1) and (2) of the LRA provides that disputes about the interpretation and application of a collective agreement are required to be resolved through conciliation and through arbitration if they remain unresolved after the conciliation. Section 65 (1)(c) of the LRA prohibits from taking part in a strike, persons whose issue in dispute is one that a party has a right to refer to arbitration in terms of the LRA.
- [11] Some of the people that a collective agreement binds in terms of section 23 (1)(c) of the LRA are members of a registered trade union that is a party to the agreement if the collective agreement regulates terms and conditions of employment. Section 23 (1)(d) of the LRA adds to the category of employees bound by a collective agreement, employees who are not members of a registered trade union or trade union party to the agreement if the employees are identified in the agreement. The following clause of the agreement stipulates some of the people who are bound by it:

'1.1.1 The terms of this agreement shall be observed in the Road Passenger

Transport Industry –

(b) by all Employers and Eligible Employees within the Road Passenger Transport Industry in the Republic of South Africa.’

- [12] Clause 2 (5) of the agreement defines an “Eligible Employee” as an individual, other than an individual who is part of an Employer’s Management, Supervisory or Management Support Staff, who works in the Road Passenger Transport Industry and who is in the permanent employ of an Employer in that industry. Section 23 (2) provides that a collective agreement binds for the whole period of the collective agreement every person bound in terms of section 23 (1)(c) who was a member at the time it became binding, or who became a member after it became binding whether that person continues to be a member of the registered trade union.
- [13] Based on the above, it is clear that the agreement is binding on all the respondents who were members of SATAWU on and after 1 April 2011 when it became operative. It will remain binding on them until 31 March 2012 as its duration is from 1 April 2011 to 31 March 2012. Their resignation from SATAWU after the agreement was concluded is of no moment. The agreement is also binding, for its duration, on the remaining respondents because they are identified in the agreement as people on whom it is binding as they fall within the category of “Eligible Employees” as envisaged in clause 2 (5) of the agreement. I have rejected the respondents’ argument that the agreement is not binding on them because it has no basis.
- [14] Partial concerted refusal to work by persons who are employed by the same employer for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee constitutes strike action in terms of section 213 of the LRA. Relying on the decision in *Simba (Pty) Ltd v Food & Allied Workers Union and Others* (1998) 19 ILJ 1593 (LC), the respondents argued that their conduct did not constitute an unprotected strike as they refused to do work which they were not legally required to do. It was the respondents’ argument that the applicant was acting

in contravention of the BCEA by not granting them meal breaks and requiring them to do night work without providing them with transport at the commencement and end of their shifts which started before 06h00 and ended after 18h00. They also argued that as the applicant's conduct was illegal because it was in breach of the BCEA this application should be refused. In this regard they referred to this court's decision in *Simba (Pty) Ltd v Food and Allied Workers Union and Others* (1997) 18 ILJ 558 (LC).

- [15] The present case can be differentiated from the two decisions the respondents sought to rely on because it involves a collective agreement which is binding on the parties. The respondents' concerted refusal to do night work for the purpose of resolving the dispute over meal breaks, spreadover and transport to and from work when doing night work constitutes a strike.

- [16] The issues which form the basis of the respondents' dispute are governed by the agreement; meal intervals in clause 8 (3), spreadover in clause 8 (6) and night shift allowance in clause 12. Clause 39 of the agreement provides the dispute resolution procedure. It refers to conciliation mediation and/or arbitration. The respondents' strike action to resolve issues governed by the agreement was in breach of clause 39 of the agreement, sections 24 and 65 (3) of the LRA and therefore unprotected.

- [17] Section 17 of the BCEA requires that employees be compensated for night work. It is common cause that the agreement provides that the respondents be granted an allowance for night work. Section 17 (2) further provides for the availability of transport between the employee's place of residence and the workplace at the commencement and conclusion of the shift. In dealing with night work therefore the parties included only the allowance part of section 17 and excluded the part dealing with availability of transportation. Section 49 (1)(b) of the BCEA prohibits parties to a collective agreement from reducing protection afforded to employees who perform night work in terms of section 17 (3) and (4) of the BCEA. Availability of transportation to employees doing night work is provided for in section 17 (2)(b) of the BCEA and falls within the realm of the basic conditions which can be excluded, in

terms of section 49 of the BCEA, by a collective agreement concluded in a bargaining council. The right of workers doing night work to transportation has been excluded. The dispute regarding the exclusion of the availability of transport for employees doing night work therefore falls within the disputes governed by the agreement as it deals with the exclusion of the right of employees doing night work to transportation. I therefore concluded that the respondents' strike action based on the applicant's refusal to provide the respondents who did night work with transport to and from their places of residence at the commencement and end of night work was unprotected for the same reasons which rendered their strike action for meal intervals and spreadover unprotected. All the disputes and grievances which led the respondents to embark on the unprotected strike are governed by the agreement. The respondents correctly referred them to the SARPBC for conciliation. They should have referred them to the same SARPBC for arbitration. Their failure to do so and embarking on a strike instead rendered their strike action unprotected.

Urgency

[19] The applicant has proved its *prima facie* right by proving that the respondents should have referred the matter to arbitration, in terms of the agreement, the dispute it sought to resolve by embarking on an unprotected strike. The applicant has a right to schedule shifts in terms of the agreement and to conduct its business free from interruption by unprotected strikes.

[20] The balance of convenience favoured the applicant in that the applicant would have suffered more prejudice had this application been refused than the respondents had it been granted. I say so because the applicant could have suffered financial loss and the loss of the contract for ferrying passengers to Gautrain bus stations. The respondents may be granted relief by the arbitrator which will address all the prejudice they will have suffer should the arbitrator find in their favour.

[22] I considered the respondents' point *in limine* that the applicant was not

entitled to any form of interdict because it has an alternative remedy of employing other people to work before 06h00 and after 18h00. At the time of this application, those people had already started working for the applicant before 06h00 and after 18h00. It is true that an applicant for an interdict has to prove that there is no other adequate available remedy. In *Setlogelo v Setlogelo*,³ the court considered whether a claim for damages would not have been an adequate remedy. Dealing with the question of alternative remedy, the court in *Minister of Law and Order v Committee of the Church Summit*,⁴ found that alternative remedy must be adequate in the circumstances, ordinary and reasonable; must be a legal remedy and grant similar protection. The alternative remedy that is referred to is alternative remedy to the grant of an interdict for the violation of the applicant's right by the respondents.

[23] I have already found that the respondents violated the applicant's right to conduct its business in terms of the agreement. It cannot be said that employing other employees to perform duties which the respondents refuse to perform in breach of the agreement, such conduct does not constitute alternative remedy for the violation of the applicant's rights. An example of alternative remedy in the context of an application for an interdict would be damages. The respondents' point *in limine* therefore has no basis. In the circumstances, I accepted the applicant's argument that it had no alternative remedy. Having considered all the factors which I had to consider collectively I concluded that the application was urgent.

[24] It is for these reasons that I granted the interdict on 13 January 2012.

LALLIE J

Judge of the Labour Court

³ 1914 AD 221.

⁴ [1994] (3) SA 89 (B).

APPEARANCES

FOR THE APPLICANT:

Advocate Cassim SC

Instructed by Bowman Gilfillan Incorporated

FOR THE RESPONDENTS:

Mr Van Huysteen of Van Huysteen
Incorporated