REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Case no: J 543/12

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA	Applicant
And	
SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION	First Respondent
THOSE PERSONS LISTED IN ANNEXURE "A"	Second and further Respondents

Heard: **20 April 2012**

Delivered: **20 April 2012**

Summary: (Urgent – return day – strike interdict – employer's substantial compliance with strike demands; Forensic audit – meaning of).

REASONS FOR JUDGMENT

LAGRANGE, J

Introduction

1] This matter came before me on the return day, 20 April 2012. Originally it came before the honourable Basson J for interim relief on 2 March 2012. Interim relief was granted, and on 7 March 2012 an application before the honourable Malindi, AJ to rescind the interim order was dismissed by the honourable judge with costs. Still later, on 16 March 2012, the rule was extended to 19 April 2012 in an order by agreement handed down by the honourable Cele J. In terms of the order, the rule was extended until 19 April 2012, and it was ordered that the applicant's board meeting on 29 March 2012 should table the dispute for discussion and nominees of the board were to meet officials of the union on 2 April 2012. The issue of costs was reserved.

2] When the matter came before me I made the following final order:

2.1 the rule extended on 16 March 2012 is confirmed

2.2 the applicant is directed to hold a meeting as contemplated by paragraph 2 of the court order dated 16 March 2012 within 10 days of this order

2.3 the applicant is ordered to pay the respondent's costs for appearing on 16 March 2012

2.4 there is no order as to costs made in respect of the remainder of these proceedings.

3] My brief reasons for the order are set out below.

Background

4] In January 2012 and the union referred a dispute to the CCMA demanding the suspension of the group CEO, Mr L Montana, and the head of corporate security, Mr K Mantsane. Following the unsuccessful conciliation

of the dispute, the union issued a strike notice to the employer ('PRASA') on 22 February 2012 advising it of its intention to embark on a strike on 27 February 2012. The strike demands were expressed in the following terms by the union in the notice:

> *"The aforementioned strike would be undertaken to advance the following demands:*
>
> *1. Suspension of the group CEO, Mr Lucky Montana and the Head of Corporate Security Mr K Mantsane.*
>
> *2 and that the forensic investigation be commissioned to probe possible acts of misconduct on the part having regard to the dossier submitted by SATAWU to PRASA Board of Directors."*

(*sic*)

5] After the strike had commenced, PRASA brought an urgent application to declare the strike unprotected in terms of the Labour Relations Act 66 and 1995 ('the LRA'), on the basis that the first demand made by the union and its members was unlawful and that the second demand had been met by the respondent and accordingly there was no dispute in existence relating to this demand. The employer also asked for relief to restrain the union and its members from assaulting and intimidating employees and passengers, from damaging its property and from restraining the respondents in interfering with the running of the applicant's business. This relief was granted on an interim basis under the previous orders of this court referred to above.

Merits

The unlawful demand

6] Essentially, this contention referred to the demand to suspend the two managerial staff. PRASA claimed that a demand simply to suspend the two individuals without there being fair grounds for doing so is unlawful, because the employer was obliged to follow a fair procedure and to be

satisfied that there were fair grounds for suspending employees before it could lawfully accede to such a demand. The applicant called Montana to a meeting of the board of directors to answer the extensive allegations made by the union. The union had representatives in attendance at the meeting.

7] The PRASA board was satisfied on the strength of Montana's answers that there was no basis for suspending him. Though no mention is made of whether PRASA also considered suspending Mr Mantsane, it relies in any event on its claim that the suspension demand was not one that it could comply with unless it was procedurally and substantively fair. It was argued by Mr Manchu for the respondents, that the demand did not necessarily mean the agency should have suspended the two individuals without a fair process.

8] However, the demand was not for the employer to suspend them only if it would be fair to do so after following a fair process. It might have been different if the union had demanded that the company should immediately consider the suspension of the staff and implement a suspension if there was good cause for doing so, or simply that they be fairly suspended. In this regard it is important to mention that when the union filed its answering affidavit, it did not explain that its demand was implicitly qualified as was suggested in argument. What the union said was that:

> *"The respondent [the union] is adamant that its demands are within the ambit of the law and fall within the scope of mutual interest disputes. The respondent submits that it has an interest in the corporate governance of the applicant and it is within its right to demand the suspension of an employee pending the conclusion of forensic investigation to either prove or disprove the allegations against the affected employee."*

(emphasis added)

9] In this considered response it might be argued that it was implicit that the union accepted that a suspension could only be implemented after

following due process and on good cause. However, elsewhere in the answering affidavit, the union only says that the demand to suspend the two employees did not mean the applicant should not follow due processes, but nowhere does it indicate that it agreed that the suspensions also would had to have been substantively fair. The importance of this is that once the issue of the true meaning of the union's demand was raised it should have clarified whether it would have been satisfied with due process, even if the outcome did not result in suspensions. The union did not say unambiguously that it was only calling for the suspensions if they were warranted after due process was followed.

10] Looked at from a different perspective, what would the employer have needed to do to satisfy this demand? It is difficult to escape the conclusion that the only thing that would have satisfied the demand was the actual suspension of the individuals in question, even if the union accepted the employer had to follow a fair process. In this respect, the facts of this matter are distinguishable from those in ***City of Johannesburg Metropolitan Municipality v SAMWU & others*** **[2009] 5 BLLR 431 (LC)**, in which the court noted that: *"In these proceedings, the suspension demands, originally tabled in broad terms, have been clarified by the union in its answering affidavit. Its members seek to strike in support of a demand that the employees concerned be fairly suspended."*[1]

(emphasis added)

11] In the *SAMWU* matter the union did not qualify its demand only by an acceptance that the suspension had to be procedurally fair. In this instance, because the union qualified its answer only to say that a fair process had to be followed, it cannot simply be assumed that its demand would have been satisfied if the employer had taken the kind of steps contemplated in the *SAMWU* case to embark on a fair preventative

1 At 431

suspension.[2]

The demand for a forensic audit

12] The demand for a forensic investigation was linked to well-publicised allegations of serious corruption levelled by the union against the CEO, particularly in relation to the award of various tenders by PRASA. PRASA stated that even though its board was of the view that Mr Montana's response to the allegations against him was comprehensive and supported with substantive documentation, it nonetheless instructed its Group Internal Audit and Deloitte to verify the documentation against the respondent's allegations.

13] It further states that on 28 February 2012 the Group Internal Audit and Deloitte tabled its findings to the board. It claimed that the allegations were found to have no basis by Deloitte, which was an independent firm of auditors. Because the investigation was conducted with the assistance of a third party firm of auditors, the agency contended that the call for a forensic investigation was pointless.

14] According PRASA, the outcome of the Group Internal Auditor and Deloitte investigation was that:

14.1 There was no basis for the allegations made against the applicant and Mr Montana;

14.2 All the tenders awarded were in line with the supply chain management ("SCM") policies and guidelines of the applicant;

14.3 Proper approval procedures are in place and were followed in relation to the alleged tender irregularities;

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2 *Ibid.* **The learned judge identified three criteria for a fair preventative suspension as follows:** "The first is that the employer must be satisfied that the employee is alleged to have committed a serious offence. The second requirement is that the employer must establish that the continued presence of the employee at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the well-being or safety of any person or property. The third is that the employee must be given a hearing in the form of an opportunity to make representations before a decision to suspend is taken."

14.4 There was no wrongdoing on the part of Mr Montana and there is no direct correlation between him and the specified tenders;

14.5 Security contracts scrutinised by Deloitte were issued within Metrorail crafting and date back as far as the mid-1990s before Mr Montana was employed by the applicant, and

14.6 The applicant's corporate section had not awarded a security contract or tender.

15] The union complained that it had no knowledge of the outcome report as the agency did not provide it with access to the report. It further contends that in the absence of the reports it cannot be satisfied that the reports produced met its demands and therefore insists that its demands had not been complied with. The union also points out that during the investigation process conducted it was not called upon to make representations as an interested party that had brought the allegations to the attention of the board of directors, and if it had been invited it would have proved that there was a legitimate basis for its allegations as it had witnesses to confirm them. Importantly, the union also said it resorted to strike action as it disagreed with the outcome of the investigation.

16] In response, the applicant points out that it was never part of the union's demand that it be furnished with the report and that the fact that it was dissatisfied with the outcome of the report was not a matter which had been referred to in conciliation before the strike notice was issued. To illustrate deficiencies in the investigation report, the respondents' counsel, Mr Manchu, referred to some of the seven 'inconclusive' findings reached on allegations made by the union. The report was supplied as an annexure to a supplementary affidavit filed by the applicant a couple of days prior to the hearing, so the union did eventually receive a copy.

17] On the face of it, the union might well have some reason to believe that the report does not provide satisfactory answers to some of the allegations it made. The inconclusive outcomes of some enquiries in the report might

well give rise to new demands for further investigations or other steps to be taken. However, the difficulty the union faces in relying on its original demand for a forensic investigation to be undertaken, is that it seeks, with hindsight, to expand on the scope of its original demand in a way that could not have been anticipated by the applicant.

18] Thus it argues that it was implicit that it would be approached for evidence of the allegations. It further argues that its request clearly meant that an independent firm of auditors, which was not PRASA's firm of appointed internal auditors (Deloittes), should have conducted the investigation. It demands that the investigators should have delved deeper when they were unable to obtain information in relation to the inconclusive results of some lines of enquiry, and should have summonsed responsible persons to explain the absence of documentation or information.

19] I can understand that the union would have liked the most comprehensive, independent and searching investigation to have been conducted. However, I do not think it could assume that its view of what was sufficient to constitute a forensic investigation would necessarily be the same as the employer's. If it wished to be part of an enquiry conducted by a third party agency with no ties to the applicant and wanted to receive the results and also wanted the investigators to be given the power to summons persons to provide evidence to the enquiry it should have spelled out these ancillary demands as part of its demands about the investigation. Of course, the fact that these demands were not clearly articulated previously does not mean the union could not table fresh demands flowing from the perceived inadequacies of the original investigation, but then at least the employer will know how far the union expects it to go to meet its demands. Strike demands must be sufficiently clear for the employer to know what is required to avert a strike.

20] The notion of what constitutes a 'forensic investigation' was debated in argument. Mr Manchu advanced a definition which would embrace all the unarticulated details mentioned above. Mr Pretorius referred by contrast to a dictionary definition. The adjective 'forensic' simply means something 'pertaining to or used in a court of law' usually in relation to the detection

of crime.[3] Forensic accounting is described as 'the application of accountancy to investigating fraud'.[4] Clearly, if the applicant appointed its internal audit department and an auditing firm, albeit the one that normally conducts its internal audits, to investigate the allegations of corrupt practices made by the union, that is not an investigation which falls outside of the scope of the meaning of a forensic investigation in the common sense meaning of the phrase. It might be the case that in the accounting profession, the parameters and standards of a forensic accounting investigation might be better defined, but no expert opinion was advanced to support the interpretation advanced by the union's counsel.

21] In the circumstances, I do not think the union's subsequent elaboration of what it expected the applicant to do in the course of conducting a forensic investigation can simply be read into its original demand as features of a forensic investigation necessarily implied by the term. If it wanted those features to be part of the investigation, it was up to it to specify those as part and parcel of its demands.[5] As things stand it must be accepted that if it seeks more from the employer in relation to the investigation of corruption that must be articulated as a fresh demand. PRASA's actions reasonably met the demand originally articulated thereby resolving that dispute and ending the issue as a legitimate basis for striking[6]

22] In respect of the forensic investigation demand there was not a disjuncture

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3 Shorter OED, 6ed.

4 *Op cit*

5 **See *FGWU & others v The Minister of Safety & Security & others* [1999] 4 BLLR 332 (LC)** at 340,[27], viz

"Once that issue has been identified and dealt with in conciliation, the would-be strikers can only strike over that issue. They cannot change the goal posts when they issue the notice in terms of section 64(1)(b). How the applicants understood and designated the issue in dispute when they referred the matter to conciliation is therefore of crucial importance."

6 See in this regard, ***Afrox Ltd v SACWU & others; SACWU & others v Afrox Ltd* [1997] 4 BLLR 382 (LC)**, where the court held, at 386:

"*A strike can terminate in various ways. One way for a strike to terminate is where the strikers abandon the strike. This normally takes the place of an unconditional return to work. Another possible way, for there are probably other ways, (Cf "Some aspects of the termination of a dismissal lock-out" 1994 Contemporary Labour Law 79–83) is by the disappearance of the substratum. If the casus belli is removed, for example, by the employer conceding to the demands of the strikers or by removing the grievance or by resolving the dispute then the foundations of the strike fall away. The strike is no longer functional; it has no purpose and it terminates. When the strikes terminate so does its protection. It is not in the interests of labour peace for a strike action to be continued in such circumstances even in the case of a protected strike. See section 1 of the LRA.*"

between the real dispute and the demand, but between the dispute and demand as originally articulated and the demand as subsequently articulated which set out previously unarticulated pre-requisites for an acceptable investigation. Further, the respondents embarked on a strike over their dissatisfaction with the outcome and extended the issue to a disagreement over the outcome of the investigation. Apart from this being an entirely new element in dispute, the way in which this dispute might have been resolved is unclear, in the absence of the union expressing further demands as to what would resolve this source of dissatisfaction. To the extent that the industrial action was embarked on simply as a way of expressing dissatisfaction with the outcome of the investigation it could not amount to a demand for the purpose of grounding a protected strike, even if it had been referred to conciliation, which it was not.

The failure of PRASA board nominees to meet with the applicants

23] Cele J had, by agreement of the parties, ordered that the applicant's board nominees had to meet with the union officials on 2 April 2012. The applicant did not do so. The reason advanced for not complying with the court's order was that the applicant claimed that the board had met with the union on 17 February 2012 and the honourable judge might not have been aware of this at the time. Accordingly, at a meeting on 29 March 2012, the board resolved that it would be futile to meet with the union again to discuss the same issues. The applicant strenuously insisted it meant no disrespect to the court by not complying with the order.

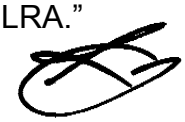
24] The difficulty is that the order was made by agreement so it is hard to understand how the applicant would have acceded to the order if it made no sense to it. If, in hindsight, it saw no point in the meeting it was not within its power to decide to abandon it, unless the respondents agreed to abandon the relief as well. It is not for one party to litigation to unilaterally elect whether or not to comply with orders of court. Its unilateral decision

not to comply with the court's order was high-handed and, if not outright contempt, certainly bordered on it. Costs were awarded to the respondents for the hearing on 16 March, because the settlement which resulted in the order was not complied with.

Variation of the order

In setting out these reasons, it has also become apparent to me that a patent error appeared on the face of the original rule that was confirmed by my order, which the applicant had conceded at the hearing was wrong. Paragraph 2.1 of the order read as follows:

"The strike that commenced on 27 February 2012, is declared to be unprotected, unlawful and prohibited as contemplated by section 65(1)(c) of the LRA."



25] The reference to section 65(1)(c) is patently erroneous. The reasons the strike were declared unlawful are the ones discussed above, namely that the first demand was unlawful and the second demand had been substantially complied with. Accordingly, paragraph 2.1 in the rule should read:

> *"The strike that commenced on 27 February 2012, is declared to be unprotected, unlawful as the first demand is unlawful and the second demand does not concern an existing dispute or grievance."*

26] The final order is accordingly varied by the substitution of paragraph 2.1 of the rule with the revised wording in paragraph [26] above.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: P Pretorius, SC assisted by S Khumalo instructed by Maserumule Inc.

RESPONDENTS: T Manchu instructed by Thaanyane Attorneys.