



REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO C 1006/2011

In the matter between:

CAPE CLOTHING ASSOCIATION

Applicant

and

SOUTHERN AFRICAN CLOTHING

AND TEXTILE WORKERS UNION

First Respondent

NATIONAL BARGAINING COUNCIL FOR THE

CLOTHING MANUFACTURING INDUSTRY

(CAPE CHAMBER)

Second Respondent

Date heard: 18 December 2011

Date of order: 19 December 2011

Reasons for judgment: 13 January 2012

REASONS FOR JUDGMENT

VAN NIEKERK J

Introduction

1] On 19 December 2011, I granted the following order:

“1. A rule nisi is issued calling on the first respondent to show cause on 25 January 2012 why a final order should not be made in the following terms:

1.1 Declaring that the dispute between the applicant and the first respondent pertaining to the interpretation, application or rectification of clause 5 of the 2011/2012 substantive agreement between the applicant and the first respondent, is a dispute contemplated by section 24 of the Labour Relations Act, 66 of 1995;

1.2 Ordering that the first respondent is interdicted and restrained from calling upon its members to embark on strike action in relation to the dispute;

1.3 Ordering that the first respondent inform its members that strike action pertaining to the dispute will be unprotected and that they should desist from such strike action;

1.4 Ordering the first respondent to pay the costs of these proceedings.

2. Subparagraphs 1.2 and 1.3 above shall operate as an interim order pending the final outcome of this application.”

These are my brief reasons for granting the order.

[2] The facts relevant to the application are common cause. The essence of the dispute between the parties concerns the quantum of annual leave pay for the period of the sector’s annual shut down. Part F of the National

Consolidated Main Agreement makes provision for every employee to be granted at least three consecutive weeks' plus one working day's annual leave between 15 December of each year and 14 January of the next. In effect, employees receive 22 calendar days leave.

- [3] Clause 5 of the 2011/2012 substantive agreement between the parties deals separately with the issue of payment for annual leave, and how public holidays that fall within a period of annual leave are to be accounted for. At issue in these proceedings is clause 5 of the agreement. It reads as follows:

“WESTERN CAPE PUBLIC HOLIDAYS

5.1 The Western Cape collective agreement to be amended to reflect the wording of the KwaZulu Natal metro agreement wording on payment of public holidays falling during the shutdown of the industry. This parity dispensation shall become binding with effect from the 2011/2012 annual leave period.

5.2 Consequent to the implementation of the provisions of sub-clause 5.1 above, Western Cape employees shall be paid an additional two (2) days' paid leave for the 2011/2012 annual leave period.”

- [4] The union contends that the existing terms and conditions of employment of its members in the Western Cape require that they be paid an amount equivalent to 20 (or 21) days pay over the annual industry shut down period. The claim is computed on the basis that the Main Agreement entitles each worker to 18 (or 19) days' pay, plus the additional two days referred to in clause 5.2 of the 2011/2012 substantive agreement. (Whether the claim is for 20 or 21 days is dependent on whether the Day of Reconciliation, 16 December, falls within the annual shut down period of any particular employer).
- [5] The applicant does not share this interpretation. It contends that clause 5 of the collective agreement sought to ensure parity with the dispensation on KwaZulu Natal and that the union's interpretation of clause 15 would require employers in the Western Cape to pay a premium of two days pay,

over and above that paid by employers in KZN. (It appears that in KZN, employers pay employees for 15 days plus 3 (or 4 if they shut down on 15 December)). On 29 November 2011 the applicant declared a dispute about the interpretation and application of clause 5. The dispute was referred to expedited arbitration.

- [6] Shortly before the commencement of the arbitration, there was a dispute about the arbitrator's terms of reference and the proceedings were aborted. On 14 December 2011, the union referred a dispute to the bargaining council, contending that the applicant had unilaterally varied the terms and conditions of employment of its members by paying less than 20 or 21 days for the 2011/2012 holiday period, and seeking the restoration of the status quo as contemplated by s 64 (4). The union subsequently issued a notice of its intention to strike in circumstances where it contended that the time limits contained in s 64 (1) did not apply, at least as against those of the applicants members who failed or refused to pay 20 or 21 days leave.
- [7] In these proceedings, in essence, the union contends that the existing terms and conditions of employment that apply to its members in the Western Cape require their employers to pay to them the amount equivalent to 20 (or 21) days pay over the shut down period, and that the applicant's members have unilaterally changed this term by stating that the employers will only pay for 18 (or 19) days pay. Having declared a dispute in terms of s 64(4), the union contends that there is no reason in law why it should not declare a dispute in terms of s 64(4), and to take strike action when the employers do not reverse the unilateral change complained of within the 48 hour period referred to in s 64(3) (e).
- [8] Mr Oosthuizen SC, for the applicant, submitted that properly construed, the dispute between the parties is one concerning the interpretation and application of clause 5 of the collective agreement, and that in terms of s 24 of the LRA, that is a dispute that is required to be referred to arbitration. Since the substantive limitations on the right to strike in s 65(1) (c) of the Act extend to disputes that the Act requires be referred to arbitration or adjudication, the strike called by the union is unprotected.

- [9] In *Ceramic Industries LTA t/a Betta Sanitary Ware v National Construction Building and Allied Workers Union (2)* (1997) 18 ILJ 671 (LAC), Froneman JA dealt with the characterisation of a dispute for the purposes of strike action. In that case, a union had referred a dispute to the CCMA concerning the harassment of its officials and members by certain members of management. Rejecting a characterisation by this court that the subject matter of the dispute included a demand for the dismissal of the latter, Froneman JA said:

“Even it was open to approach the matter on the basis of a characterisation of the issue as one involving a specific demand, there are compelling reasons why it would not in any event not affect the eventual outcome of the present case. The union’s initial complaint was the alleged harassment of union officials and employees. For the reasons already stated that was a justiciable rights dispute with a specific remedy to be pursued at the Labour Court. The union could not convert the nature of that underlying dispute into a non-justiciable one simply by adding a demand for a remedy falling outside those provided by the Act. The tail cannot wag the dog. If such an approach is allowed, an underlying rights dispute normally justiciable or arbitrable in terms of the Act could be transformed into a strikeable issue simply by adding a demand for a remedy not provided for in the Act. That would not be acceptable” (at 677J-678A).

- [10] This has been interpreted by the Labour Appeal Court to mean that it is this court’s duty to ascertain the true or real issue in dispute (see *Coin Security Group (Pty) Ltd v Adams & others* (2000) 21 ILJ 925 (LAC), at 9309B). In doing so, the court is obliged to look at the substance of a dispute, and not the form in which it is presented. Nor is the characterisation of a dispute by any of the parties decisive.
- [11] Applying these principles, it seems to me that properly characterised, the dispute between the parties in the present instance concerns the application and interpretation of the collective agreement between them, and more particularly of clause 5. The interpretation of clause 5 is obviously contested terrain, and what the union effectively claims is that

those employers who fail to pay the additional two days' leave pay are in breach of the collective agreement. The appropriate remedy in this instance is to invoke the provisions of s 24. There is a weight of authority to suggest that the CCMA has the necessary jurisdiction to correct any erroneous interpretation of a collective agreement and to order a party in breach of the agreement to comply with it (see, for example, *Fouche A in Oelofsen & another and SA Police Service* (2006) 27 ILJ 639 (A, especially at 651, referring to *Coetzee v SAPS PSCB* 146-03/04). To find that the union members' existing terms and conditions of employment entitle them to leave as contended for by the union, I would necessarily be obliged to determine the dispute about the interpretation of clause 5. This I am clearly not empowered to do – a dispute of this nature must in the first instance be referred to arbitration. It is not possible for me to make a ruling in favour of the union without usurping the arbitrator's function. This court has no jurisdiction to adjudicate a dispute that the Act requires to be arbitrated (see s 157(3)). For those reasons, in my view, the application cannot succeed.

- [12] In any event, I am not persuaded that the provisions of s 64(4) give rise to a right to strike in the present circumstances. That section is concerned to preserve the status quo, pending the outcome of the conciliation process prescribed by the Act. To invoke the remedy established by s 64, it is necessary to establish both an existing term and condition of employment and the fact of a variation of that term and condition by the employer, in circumstances where the employee has not consented to the variation. The easy examples are the unilateral change to hours of work or a shift system, or the unilateral implementation of an offer tabled by the employer during the bargaining process that has the effect of increasing employees' remuneration but not to the extent demanded by the union. Here, there is some overt act by the employer that constitutes the act of variation. That element is not present in this instance. The status quo relied on by the union is its interpretation of the Main Agreement and the 2011/2012 substantive agreement. That interpretation is contested terrain. It does not ordinarily amount to a unilateral change to employment conditions when a union claims that a collective agreement giving rise to those conditions

provides for x while the employer claims that they provide for y. Secondly, the temporary nature of the status quo relief is a clear indication that it is not intended to apply in circumstances such as the present. Du Toit *et al* in *Labour Relations Law: A Comprehensive Guide* 5th ed., observe that s 64(4) does not apply to changes that may be referred to arbitration or adjudication in terms of the Act, because such disputes are excluded altogether from the ambit of protected industrial action (see p 304). There is another reason why this is so. Assuming the union's submissions to be correct, it would mean that the employers in the sector are obliged to pay annual leave pay at the rate the union contends for, but only for the period referred to in s 64 (4), i.e. the period of the conciliation proceedings. Presumably, after the expiry of that period, the union's members would then be obliged to return the additional leave pay they claim to their employers. This is not consistent with the purpose of s 64(4), which, as I have indicated, is ultimately directed at delaying an employer's right to resort to economic power in the form of a unilateral implementation of changes to conditions of employment.

[13] In short: even if the dispute between the parties is to be categorised as a dispute concerning a unilateral change to conditions of employment, the status quo remedy established by s 64 is not applicable in the present instance, and the union is not entitled to rely on s 64 (?) to give notice of a strike without the time periods established by s 64 being exhausted.

[14] For these reasons, I was satisfied that the applicant had established a *prima facie* right for the purposes of the test applicable to the granting of interim relief, and issued the rule *nisi* reflected in paragraph [1].

André van Niekerk
Judge

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