



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: 26 April 2012

Date of judgment: 12 June 2012

JUDGMENT

STEENKAMP J

Introduction

- 1] This is the return day of a rule *nisi* granted by Van Niekerk J on 19 December 2011. He granted the following order:

“1. A rule nisi is issued calling on the first respondent to show cause on 25 January 2012¹ 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.”

¹ The rule *nisi* was extended a number of times by agreement between the parties. The return day, when I finally heard argument on whether the rule should be confirmed, was 26 April 2012; and, given that I reserved judgment on that day, the rule *nisi* was further extended by agreement to 12 June 2012.

On 13 January 2012, Van Niekerk J provided written reasons for granting the order. I have had regard to those reasons when hearing argument on the return day and in considering my reasons for this judgment. In setting out the background to the dispute, I have quoted *verbatim* from his summary.

Background

- [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 year. 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. That agreement came into effect on 1 September 2011 and remains effective until 31 August 2012. At issue in these proceedings is clause 5 of the substantive 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 5 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.

Is the union entitled to strike in terms of s 64(4)?

[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).

2] Mr *Kahanovitz*, for the union, contended that it matters not what was envisaged by the main agreement and this court need not interpret it: on the clear language of clause 5.2, its members are entitled to be paid two days extra for the 2011/12 shutdown period; the applicant refuses to pay it; and that amounts to an unilateral change to the workers' terms and conditions of employment – *ergo*, having followed the procedure prescribed by s 64(4), they have the right to strike.

[8] Mr *Oosthuizen*, 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. he argued that clause 5.2 of the agreement cannot be read in isolation: that clause is "consequent to" clause 5.1; it was designed to achieve parity between Western Cape and KwaZulu-Natal; and there is now a dispute as to whether it is being correctly interpreted or applied in order to achieve parity.

The applicable legal principles

[9] In his earlier judgment giving reasons for granting the rule *nisi*, Van Niekerk J had regard to *Ceramic Industries LTA t/a Betta Sanitary Ware v National Construction Building and Allied Workers Union* (2)², where

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. The court started off by restating the general principle:³

“Broadly speaking, therefore, the Act seeks to give effect to the fundamental right to strike by insulating participation in a protected strike from the legal consequences that might otherwise have followed in its wake. On the other hand, it regulates that right both procedurally and substantively. Procedurally it does so by requiring that certain formal requirements have to be met before protection follows. Substantively, it imposes limitations, one of which is to limit protected strikes to issues that are not arbitrable or justiciable in terms of the Act .”

- 3] And of course one of those issues that are arbitrable in terms of the Act is a dispute about the interpretation or application of a collective agreement in terms of s 24(2).
- 4] Rejecting a characterisation by this court that the subject matter of the dispute in *Ceramic Industries* included a demand for the dismissal of the employer’s officials, Froneman JA said:⁴

“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.”

[10] As Van Niekerk J pointed out, this has been interpreted by the Labour

3 At 675 C-D.

4 at 677J-678A.

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 930B). 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. This principle was recently confirmed by the Labour Appeal Court in *BMW South Africa (Pty) Ltd v NUMSA*⁵ and by this court in *Parliament of the RSA v NEHAWU & Others*.⁶

- 5] In *Eskom v NUMSA and Others*⁷ the Labour Appeal Court held that the clear purpose of sections 64(4) and (5) is:

“...to retain or restore the status quo until the conciliation stage regarding a dispute about a unilateral change to terms and conditions of employment is over and both parties are in a position to resort to the use of economic power.”

- 6] In the present case, though, as Van Niekerk J pointed out, there is a dispute about what the status quo is: The parties differ over the interpretation of the substantive agreement currently in force. In other words, it is not clear that there has been a unilateral variation in circumstances where the existing terms and conditions (as amended by agreement in the Bargaining Council) are not clear.
- 7] This is analogous to the position in *Kathmer Investments Ltd v Woolworths (Pty) Ltd*⁸ where it was held that a dispute about what any term of an agreement was, is a dispute which arises out of the agreement or which concerns the agreement, and was therefore referable to arbitration.
- 8] The union placed much reliance on the decision of the Labour Appeal Court in *Maritime Industries Union of South Africa (MITUSA) and Others v*

5 [2012] 3 BLLR 274 (LAC); (2012) 33 ILJ 140 (LAC) para [27] and authorities there cited.

6 (2011) 32 ILJ 2534 (LC).

7 (2002) 23 ILJ 2208 (LAC) para [12].

8 1970 (2) SA 498 (A) at 503 G-H.

- 9] In *MITUSA*, Zondo JP stated *obiter*:

“[106] It is clear that s 64(4) relates to a dispute about a unilateral change to terms and conditions of employment. It is also clear that it affirms that such a dispute can be the subject of a referral in terms of s 64(1) ^D which is a referral of a dispute that can be the subject of a strike. Accordingly, it can be accepted that a strike is competent in respect of a dispute about a unilateral change to terms and conditions of employment. However, if a dispute about a unilateral change of conditions of employment can properly fall within the provisions of ^E item 2(1)(b) of schedule 7, it will nevertheless be arbitrable. ‘Strikeable’ and arbitrable disputes do not necessarily divide into watertight compartments. Although in relation to dispute resolution the Act contemplates the separation of disputes into those that are resolved through arbitration, those that are resolved through ^F adjudication and those that are resolved through power-play, there are disputes in respect of which the Act provides a choice between power-play, on the one hand, and, arbitration, on the other, as a means for their resolution. This is the case, for example, with disputes about organizational rights. (see s 65(2)(a) and (b) read with s 65(1)(c) ^G and ss 12-15 and s 21 and s 22.)

[107] A dispute about a unilateral change to terms and conditions of employment, which, as already stated above, is a dispute in respect of which a strike is competent, may, arguably also be said to fall within the ambit of an unfair labour practice as defined in item 2(1)(b), ^H especially in relation to training, demotion and the provision of benefits to an employee. A dispute falling under item 2(1)(b) is, of course, subject to arbitration in terms of item 3(4)(b) . The idea of giving such a choice is also to be found in the Labour Relations Amendment Act 12 of 2002. In s 189(7) a registered trade union is ^I given a choice, when an employer has given a notice to terminate employees’ contracts of employment for operational requirements either to refer the dispute about such a termination to the Labour Court for adjudication or to resort to a strike.”

- 10] Of course, Item 2(1)(b) of Schedule 7 has since been replaced by s 186(2) of the LRA, dealing with unfair labour practices. I accept that there will be instances where the same action – for example, the removal of training, as in *MITUSA* – could give rise to either an unfair labour practice claim or a

9 (2002) 23 *ILJ* 2213 (LAC) para [106] – [107].

dispute in terms of section 64(4), where an existing right appears to have been varied. But that judgment does not go so far as to suggest, in my view, that a dispute about the interpretation of a collective agreement is also strikeable.

- 11] A dispute about the interpretation and application of a collective agreement falls squarely within the ambit of s 24 of the LRA. And the limitation on the right to strike in s 65(1)(c) is unequivocal:

“(1) No person may take part in a *strike* or a *lock-out* or in any conduct in contemplation or furtherance of a *strike* or a *lock-out* if-

(a) ...

(b) ...

(c) the *issue in dispute* is one that a party has the right to refer to arbitration or to the Labour Court in terms of *this Act*;

- 12] And s 24 creates the remedy for a dispute about the interpretation or application of a collective agreement:

“24 (2) If there is a *dispute* about the interpretation or application of a *collective agreement*, any party to the *dispute* may refer the *dispute* in writing to the Commission if-

(a) the *collective agreement* does not provide for a procedure as required by subsection (1);

(b) the procedure provided for in the *collective agreement* is not operative; or

(c) any party to the *collective agreement* has frustrated the resolution of the *dispute* in terms of the *collective agreement*.”

Applying the legal principles to this case

- [11] Applying these principles, I agree with Van Niekerk J 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, as he said, “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. Despite Mr *Kahanovitz*’s argument to the contrary, clause 5.2 is not clear and does

not create a clear term or condition of employment that has been unilaterally varied. The clause cannot be read in isolation¹⁰; it is intended to be implemented “consequent to” clause 5.1, ie to achieve parity; and there is clearly a dispute as to its interpretation and application between the parties.

- 13] This situation is not the same as the one that pertained in *SA Federation of Civil Engineering Contractors v NUM & another*¹¹ to which Mr Kahanovitz referred me. In that case, the court accepted – correctly – that, as a general rule, employees are not precluded from striking over an issue covered by a current agreement in support of a demand relating to a future agreement. But in the case before me, there is a dispute about the interpretation and application of the current collective agreement. The union has not formulated a new demand to be embodied in a future agreement.
- 14] The appropriate remedy in this instance, as Van Niekerk J found when granting the rule *nisi*, is to invoke the provisions of s 24. He referred to a number of authorities 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. Even though it was an arbitration award and thus not authoritative, I agree with the findings of Fouché A – referred to by Van Niekerk J -- in *Oelofsen & another and SA Police Service* (2006) 27 ILJ 639 (A), especially at 651, referring to *Coetzee v SAPS PSCB* 146-03/04).
- 15] Van Niekerk J correctly pointed out that, to find that the union members’ existing terms and conditions of employment entitle them to leave as contended for by the union, this court would necessarily be obliged to determine the dispute about the interpretation of clause 5. This it is not empowered to do – a dispute of this nature must in the first instance be referred to arbitration. It is not possible for this court to make a ruling in favour of the union without usurping the arbitrator’s function. This court

10 See *Cinema City v Morgenstern Family Estates & Others* 1980 (1) SA 796 (A) 804 E-F; *Richter v Bloemfontein Town Council* 1922 AD 57 at 69 *infra*.

11 (2010) 31 ILJ 426 (LC).

has no jurisdiction to adjudicate a dispute that the Act requires to be arbitrated (see s 157(3)). For those reasons, the application cannot succeed on the return day either.

- [12] Van Niekerk J was in any event not persuaded that the provisions of s 64(4) give rise to a right to strike in the present circumstances. Neither am I. As he pointed out, 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. That has not happened in this case. The status quo relied on by the union is its interpretation of the Main Agreement and the 2011/2012 substantive agreement. That interpretation is, in the words of Van Niekerk J, contested terrain. 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 (4) to give notice of a strike without the time periods established by s 64 being exhausted.

Conclusion

- [14] I am satisfied that the applicant has established a clear right for the purposes of granting final relief.
- 16] Both parties have argued that costs should follow the result, despite their continuing relationship.
- 17] The rule *nisi* is confirmed. The respondent is ordered to pay the applicant's costs, including the costs of senior counsel.

Anton Steenkamp
Judge of the Labour Court

APPEARANCES

APPLICANT: Adv André Oosthuizen SC,
instructed by Norton Rose.

FIRST RESPONDENT: Adv Colin Kahanovitz SC,
instructed by Cheadle Thomson and Haysom Inc.