



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D172/12

In the matter between:

APOLLO TYRES SA (PTY) LTD

Applicant

and

**NATIONAL UNION OF
METALSWORKERS
OF SOUTH AFRICA**

First Respondent

**EMPLOYEES EMPLOYED AT Second and further Respondents
APOLLO TYRES (DURBAN
FACTORY)**

Heard: 9 March 2012

Delivered: 12 March 2012

JUDGMENT

VAN NIEKERK J

- [1] This is an urgent application in which the applicant seeks an interim order interdicting a strike that has been called at its premises. It does so by seeking a declaratory order to the effect that the substantive underlying

demand for the restoration of the shift system worked at the applicant's Durban factory prior to 20 February 2012 is unlawful, and because the union has failed to comply with the recognition agreement.

- [2] It is not disputed that the application is urgent. In so far as the applicant contends that it has a prima facie right that entitles it to the relief sought, this is obviously dependent on the correctness of its contentions as recorded in paragraph [1].
- [3] I do not intend to burden this judgment with a recitation of the material facts – these are largely a matter of common cause. All that needs to be recorded for present purposes is that on 12 February 2012, this court (per Gush J), in relation to a previous application to interdict a strike called at the applicant's premises, granted an order in the following terms:

*“The second and further respondents are interdicted from continuing with or participating in a strike concerning the implementation of the new shift system and are directed to tender their services in accordance with the new shift pattern **unless and until they have complied with the provisions of section 64 (1) of the LRA**”* (own emphasis).

- [4] That order was granted in circumstances where the union had initially contended that it was entitled to call a strike without compliance with the procedural limitations contained in s 64(1) because the applicant had failed to restore the status quo as demanded by the union in terms of s 64(4). In other words, the court found that the strike was unprocedural, not that it was unprotected for any substantive reason, and interdicted the strike for so long as the union failed to comply with the procedural requirements set out in s 64 (1). Those requirements have been met, and there is no bar either in terms of s 64(1) or the order granted on 12 February to the strike that is the subject of these proceedings.
- [5] In response to the applicant's contention that the union's demand is unlawful because it requires the applicant to implement a shift system that contravened the BCEA, the union modified its demand to require agreement to apply for a ministerial variation or exemption so as to permit the restoration of the old shift pattern. The union's demand is not that the

applicant adopts a shift system that contravenes the BCEA. Its demand, as modified, is that the applicant agrees to apply for a variation so as to permit the reinstatement of the shift system it demands, and that it be implemented if and when the variation is forthcoming.

- [6] The applicant's case appears ultimately to be that it would be inconvenient to have to apply for the necessary variation on an annual basis, as contemplated by the BCEA . The applicant's inconvenience is not a factor that is relevant to the determination of the lawfulness of the union's demand. The shift system that is the subject of the union's demand is one that its members regard as convenient, but that equally is not a basis for this court to intervene in the power play that has been initiated. Following this, and to the extent that the applicant contends that the union's demand is unreasonable and that it is entitled to an order on that basis, the LRA establishes a voluntarist system of collective bargaining. This precludes courts from determining whether parties are acting rationally during the collective bargaining process, and in particular, from determining the rationality of a party's demand. There is an exception perhaps where a demand is unreasonable in the sense that it is incapable of acceptance or implementation or that it would require the party to whom the demand is directed to act unlawfully, but this is not a case that falls into that category.
- [7] In so far as the applicant contends that the strike is unprotected because the union has failed to comply with pre-strike procedures established by the recognition agreement, the law is clear. In *County Fair Foods (Pty) Ltd v FAWU* [2001] 5 BLLR 494 (LAC), the Labour Appeal Court held that it was sufficient for a union party to comply either with the relevant statutory procedures or with the provisions of a collective agreement to the extent that the agreement establishes a dispute resolution procedure. Although that decision has been criticised, it remains binding and I fail to appreciate any basis on which I am entitled to depart from it.
- [8] In the circumstances, the applicant has failed to establish a prima facie right to the relief that it seeks, and the application stands to be dismissed.
- [9] Finally, in relation to costs, the parties remain locked in a power struggle over the issue of a shift system. One way or the other, they will have to

resolve their differences. In my view, an order for costs would prejudice the prospects of an expeditious resolution of the dispute between them, and for that reason, on tea sis of *National Union of Mineworkers v East Rand Gold and Uranium Ltd* (1991) 12 ILJ 1221 (A), I intend to make no order as to costs.

Order

I accordingly make the following order:

1. The application is dismissed.
2. There is no order as to costs.

Van Niekerk J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Mr A Rocher Farrell Inc Attorneys

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FIRST RESPONDENT: Ms B Witcher, Brett Purdon Attorneys