



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, BRAAMFONTEIN

JUDGMENT

Not Reportable

Case no: J599/2013

In the matter between:

TRUSTEES OF LEKOA TRUST

Applicant

and

TAWU AND OTHERS

Respondents

Heard: 26 March 2013

Delivered: 26 March 2013

JUDGMENT

GUSH, J

[1] The applicants, in this matter, have applied for an order, firstly condoning the applicants' non compliance to the forms of service provided for in the Labour Court Rules and treating the matter as one of urgency and for a rule *nisi* calling on the first and further respondents to show cause in date and time to be determined by the court why an order should not be made in the following terms:

'2.1 Declaring the refusal by the individual respondents employed by the applicant as set out in Annexure A

to the Notice of Application to work special hired trips; to be an unprotected strike and or unlawful industrial action as contemplated in Section 68 of the Labour Relations Act 66 of 1995 ("the LRA")

2.2 Interdicting and restraining the individual respondents employed by the applicant as listed in Annexure A to this notice of application from participating in the unlawful strike, and or unlawful industrial action of refusing to work on special hire trips;

2.3 Interdicting the first respondent from instigating the individual respondents to participate in an unprotected strike by refusing to work on special hire trips.'

- [2] The applicant applied for the above three paragraphs to serve as an interim interdict pending the final determination of the application.
- [3] The basis for the interdict is a collective refusal by the second and further respondents to undertake trips known as special hire trips where a party hires a bus from the applicant for purposes of attending a function together. It is common cause that the individual respondents who are drivers employed by the applicant are collectively refusing to undertake such trips.
- [4] The respondents have raised a number of issues why they are refusing to undertake such trips which I will deal with later. The respondents' concede that they have not referred a dispute over these issues for conciliation as is required for a protected strike to take place.
- [5] In fact, Mr Lengane, who appeared for the respondents, despite the affidavit filed by the respondents in which it is admitted that the respondents are refusing to undertake "private hire" trips conceded

variously at times during his argument that the individual respondents that they were refusing to undertake the special hire trips at times argued that they were not refusing to undertake the “special hire” trips.

- [6] The applicant’s drivers, including the respondents are employed in terms of a contract of employment which provides under the heading ‘Hours of Work’, that they would work 45 hours per week. In so doing, the contract requires that they work six days a week, Mondays to Saturdays and from time to time they will be required to work overtime and operate special hires.
- [7] The respondents urged that the interpretation of this clause should be interpreted to mean something other than it in fact means. The respondents urged that this clause should be interpreted to mean that all special hire trips are overtime. The clause clearly provides that from time to time the employees will be required to work overtime on the one hand and on the other, from time to time the employees will be required to operate special hire trips.
- [8] There is nothing to support the respondents’ suggested interpretation that the clause designates special hire trips as overtime.
- [9] The second issue which was raised by the respondents was that as they had made no demand this defeated any suggestion that their action in refusing to undertake the trips was a strike.
- [10] Attached to the applicants’ papers, however is a letter addressed by the respondents to the applicants. Although it is headed a request, it is no more than a demand by the respondents that they be paid a certain amount per special hire trip and that it is very urgent matter and that a reply is requested on or before Friday 8 March.

- [11] The payment for undertaking special hire trips appears to be the central issue surrounding the refusal to work. The applicants have set out in their founding affidavit the source of the respondents' unhappiness. It appears that having discovered some irregularities in the booking of private hire trips that it outsourced the booking of these trips in order to obviate the irregularities and had this was the reason for the respondents' concern.
- [12] In its opposing papers, the respondent raises a number points *in limine*. The first point *in limine* is that the urgency is supposedly self created. The basis upon which the urgency is supposedly self created is that the applicant had knowledge of the alleged unprotected strike action on 6 March when the letter was sent which I referred to earlier.
- [13] On 9 March, the individual respondents did not undertake the special hire trips apparently in accordance with the demand (which the respondent deny is a demand) not having received the desired reply by 8 March. Special hire trips are generally undertaken over weekends.
- [14] The respondents' refusal to undertake the trips continued over the 16 March weekend and the applicant is criticised by the respondents for attempting to resolve the matter by meeting with the first respondent without approaching the court. This, the respondents suggest, lead to a self created urgency.
- [15] It is nothing of the sort, it is no more than the responsible action of an employer to approach the representative trade union and to try and resolve the matter before resorting to court action.
- [16] This application was brought shortly after theses attempts failed and in anticipation of a reasonable apprehension that the refusal would continue. I have no doubt that given the circumstances of the matter that the application is urgent.

- [17] The second point in *limine* which the respondents raise is the existence of an alternative remedy. The alternative remedy which the respondents suggested was for the applicants could refer the dispute to arbitration. Quite how this would deal with the continued concerted refusal to work in support of their demand, clearly, a dispute they regard as a dispute of interest, is a mystery. The respondents' in addition suggested that the dispute could be referred to private arbitration. The respondents offer no explanation why they have not taken steps to have the dispute referred to the bargaining council in order that the matter be conciliated and to enable them to embark on protected industrial action.
- [18] I have no doubt that in the circumstances taking into account the nature of the demand which is for additional payment and the timing of the strike, the applicants had no reasonable alternative remedy other than to approach the court.
- [19] In addition to the respondents demands for increased payment, the respondents suggest that the reasons for the refusal are that they are required to do private hire trips for other companies and claim payment from the other company.
- [20] Apart from denying that this takes place, it is clear from the papers that the private hire trips undertaken by the applicant are operated in circumstances where a third party or an agency hires the vehicle and the vehicle is despatched by the applicant and is driven by one of its drivers and the applicant pays the driver for his services. The services of the driver in these circumstances fall within the second and further respondents' duties as set out in their contracts of employment.
- [21] I have no doubt in the circumstances that the applicants are entitled to an order that the respondents' conduct constitutes an unprotected strike and that the applicants are entitled to an

order interdicting and restraining the second and further respondents from continuing with and participating in the unprotected strike action.

[22] As regards any disputes which relate to payment, it is open to the respondents to refer such disputes to the appropriate Bargaining Council for those disputes to be resolved. If the respondents are instructed to obtain their remuneration from a third party in respect of a trip they are required to undertake, and refuse to do so, that refusal does not fall within their contracts of employment and their refusal to undertake such trips does not constitute an industrial action.

[23] In the circumstances, I grant an order as set out in paragraphs 1 and 2 and 2.1, 2.2, 2.3, 2.4, 2.5, and 2.6 as amended viz:

- a. The applicant's non compliance with the forms and service provided for in the Labour Court Rules and treating this matter as one of urgency in terms of Rule 8 is condoned;
- b. A rule nisi is issued calling upon the first and further respondents to show cause on 16 May 2013 why an order should not be made in the following terms:
 1. Declaring the refusal by the individual respondents employed by the applicant as set out in Annexure A to the Notice of Application to work special hired trips; to be an unprotected strike and or unprotected industrial action as contemplated in Section 68 of the Labour Relations Act 66 of 1995 ("the LRA")
 2. Interdicting and restraining the individual respondents employed by the applicant as

listed in Annexure A to this notice of application from participating in the unprotected strike, and or unprotected industrial action of refusing to work on special hire trips;

3 Interdicting the first respondent from instigating the individual respondents to participate in an unprotected strike by refusing to work on special hire trips.

- c. That the respondents pay the costs hereof
- d. That paragraphs 1,2, and 3 above operate as an interim order pending the final determination of this application
- e. That the order be served on the first respondent by serving or faxing the order to the first respondent on fax number 0118384452; and on the second and further respondents by serving or faxing the order to the first respondent and by placing a copy of the order on the notice boards at the applicant's operations.

Gush, J

Judge

APPEARANCES

For the Applicant: Advocate Nalane

Instructed by: Bowman Gilfillan

First and Further Respondents: Advocate Lengane

Instructed by: Medupi Lehong Inc

LABOUR COURT