



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: J167/15

In the matter between:

**ZULULAND ANTHRACITE
COLLIERY PROPRIETARY LIMITED**

Applicant

and

**ASSOCIATION OF MINEWORKERS
AND CONSTRUCTION UNION**

First Respondent

**THE INDIVIDUAL RESPONDENTS WHOSE
NAMES ARE LISTED IN ANNEXURE "A"**

Second to Further Respondents

Date heard: 5 March 2015

Delivered: 7 August 2015

JUDGMENT

RABKIN-NAICKER J

[1] The applicant company approached the court on an urgent basis for an order declaring a strike which started on 30 January 2015, to be unprotected, and

interdicting the second and further respondents from participating in the said conduct. A *rule nisi* by consent was ordered by my brother Cele J on 3 February 2015. Before me, the respondents opposed confirmation of the rule and sought to have it discharged with costs. The parties are signatories to a collective agreement (the relationship agreement) which provides that AMCU will only have access to the Bargaining Forum to negotiate on substantive issues once it has enjoys 30% representivity in the bargaining unit. At the time of the strike it had 22.63%.

[2] It is argued by AMCU, on the basis of the full set of affidavits, that the strike was protected and the company is not entitled to the confirmation of the rule which should be discharged with a punitive costs order. The company contends that the true reason for the strike is that AMCU sought to bargain with it in contravention of the recognition agreement which only permits bargaining where certain representative thresholds are met. On the other hand, AMCU contends in its papers that the true reason for the strike was the unilateral implementation of changes to the shift system.

[3] However, in submission before me on behalf of AMCU it was argued that nothing turns on the question of the nature of the shift system and that even if it is accepted that the company was entitled to introduce the system as a matter of managerial prerogative, it does not follow that the employees were precluded from striking in relation to changes to the shift system. In other words it is on this novel submission that AMCU wishes to have the matter decided.

[4] The argument put up on behalf of AMCU is as follows:

4.1 The definition of "strike" in section 213 of the LRA is: "strike' means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory;" (AMCU's emphasis);

- 4.2 This definition ought to be considered together with the definition of the phrase “issue in dispute” in section 213 of the LRA i.e. “the demand, the grievance, or the dispute that forms the subject matter of the strike or lock-out”. (AMCU emphasis)
- 4.3 As such, it is a misnomer that a strike must be premised on a demand made in the context of collective bargaining (or an attempt to bargain or obtain rights).
- 4.4 It is perfectly permissible for employees to strike in relation to an issue in respect of which they are aggrieved, with a view to resolving such grievances.
- 4.5 The strike that commenced on 30 January 2015, took place:
- (a) outside of the context of collective bargaining (or a demand or attempt by any party to bargain collectively);
 - (b) in the context of the employees being aggrieved regarding changes to the shift system implemented by the company on 21 October 2013;
- 4.6 The strike accordingly related to a grievance regarding the implementation of the 3 shift system (and not a demand in the context of collective bargaining, or an attempt to bargain regarding the issue).
- 4.7 The employees thus were entitled to strike on the basis of their grievance. This is so irrespective of whether, from a contractual perspective, the Company was entitled to introduce changes to the shift system on 21 October 2013.

[5] Further, AMCU submits that to consider whether collective action which falls within the definition of “strike” is protected, regard must first be had to section 64(1)(a) (i) and (b) of the LRA, i.e.

“(1) Every employee has the right to strike and every employer has recourse to lock-out if-

- (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and-

- (i) a certificate stating that the dispute remains unresolved has been issued; or
- (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that-
- (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless-
 - (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
 - (ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation;

[6] On the basis that the jurisdictional pre-requisites of the above provision were met and that the applicant company did not specifically identify any provision contained in section 65 of the LRA, the respondents submit that the strike was protected.

[7] The above argument falters in major respects. First, the AMCU submissions are premised on the basis that there is a right to strike over a grievance that does not amount to a demand within the context of 'collective bargaining.' This stance misconstrues what 'collective bargaining' is. In ***National Union of Public Service and Allied Workers obo Mani & Others v National Lotteries Board 2014 (3) SA 544 (CC)***, the majority judgment per Zondo J, considered the meaning and purpose of collective bargaining:

“[142] Earlier I referred to every trade union's right in s 23(5) of the Constitution 'to engage in collective bargaining' and the fact that the LRA was enacted to give effect to the rights in s 23 of the Constitution. About collective bargaining it has been said:

'(B)y bargaining collectively with organised labour, management seeks to give effect to its legitimate expectation that the planning of production, distribution, etc should not be frustrated through interruptions of work. By bargaining

collectively with management, organised labour seeks to give effect to its legitimate expectations that wages and other conditions of work should be such as to guarantee a stable and adequate form of existence and has to be compatible with the physical integrity and moral dignity of the individual, and also the job should be reasonably secure. This definition is not intended to be exhaustive. It is intended to indicate (and this is important for the law) that the principal interest of management in collective bargaining has always been the maintenance of industrial peace over a given area and period, and that the principal interest of labour has always been the creation and the maintenance of certain standards over a given area and period, standards of distribution of work, of rewards, and of stability of employment.' As to what collective bargaining entails, it has also been said that —

'(b)y collective bargaining is meant those social structures whereby employers (either alone or in coalition with other employers) bargain with the representatives of their employees about terms and conditions of employment, about rules governing the working environment (eg the ratio of apprentices to skilled men) and about the procedures that should govern the relations between unions and employer. Such bargaining is called 'collective' bargaining because on the workers' side the representative acts on behalf of a group of workers.'"

- [8] Second, the respondents have submitted that given the jurisdictional pre-requisites of the provisions of section 64 of the LRA were met, the strike was protected. However, the basis of the section 64 referral, the issue in dispute, was that the change in the shift system (which occurred some twelve months earlier) amounted to a unilateral change to their members' terms and conditions of service. The respondents' approach to this application has not been to rely on the alleged unilateral change to terms and conditions of employment as their protection. The respondents have rather used this Court to test out an approach which if accepted would permit a union to claim that a strike is protected despite the LRA or a collective agreement requiring that the dispute in question must go to arbitration, or over which an advisory award is required where there is a refusal to bargain. The approach is without merit, misconstrues the meaning of collective bargaining and is blind to the design of dispute resolution contained in the LRA.

- [9] I therefore find that given the terms of the collective agreement, the strike was unprotected. Given that the strike is long over, the rule stands to be discharged. In all the circumstances, I make the following order:

Order

1. The rule *nisi* issued on the 3 February 2015 is discharged.
2. The respondents are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr K Makapane of Bowman Gilfillan Attorneys

For the Respondents: Adv Riaz Itskin

Instructed by: Larry Dave Attorneys

LABOUR COURT