THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1840/11

INTERSTATE BUS LINES (PTY) LTD **Applicant**

and

VENTER, P M, *N.O.* **First Respondent**

SOUTH AFRICAN ROAD PASSENGER BARGAINING COUNCIL **Second Respondent**

SATAWU obo MEMBERS **Third Respondent**

Heard: 19 August 2015

Delivered: 20 August 2015

Summary: Review – commissioner exceeding powers in redefining agreed issue in dispute and then finding that employer guilty of an unfair labour practice relating to the provision of benefits on that basis – award set aside

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JUDGMENT

MYBURGH, AJ

[1] The company[1] has in place an incentive scheme in terms of which employees can earn a 14th cheque on a sliding scale, subject to performance. In terms of clause 6 of the policy document, “[i]f employees participate in a strike [implicitly an unprotected one] … the employees involved loose 50% of their incentive payment and the company maintains the right to decrease their incentive payment further or to completely cancel the incentive scheme” (“clause 6”).

[2] On 6 and 10 August 2010, SATAWU[2] members (“the employees”) engaged in a so-called picket at the company’s premises. On the facts before the arbitrator, the action entailed the employees collectively protesting during their breaks (falling within the company’s business hours) in front of the company’s premises by displaying placards and chanting slogans about various grievances that they (as SATAWU members) had against the company. The purpose of the picket was to put pressure on the company to attend to and resolve such grievances. By agreement between the company and SATAWU, the employees were issued with a final written warning relating to their participation in the picket, for misconduct described as “disseminating false information to the public and by doing so, putting the company’s name into disrepute”.

[3] The employees were also only paid two-thirds of their incentive payment, whereas those who did not participate in the picket received full payment. This resulted in SATAWU referring an unfair labour practice dispute relating to the provision of benefits (section 186(2)(a) of the LRA[3]) to the bargaining council.[4] Ultimately, on 4 July 2011, the arbitrator[5] issued an award

[1] The applicant.

[2] The third respondent.

[3] Labour Relations Act 66 of 1995. All references to sections herein are to the LRA.

[4] The second respondent.

determining the dispute. He found that the employees had not engaged in a "strike" as defined in section 213,[6] and accordingly that the company had committed an unfair labour practice is reducing their incentive payment by a third. He thus ordered the company to effect payment of the outstanding amount.

[4] The company now seeks to review the award in terms of section 145. In argument before me, Mr Snyman (who appeared for the company) advanced two grounds of review. Firstly, that the arbitrator exceeded his powers in deciding the matter on the basis that he did, because the dispute he was required to decided, as defined by the parties, was whether or not the picket was lawful (i.e. protected) – it having been accepted by the parties that the answer to this question would be dispositive of the employees' entitlement (or otherwise) to payment of a full incentive payment. Secondly, and in the alternative, that the arbitrator committed a material error of law (a reviewable irregularity) in finding that the employees were not on strike as defined in section 213.

[5] A somewhat unusual situation arose at the arbitration. In the context of the parties reaching agreement on the definition of the dispute as described above, the company accepted that no strike had taken place (by which it seems to have meant, no protected strike pursuant to which a legitimate picket could be called[7]). After the matter had been fully dealt with before the arbitrator on the basis of the defined issue, and in circumstances where his award was pending, the arbitrator issued a ruling on 8 June 2011. In terms of this ruling, he found, in effect, that the real issue was whether the picket qualified as a "strike" for the purposes of clause 6, and that "an award will not

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[5] The first respondent.

[6] The definition defines a "strike" as follows: "… 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… ."

[7] Section 69(1) provides that "[a] registered trade union may authorise a picket by its members and supporters for the purposes of peacefully demonstrating – (a) in support of any protected strike".

do justice to the dispute if this aspect is not addressed". In the result, the matter was reopened, with the parties being afforded the opportunity of dealing with this issue on 28 June 2011. At this sitting, the company objected to the redefining of the issue for determination, and refused to make any further submissions. As stated above, the arbitrator then issued his award on 4 July 2011, in which he determined the matter on the basis that a strike had not occurred. In the process, the arbitrator recorded that "it was common cause that no strike took place".

[6] Turning now to the first ground of review, I am of the view that there is merit in it. Parties are at liberty to define the dispute for determination by an arbitrator, and where they do so, but he decides the matter on a different basis (as occurred herein), this constitutes the arbitrator having exceeded his powers in terms of section 145(2)(a)(iii).[8] Implicit in the parties' definition of the issue for determination appears to have been an acceptance by them that the word "strike" in clause 6 was to be interpreted widely to include picketing. The parties were entitled to contract on this basis, but the arbitrator simply overrode their agreement – and this at a time <u>after</u> the matter had been heard by the arbitrator. To exacerbate matters, having unilaterally redefined the issue for determination, the arbitrator then used against the company the concession that it had made that no strike had taken place – a concession made in the context of the original definition of the dispute. (This notwithstanding, it is clear that the arbitrator misconstrued the nature of the concession made by the company – it being to the effect stated above.) This clearly demonstrates the danger of an arbitrator redefining agreed terms of reference.

[7] Had the arbitrator determined the dispute as originally defined (as he ought to have done), he would probably have been driven to conclude that the picket was unlawful (i.e. unprotected). This appears from the judgment of the LAC in

[8] See by way of analogy, *Reunert Industries (Pty) Limited t/a Reutech Defence Industries v Naicker & others* [1997] 12 BLLR 1632 (LC) at 1638A-B; *Telkom SA Ltd v CCMA & others* [2003] 1 BLLR 92 (LC); *Transnet Freight Rail v Transnet Bargaining Council & others* (2011) 32 *ILJ* 1766 (LC) at para 74.

ADT Security (Pty) Ltd v National Security & Unqualified Workers Union & others (2015) 36 *ILJ* 152 (LAC). In comparable circumstances to the present matter (SATAWU having obtained municipal permission for the picket herein), the LAC found that the picket was unlawful in that the employees in that matter (as occurred herein) had not followed the applicable dispute-resolution mechanisms provided for in the LRA before resorting thereto. Such a finding would have been determinative of the incentive payment issue in favour of the company. In the result, I uphold the first ground of review.

[8] In the circumstances, it is unnecessary to decide on the second (and alternative) ground of review. But insofar as I am wrong on the first ground, it seems to me that, in any event, the arbitrator's conclusion that employees' conduct did not qualify as a strike may well constitute a material error of law, on the following basis. While it is so that the employees were on their breaks (lunchtime, etc) at the time of engaging in the picket, on the jurisprudence of this court, the word "work" in the strike definition has been interpreted as including a lawful and reasonable instruction, with the result that where employees refuse to carry out such an instruction (even in their own time) they, in effect, refuse to work for the purposes of the strike definition.[9] In this matter, the company warned the employees against engaging in the picket and instructed them not to do so, but they refused to heed the instruction. The act element of the strike definition was thus arguably satisfied, with there being no controversy that the other elements were met.[10] But I make no final determination in this regard, because it is unnecessary to do so.

[9] In the light of the determination that I have made in para 7 above, little purpose would be served in remitting the matter back to the bargaining council for a fresh arbitration.

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[9] *Mndebele & others v Xstrata South Africa (Pty) Ltd t/a Xstrata Alloys (Rustenburg Plant)* (unreported LC judgment, case no. JS 1017/09, dated 21/8/2012, per Lagrange J) at para 122.

[10] These being that the employees must act in concert, and that the purpose of their conduct must be to remedy a grievance or resolve a dispute.

[10] In the result, the following order is made:

1. the arbitration award is set aside on review;

2. the arbitration award is replaced with an order that the company's conduct did not constitute an unfair labour practice, and that SATAWU's referral to arbitration is dismissed;

3. there is no order as to costs.

Myburgh, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the applicant: S Snyman of Snyman Attorneys

On behalf of the third respondent: no appearance