**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not Reportable

Case no: J1940/15

In the matter between:

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|---|---|
| **SWISSPORT (SOUTH AFRICA) (PTY) LTD** | **Applicant** |
| And | |
| **NATIONAL TRANSPORT UNION** | **First Respondent** |
| **THE EMPLOYEES LISTED IN ANNEXURE (“A”)** | **Second to Further Respondents** |

**Heard:** **29 September 2015**

**Delivered:** **9 October 2015**

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**JUDGMENT**

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RABKIN-NAICKER, J

[1] On the September 23 2015, this court issued a rule *nisi* calling upon the respondents to show cause as to why a final order should not be made in the following terms:

"4.1 Declaring that the action and/or proposed strike action contemplated for the 23rd of September 2015 constitutes an unprotected strike action in terms of section 68 of the Labour Relations Act 66 of 1995 as amended;

4.2 Interdicting the Respondents from participating in any such unlawful and unprotected strike action;

4.3 Interdicting and restraining the respondents from committing any acts of violence, intimidation and threatening any and all employees of the Applicant in any way whatsoever including but not limited to intimidating them to participate and join in."

[2] The interim relief was granted by my sister Whitcher J. On the 29 September 2015 the matter came before me in terms of Rule 8 (10), the respondents anticipating the return date of 4 December 2015. Also filed was an application for contempt in respect of the interim order and an answer thereto. The contempt application was not argued before me.

[3] I must decide whether the rule should be confirmed or discharged. In this regard I will deal with first with the question of whether or not the strike that commenced on 23 September 2015 was protected.

[4] Section 64(1) and (2) of the LRA provides as follows:

64 Right to strike and recourse to lock-out

(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; <u>and after that</u>-

(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; or

(c) in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless 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

(d) in the case of a proposed strike or lock-out where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c).

(2) If the issue in dispute concerns a refusal to bargain, an advisory award must have been made in terms of section 135 (3) (c) <u>before notice is given in terms of subsection (1) (b) or (c)</u>. A refusal to bargain includes-

(a) a refusal-

(i) to recognise a trade union as a collective bargaining agent; or

(ii) to agree to establish a bargaining council;

(b) a withdrawal of recognition of a collective bargaining agent;

(c) a resignation of a party from a bargaining council;

(d) a dispute about-

(i) appropriate bargaining units;

(ii) appropriate bargaining levels; or

(iii) bargaining subjects.

[5] On the 31 August 2015, the CCMA conciliated the dispute between the parties which it characterised as a "refusal to bargain". The advisory award under case number GAEK 6217-15 records as follows:

> "The Applicant party, NTM, wants to negotiate wages with the Respondent. The Respondent does not want to enter into discussions on wages with the Applicant due to the terms of an existing collective agreement, as well as its view that the Applicant Union does not meet the threshold in such collective agreement.
>
> The Applicant party requested an Advisory Arbitration Award. The parties agreed to a process going forward, which will be reflected below. The Applicant wanted this agreement to be placed in the Advisory Award."

[6] In his analysis of evidence and argument the Commissioner records as follows:

> "[9] According to the 2010 Recognition agreement, SATAWU had to maintain a majority in order to qualify for collective bargaining rights. This they did not have in 2014, albeit by a short margin of just 8 people. As such, the collective agreement signed with SATAWU in 2014 is invalid.
>
> [10] There is an evidentiary issue concerning the current membership of NTM at the Respondent. The parties have agreed that they will engage in a verification exercise in order to confirm the current membership of NTM, and that if they experience serious difficulties, that they would approach the CCMA in order to assist with verification.
>
> [11] A verification exercise, as mentioned above, will have an important and immediate effect on the way forward concerning the relationship between the parties.
>
> [12] Until such time as the parties complete the verification exercise, it makes practical sense to continue with the terms of the 2014 agreement for purposes of wages and conditions of employment.[1]
>
> [13] In view of the particular circumstances of this case, the requirements concerning the dates of engagement of wages and other conditions of

[1] i.e. the wages and terms and conditions of employed agreed between SATAWU and the applicant in 2014.

employment should be relaxed in order to allow the Respondent and NTM to consult, if indeed NTM have exceeded the required threshold."

[7] The advisory award reads as follows:

"ADVISORY AWARD

[14] The parties are to engage in a joint verification exercise, which is to commence within 14 days hereof.

[15] In view of the fact that it is common cause that NTM have more membership than any other Union currently at the Respondent's workplace, the Respondent should not refuse to bargain with the Applicant. This should be the case even prior to the finalization of the verification exercise, and irrespective of whether or not it results in a collective agreement."

[8] As referred to above the proceedings at the CCMA were conciliation proceedings after a referral by the union based on 'a refusal to bargain'. Conciliation proceedings are governed by section 135 of the LRA:

'135 Resolution of disputes through conciliation

(1) When a dispute has been referred to the Commission, the Commission must appoint a commissioner to attempt to resolve it through conciliation.

(2) The appointed commissioner must attempt to resolve the dispute through conciliation within 30 days of the date the Commission received the referral: However the parties may agree to extend the 30-day period.

(3) The Commissioner must determine a process to attempt to resolve the dispute which may include —

(a) mediating the dispute;

(b) conducting a fact-finding exercise; and

(c) <u>making a recommendation to the parties, which may be in the form of an advisory arbitration award.'</u> (my emphasis)

[9] Section 135 further states:

'(5) When conciliation has failed, or at the end of the 30-day period or any further period agreed between the parties —

(a) the commissioner must issue a certificate stating whether or not the dispute has been resolved;

(b) the Commission must serve a copy of that certificate on each party to the dispute or the person who represented a party in the conciliation proceedings; and

(c) the commissioner must file the original of that certificate with the Commission.'

[10] It was argued by the union that given the matter is a 'refusal to bargain dispute' and that an advisory award had been issued, that the requirements for issuing a strike notice had been met. On a proper reading of section 64(2) and section 135 of the LRA, an advisory award is required to be issued, and in addition, the certificate of outcome must be issued or an elapse of the 30 day period from date of referral must take place before a notice of a protected strike is given. As my brother Van Niekerk stated in **Digistics (Pty) Ltd v SA Transport & Allied Workers Union & others[2]**:

> "While s 135(5)(a) requires a commissioner to issue a certificate of outcome, it does not follow that a failure to do so prejudices the right to strike. The clear wording of s 64(1)(a), and in particular the use of the word 'or' between subparas (i) and (ii), contemplates that the procedural requirements established by s 64(1) are met once 30 days have elapsed from the date of the referral, whether any commissioner appointed to conciliate the dispute certificate has issued a certificate or not. The purpose of subpara (i) of para (a) is to cater for a situation where conciliation fails within the 30-day period referred to in subpara (ii). In other words, the procedural requirements imposed by the section are met once a certificate of outcome is issued by a commissioner, or 30 days have elapsed from the date of the referral, whichever occurs first.

[11] The date of referral to the CCMA was the 17 July 2015. The conciliation was held on the 31 August 2015. Thirty days had expired since the referral of the dispute at date of issue of the strike notice on 20 September 2015. Given there was no agreement to extend the thirty day period referred to in section

[2] (2010) 31 ILJ 2896 (LC)

64(1)(a) (ii), I accept that the requirements in terms of section 135 read with section 64 to issue the strike notice have been met. I note that it would have been in the interests of labour peace had the Commissioner attempted to get agreement that the verification process could go ahead in the context of an extension of the 30 day period.

[12] There is a further basis on which the respondent claims that the strike is unprotected. This is that the issue in dispute over which the union began strike action was in fact over wage negotiation proposals and not a refusal to bargain. These 'proposals and/or demands" are contained in a letter to the employer from the applicant dated 2 July 2015.

[13] In **Coin Security Group (Pty) Ltd v Adams & others** [3]it was said that:

> 'It is the court's duty to ascertain the true or real issue in dispute: Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building & Allied Workers Union & others (2) (1997) 18 ILJ 671 (LAC); Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union & others (1) (1998) 19 ILJ 260 (LAC). In conducting that enquiry a court looks at the substance of the dispute and not at the form in which it is presented (Fidelity at 269G-H; Ceramic at 678C). The characterization of a dispute by a party is not necessarily conclusive (Ceramic at 677H-I; 678A-C). There is in my view no difference in the approach of these decisions. In each case the court was concerned to establish the substance of the dispute. The importance of doing this lies in s 65 of the Act which provides that no person may take part in a strike if "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...". The phrase "issue in dispute" is, in relation to a strike, defined as "the demand, the grievance, or dispute that forms the subject matter of the strike".'

[14] The Commissioner's recordal of the evidence of the respondent at the conciliation, which has not been disavowed in the papers is the following:

> "[6] The Respondent stated that SATAW had indeed lost considerable membership, and according to their records, was the Union with the least membership in the Company It acknowledged that NTM had the highest

[3] (2000) 21 ILJ 924 (LAC);

membership out of all the Unions present, but that such membership was below majority status.

[7] Mr Monnana referred me to a collective agreement between the Respondent an SATAWU dated 7 August 2014. This agreement also made reference to a Recognition Agreement dated 27 May 2010, also between itself and SATAWU. In the 2010 agreement, the collective bargaining threshold was that of majority status. As at the date of signature of the 2010 agreement, the total number of employees in the bargaining unit was 2011. SATAWU'S membership was 998. As at 31 August 2015, SATAWU's membership was 189 out of a total of 2251.

[8] Mr. Monnana argued that NTM did not even have the threshold as per the collective agreement of 2015. Further, that in terms of the time periods for negotiation of wage agreements, as per para. 4.2.2, the wage proposals should have been made by May 2015, negotiated in June 2015 and implemented in January 2016. Since they have not complied with either these time periods, and they have not reached the threshold, there is no basis to consult with NTM."

[15] In my view given the above, and taking into consideration that that the company has on the papers not taken any initiative to act on the advice contained in the award, I find that the issue in dispute is a refusal to bargain.

[16] A further ground relied on by the company in seeking that the strike be called unprotected is the content of Clause 4.2 of the recognition agreement between the parties, as referred to in paragraph 8 of the Award quoted above. This it argued regulated the issue in dispute between the parties. Clause 4.2 records as follows:

"4.2.1 Once the union has reached 45% the parties agree that the wage negotiations will be conducted in June of that year to be effective in January of the following year. This excludes all current and substantive agreements.

4.2.2 Wage demands must be submitted by May of preceding year for negotiations to commence June and effective in January of the following year."

[17] The respondent is of the view therefore that the union may not strike as the matter is regulated by the clauses above. This would mean that collective bargaining could only begin in 2016, once the 45% threshold is verified. It should be noted that the clause contains a suspensive condition i.e. that the collective bargaining threshold is met. I am of the view that the clause cannot be said to regulate the issue in respect of the refusal to bargain in view of the fact that the verification process has not taken place.

[18] The final ground the company relied on was that the union did not properly notify them 48 hours before the strike because they did not use the Human Resources Manager's direct fax number nor the domicilium noted in the recognition agreement. In its affidavit in terms of Rule 8(10), the union states that it used the number that was the contact for the company reflected on the award and that the company appeared at the CCMA having been notified through that number. The number used to serve the notice is indeed recorded by the HR Manager on the attendance register at the CCMA annexed to the union's papers. There is no merit in the company's case on this point.

[19] In all of the above circumstances, I find that the strike was protected. Both parties expressed their willingness that they be ordered by this court to return to the CCMA to get assistance with the verification exercise. This should be done urgently in my view in the hope that the parties can constructively move forward. In all the circumstances, I make the following order:

<u>Order</u>

I. The rule *nisi* is discharged.

II. The parties are ordered to jointly approach the CCMA not later than Monday 12 October 2015 in order to obtain assistance for the verification process under case number GAEK 6217-15.

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Rabkin-Naicker, J

Judge of the Labour Court of South Africa

**APPEARANCES:**

On behalf of the Applicant: H. Van Beek

Instructed by: C De Villiers Attorneys

On behalf of the Respondent: National Transport Movement