



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case Number: C895/2015

In the matter between:

IRWIN & JOHNSON LIMITED

Applicant

And

**NATIONAL CERTIFIED & ALLIED
WORKERS UNION (NCFAWU)**

First Respondent

**THE PERSONS LISTED IN ANNEXURE
'A' HERETO**

2nd to Further Respondents

Date heard: 4 December 2015

Delivered: 22 April 2016

JUDGMENT

RABKIN-NAICKER J

[1] On the 15 October 2015 a *rule nisi* returnable on 4 December 2015 was issued by Steenkamp J in the following terms:

- “3. That a *rule nisi* be issued, returnable on 4 December 2015 at 10h00 calling upon all Respondents to show cause why the following order should not be made final and why those Respondents who oppose the application on the return day should not be ordered to pay the costs of application, jointly and severally, the one paying the others to be absolved:
- 3.1 declaring in terms of section 65 (1) (c) and s65 (3) of the LRA that the strike, which commenced on 12 October 2015 at the entrance to the Applicant’s (“premises”) following on a strike notice in terms of section 64 (1) (b) of the LRA and issued on 9 October 2015, was not in compliance with the LRA and is an unprotected strike;
- 3.2 declaring that the strike in respect of the dispute concerning a 23% increase demanded by the Respondents is unlawful and prohibited on the grounds:
- 3.2.1 an agreement was reached on 1 September 2015 which settled the 23% wage increase dispute for a period of 12 months. That agreement regulates the issue in dispute as contemplated in section 65 (3) (a) (i) of the LRA;
- 3.2.2 Alternatively, the dispute is one which the Applicants have a right under section 65 (1) (c) of the LRA to refer to arbitration or the Labour Court.
- 3.3 In terms of section 68 (1) of the LRA, interdicting and restraining the Respondents from participating in the strike and in any conduct in contemplation or in furtherance of the strike;
- 3.4 interdicting and restraining First Respondent from:

3.4.1 encouraging or instructing its members currently on board the vessels “Flame Thorn”, “Fox Glove”, and “Fuschia” from performing any acts, or omissions, which may directly or indirectly endanger the vessel and/or the lives of any of the crew aboard the vessels;

3.5 interdicting and restraining such Second to Further Respondents who are on board the vessels ‘Flame Thorn’, “Fox Glove”, and “Fuschia” from performing any acts, or omissions, which may directly or indirectly endanger the vessel and/or the lives of any of the crew aboard the vessels;

4. Pending the return date, directing that the relief in terms of paragraph 3.3 to 3.5 shall operate as an interim order with immediate effect.”

[2] The applicant was given leave to supplement its founding papers and a timetable was agreed for answering and replying papers. The matter came before me on 4 December 2012 in order to decide whether the rule nisi should be confirmed.

[3] The applicant sought to establish a clear right to a declarator that the strike action was unprotected, on the basis of its interpretation of a collective agreement between the parties, in particular the following wording of the agreement:

“The parties agreed on a 8.25% increase effect (sic) 1 July 2015 for a 12 month period across the board on all minimum and actuals, on all components of remuneration”

[4] The parties disputed the meaning of the underlined words above. It is clear to the court that the real issue in dispute between the parties is the interpretation and application of the agreement. Thus a finding on whether the applicant has a clear right to the declaratory order it seeks requires an interpretation of the collective agreement in question. This is reflected in both the pleadings and submissions before court. In **Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union on behalf of Members**¹ the LAC stated that:

¹ (2015) 36 ILJ 624 (LAC)

“[29] The real dispute between the parties was indeed about the interpretation and application of the main agreement, in particular clause 2.5.6 thereof. In terms of s 24 of the LRA it was not within the power of the court a quo to hear and determine such a dispute between the parties. That power resided in the body contemplated in the main agreement, if there was indeed a procedure provided as contemplated in s 24(1) of the LRA, or in the CCMA.....

[31] Having determined the true nature of the dispute between the parties, the court a quo should not have gone on to adjudicate the merits of the dispute, but ought to have allowed the matter to be referred to the body or the CCMA with jurisdiction as contemplated in s 24 of the LRA. By adjudicating the merits of the dispute, which squarely involved the interpretation and application of the relevant clauses in the main agreement, the court a quo erred and the appeal should therefore succeed.”

[5] It was also argued by Mr Ackerman that I could find for the applicant on the basis that the respondents’ characterised the dispute as one pertaining to rights i.e. it was unfair that the skippers had been given a 23% wage rise. This issue has already been dealt with in a ruling of the CCMA dated the 9 July 2015. The union had referred an unfair labour dispute related to benefits to the CCMA after the skipper employed by the company were given an adjustment to their salaries i.e. an increase of 23%. In that forum, the applicant argued that the matter was one of mutual interest and the Commissioner agreed with it in a jurisdictional ruling. That ruling has never been reviewed.

[6] Mr Ackermann further proposed that because it was a jurisdictional ruling, this Court is not bound by it and must determine for itself the true nature of the dispute. This is incorrect. Section 158(1)(g) of the LRA provides that this court may “subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law;”.

This court's jurisdiction to set aside a ruling of the CCMA derives from section 158(1) (e), albeit that it employs a different review test to jurisdictional rulings.² A jurisdictional ruling is binding and remains valid until set aside by Labour Court.³

[6] In all the circumstances, a confirmation of the *rule* would amount to an adjudication of the interpretation of the collective agreement in question. This adjudication must serve before the appropriate arbitration forum. I therefore make the following order bearing in mind the ongoing relationship between the parties:

Order

1. The rule issued on the 15 October 2015 is hereby discharged.
2. There is no order as to costs.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: A.W. Ackermann instructed by Bowman Gifillan

Respondents: Union official

² SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others (2008) 29 ILJ 2218 (LAC)

³ De Beers Consolidated Mines (Pty) Ltd (Venetia Mine) v National Union of Mineworkers (2008) 29 ILJ 2755 (LC) (2008) 29 ILJ 2755 (LC)