Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: J 1471/17

In the matter between:

JIMMY NYAMBI & 14 OTHERS **Applicants**

and

H C SHAIK INVESTMENT CC **First Respondent**

NAMPAK GLASS (PTY) LTD **Second Respondent**

Heard: 04 July 2017

Delivered: 05 July 2017

Summary: (Urgent – interdict to prevent alteration to terms and conditions of employment to preserve right to exercise right to strike against true employer under s 64(4) – whether either or both respondents the applicants' employer the subject of a pending arbitration ruling by the CCMA under s 198D of the LRA – existence of suitable alternative mechanism for bringing lawful strike action to bear on the second respondent)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an urgent application interdict to prevent the alleged unilateral alteration of terms and conditions of employment pending outcome of a dispute about the applicant's employment status which has been referred to arbitration under section 198 D of the Labour Relations Act, 66 of 1995 ('the LRA'). In terms of that section, any dispute about the employment status of the employees in relation to a temporary employment service or the client of such a service may be referred to arbitration.

[2] At present, an arbitration award is pending concerning whether or not the applicants are employees of either or both the first and second respondents. The respondents denied that the first respondent is providing labour broking services as a temporary employment service to the second respondent as its client. They maintain that the commercial relationship between them is simply governed by a "service level agreement" ('SLA') and not by a temporary employment service ('TES') agreement. In practical terms, the applicants are essentially engaged in various tasks checking the quality of bottles produced by the second respondent ('Nampak') and work they perform is intimately connected with the operations of the second respondent. Nevertheless, for the purposes of this judgement it is not necessary to determine whether the relationship between the respondents is that of a TES and a client, which in any event is the subject matter of the pending arbitration award (CCMA case no GAEK 929216).

Urgency

[3] The application was launched on Thursday 27 June, and the applicants gave the respondents very short notice of approximately one day to file answering affidavits. The notification of the alleged changes to terms and conditions of employment due to be implemented on 1 July 2017 was conveyed to the individual applicants on 14 June 2017 and a letter of demand calling of the first respondent not to implement the changes was conveyed by the applicants' attorney of record on 22 June 2017. By 24th June, the applicants had responses from both respondents which made it clear that the demand not to implement changes to working hours and

other aspects of the applicants' employment would not be acceded to. The application was then launched three days later. As matters turned out, answering affidavits were filed on 30 June. The applicants filed a replying affidavit on the morning of the urgent application hearing.

[4] The respondents contend that the urgency was self-created because the application was brought on very short notice when the applicants waited 10 days to bring the application. I accept that in dealing with a large number of unionised employees, there might have been some delay before proper instructions could be obtained in order to submit the letter of demand on 22 June. Similarly, the applicants could not have been expected to launch the application before waiting a reasonable time for the respondents to answer the letter of demand. The additional delay of a couple of days in launching the application is not material in my view. Had the respondents not been able to respond adequately in the time available before the hearing on 4 July, the matter might well have been dismissed for lack of urgency justifying the drastic curtailment of normal time periods for filing answering affidavits. However, since they were able to respond before the matter was heard, I am prepared to accept that the application should be considered on an urgent basis.

Existence of a prima facie right

[5] The object of the application is to preserve the ability of the applicants to engage in protected strike action against true employer or employers in terms of sections 64 (4) and (5) of the LRA, which provides:

> (4) Any employee who or any trade union that refers a dispute about a unilateral change to terms and conditions of employment to a council or the Commission in terms of subsection (1)(a) may, in the referral, and for the period referred to in subsection (1)(a)-
>
> (a) require the employer not to implement unilaterally the change to terms and conditions of employment; or
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> (b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.

(5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of service of the referral on the employer."

[6] The applicants argue that even though there is no dispute that the first respondent is their employer, until the outcome of the arbitration, it is uncertain whether the second respondent is also their employer. Consequently, until they learn the outcome of those arbitration proceedings, they are unsure whether they can exercise the right to engage in a protected strike in which other employees of the second respondent could participate. By obtaining the interdict, the applicants would be able to prevent the respondents from implementing any of the changes until they are in a position to know what the ambit of potential primary strike action under section 64 (4) is.

[7] In essence, the applicants wish to be able to exercise their rights under section 64 (4) only when there is certainty about whether or not the second respondent is also their employer. In the meantime, they wish to prevent any changes to their working conditions being made. At this juncture, it is important to emphasise that this application is based on protecting the applicants' ability to embark on a primary strike against both respondents under section 64 (4). The applicants did not seek to assert their right to specific performance of their existing contractual obligations, which was also available to them as an alternative cause of action.

[8] Undoubtedly, if the second respondent is also the applicants' employer, they would have a clear right to embark on primary strike action against it utilising the procedure under section 64 (4) if the changes intended by the first respondent amount to changes to their terms and conditions of employment. In passing, the alleged changes to terms and conditions of employment concern the following, at least some of which appear to amount to entail material alterations of working conditions, viz:

8.1 Relocation of the workplace to Alrode from the existing Germiston location, which is not disputed.

8.2 Reduction of working hours by half, which the respondents' claim is simply short-time.

8.3 Reduction in staff per shift and a less than proportionate cut in minimum target rates, which also appears to common cause.

8.4 The allocation of some staff per shift to perform lower paid functions.

However, for the purposes of this judgment it is not necessary to determine if they amount to a variation of the applicant's contractual entitlements.

[9] A primary strike against the second respondent would allow employees of the second respondent who are not applicants to also participate in the strike in support of the applicants' demands, it being well established that it is not only the employees who are directly affected by strike demands made on an employer who may participate in a protected strike in support of those demands.[1]

[10] It is trite that the object of a strike is to bring economic pressure to bear on an employer to accede to the demands of the striking employees. The question which arises is whether the only way the applicants can ensure that they and all employees of the second respondent can engage in protected strike action is by preserving the prevailing circumstances of their employment until such time as it is established that the second respondent is also their employer. The respondents argued that nothing prevents the applicants from initiating a primary strike against the first respondent, provided they follow the procedural requirements of section 64 (4) and then giving the second respondent seven days' notice of a secondary strike in accordance with the requirements of section 66 (2)(b) of the LRA. Provided those procedural requirements and the requirements of s 66(2)(c) are also satisfied[2], other employees of the second respondent

[1] See *Transport & Allied Workers Union of SA on behalf of Ngedle & others v Unitrans Fuel & Chemical (Pty) Ltd* (2016) 37 *ILJ* 2485 (CC) at 2518, par [111] and the cases referred to in footnote 80 thereof.

[2] Section 66 (2) reads:

> "No person may take part in a secondary strike unless-
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> (a) the strike that is to be supported complies with the provisions of sections 64 and 65;
>
> (b) the employer of the employees taking part in the secondary strike or, where appropriate, the employers' organisation of which that employer is a member, has received written notice of the proposed secondary strike at least seven days prior to its commencement; and

would be entitled to participate in the strike action in support of the applicants' demands even if the applicants are not employees of the second respondent.

[11] Having regard to the inextricably close connection between the work performed by the applicants as employees of the first respondent and the operations of the second respondent, there can be little doubt that such strike action would be reasonable having regard to the direct and material impact on the operations of the second respondent and would fulfil the requirements of s 66(2)(c). The economic pressure that such a strike would bring to bear the second respondent would be indistinguishable from the economic effect of a primary strike by the same employees in support of the same demands. The applicants advanced no grounds why this was not a reasonably suitable alternative to a primary strike against the second respondent. In short, I am not satisfied that in order to effectively exercise the right to strike in support of demands made pursuant to a referral made under section 64 (4) and in order to afford employees of the second respondent the right to participate in a strike in support of those demands, it is necessary for the applicants to await the outcome of the pending arbitration award, given the facts of this application. It follows therefore that the applicants have a suitable alternative remedy they can pursue without having to await that event.

[12] For the sake of completeness, mention must be made of the judgment in *De Klerk v Project Freight Group CC*[3] cited by the applicants in support of their argument that they are entitled to an interdict to preserve the dispute resolution processes of the LRA. That case concerned an employee engaged in retrenchment consultations who obtained an interdict preventing his employer from retrenching him prior to giving him access to relevant information needed for the consultation process as the court found he was entitled to under s 16 of the LRA. The analogy the applicants seek to draw with their case is inappropriate in my view. In that

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(c) the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer."

[3] (2015) 36 *ILJ* 716 (LC).

case the provision of information was ancillary to exercising the right to be able to engage in meaningful consultation. The applicants are not prevented from utilising strike action which could include employees of the applicant provided they fulfil the statutory requirements for a primary and secondary strike. Obtaining the interdict is not a pre-requisite for them to do so.

[13] Consequently, the application should be refused on account of the existence of a suitable alternative remedy.

Costs

[14] As the matter entails a reasonable degree of complexity and as there is no reason to believe that the application was brought in bad faith, an adverse cost order would not be appropriate.

Order

[1] The application is heard as a matter of urgency and non-compliance of Court Rules pertaining to service and time periods is condoned.

[2] The application is dismissed.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	D Cartwright of David Cartwright Attorneys
FIRST RESPONDENT:	H Horn instructed by Desiree Phillips Attorneys
SECOND RESPONDENT	M J Van As instructed by Cliffe Dekker Hofmeyr Inc.