



Not reportable

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

Case no: D 955/17

In the matter between:

SOS PROTEC SURE

Applicant

and

**SOUTH AFRICAN
REVOLUTIONARY ALLIED
WORKERS UNION**

Respondent

Heard: 05 July 2017

Delivered: 05 July 2017

Summary: (Urgent – strike interdict- alleged unilateral alteration of conditions of employment)

JUDGMENT

LAGRANGE J

Background

[1] This is an urgent application interdict to interdict strike action due to commence on 06 July 2017. A strike notice was issued by the union on 3

July and rising from an unresolved dispute which was conciliated on the same date.

- [2] The demands set out in the letter are the following:

“The employees are not happy that the employer is paying them what he likes there is no set rate and even so the salaries was reduced from month to month. No payslips. Unilateral change of a date. Unilateral change of shift roster.”

- [3] The papers of both parties appear to have been drawn up without legal assistance, the applicant was represented by counsel who had been instructed only the day before the hearing. On the papers, the only discernible ground advanced by the applicant for the strike being unprotected is that it concerns non-compliance with a Sectoral Determination which had previously been the subject matter of a previous dispute.
- [4] Having regard to the referral documents and to the somewhat unclear demands of the employees set out in the strike notice, it does not appear to me that those demands obviously relate to non-compliance with a Sectoral Determination except perhaps that the alleged provision of payslips is clearly a matter falling either within the scope of a breach of s 33 of the Basic Conditions of Employment Act 75 of 1997.
- [5] It was alternatively argued by counsel for the applicant that the contracts of employment of the employees clearly stipulate the employer is entitled to vary shifts and that dates were dealt with in the contracts of employment. In essence, it was suggested that the applicant had not implemented any unilateral changes to existing terms and conditions of employment. However, this alternative basis for interdicting the strike was not set out in the founding papers and the union could not be expected to deal with it in its answering papers. Consequently, a proper evidentiary basis for this claim was not set out in the founding papers.
- [6] The fact that the applicant drafted the papers itself, does not mean that the court can simply permit additional grounds and further evidence to be entertained when the other party has not at an opportunity to deal with them prior to the hearing. In passing, it should be mentioned that no,

application was made to supplement the applicant's papers. In any event, I agree with the following observation in the judgement in *Sibanye Gold Ltd v Association of Mineworkers & Construction Union & others* (2017) 38 ILJ 1193 (LC), namely:

"In *Maritime Industries Trade Union of SA & others v Transnet Ltd & others* (2002) 23 ILJ 2213 (LAC); [2002] 11 BLLR 661 (LAC), Zondo JP noted that a s 64 (4) dispute about a unilateral B change to terms and conditions of employment could legitimately be the subject of a referral in terms of s 64 (1) and thus the subject of a strike. He went on to note (at paras 106 and 107 of the judgment) that to an extent, a union had an election between power-play on the one hand and arbitration on the other, as a means to resolve the dispute. What was required in each case was to determine the nature of the dispute. I do not understand this statement to require the court mero motu to determine what it considers to be the nature of the dispute — the language of the judgment is cast in the terms of choice. In other words, a dispute about a unilateral change to terms and conditions of employment may be cast in those terms, or it may equally be cast in terms so as to fall within the ambit of an unfair labour practice dispute, or even a breach of contract. In this sense, the union has an election as to how it wishes to progress the dispute — by the exercise of economic power, by arbitration (as an unfair labour practice) or in this court by way of a dispute about a contract of employment. In other words, the manner in which the dispute is cast will ultimately determine the manner in which the dispute is to be resolved. The right to make that election must be respected, as must the outcome."¹

- [7] In relation to the demands of the union, I am satisfied that the demand relating to the provision of payslips whether justified or not is not a matter in respect of which a protected strike could be called because that is clearly a dispute of right, for which the union has alternative remedies under the BCEA or the relevant Sectoral Determination. To the extent that the union persists with this demand, the strike would be unprotected. However, the remaining demands are not demands that the employer claims it does not understand and on the papers before me has not

¹ At 1201, para [20]

advanced other grounds why those demands could not be the basis of protected strike action.

- [8] In the circumstances, the applicant is entitled only to partial relief.
- [9] In passing, it must be mentioned that it was common cause that shortly before this matter was heard telephonically in Johannesburg, a union official had been arrested by police on an alleged charge of fraud relating to union membership forms when he came to attend the hearing at the Labour Court in the Durban. It was suggested in the oral submissions of Mr Mdluli, the union official who made representations at the hearing that employees might well go on strike in any event as result of this event. The timing of the arrest is a matter of concern to the court and is reminiscent of what used to occur pre-1994 when some employers resorted to criminal law remedies as a strong-arm adjunct to their industrial relations strategy. In all probability, an event like this occurring as it did just before a strike interdict hearing, where a strike is imminent, is only likely to inflame matters. However, it had already taken place by the time the proceedings commenced and the court has no powers to intervene in that matter.

Order

- [1] The matter is dealt with as one of urgency and non-compliance with the requirements of the Rules of the Labour Court relating to time periods and service are condoned.
- [2] Pending the return date of this application on 25 August 2017, when the respondent must show cause why the order in paragraphs 2.1 and 2.2 should not be made final, the following order is made:
- 2.1 The Respondent and its members employed by the applicant are interdicted from embarking on strike action pursuant to the strike notice issued by the Respondent on 3 July 2017, unless and until it withdraws in writing its demand regarding the alleged non-provision of payslips, which notice must be served on the applicant or its attorneys of record by fax or hand delivery.

2.2 Service of this order must be effected on the Respondent by fax and copies of the order must be made available to employees of the applicant.

[3] Costs of the application are reserved for determination on the return date.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

A P v d Westhuizen
instructed by

RESPONDENT:

M Mdluli (union official)

LABOUR COURT