THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

REASONS

Not reportable

Case no: J1799/17

In the matter between:

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	**Applicant**
and	
SOUTH AFRICAN MUNICIPAL WORKERS UNION (SAMWU)	**First Respondent**
THE FIRST RESPONDENT'S MEMBERS LISTED IN ANNEXURE "A" TO NOTICE OF MOTION	**Second to Further Respondents**

Heard: 7 August 2017

Delivered: 10 August 2017

Summary: Strike *prima facie* unprotected – interim order interdicting strike granted

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JUDGMENT

MYBURGH, AJ

Introduction and background

[1] On 7 August 2017, I granted an urgent interim order interdicting a threatened strike by SAMWU at the municipality ("the strike") – the application having been unopposed. I did so on the basis that I was persuaded that the municipality had established – on a *prima facie* basis – that the strike was unprotected, and had met the other requirements for the grant of interim relief. What follows are my brief reasons for finding that the strike was *prima facie* unprotected.

[2] The essential background is this. For reasons that need not be traversed herein, the municipality transferred some 94 bus drivers to other positions / departments pending the conducting of disciplinary enquiries into alleged misconduct by them – this being referred to in the papers as a "precautionary transfer". On 14 February 2017, and arising from this, SAMWU referred a dispute about an alleged unilateral change to terms and conditions of employment to the SALGBC. In the referral form, SAMWU invoked the provisions of section 64(4) of the LRA[1] (but the municipality did not comply therewith). On 24 July 2017, the SALGBC issued a certificate of outcome reflecting that the dispute remains unresolved, and that it could either be referred to the Labour Court or form the subject of strike action. On Thursday 3 August 2017 (at 16h04), SAMWU issued a strike notice, in which it notified that "consistent with the certificate of outcome", a strike would commence on Tuesday 8 August 2017 at 05h00 – thus giving the municipality 4 ½ days' notice of the strike. On 4 August 2017, the municipality launched an urgent application to interdict the strike, which was enrolled for hearing on Monday 7 August 2017. As stated above, on that day, the matter was unopposed, and I granted an interim order interdicting the strike.

[1] Unless otherwise stated, all references to sections herein are to the LRA.

Grounds relied on by the municipality

[3] In its founding papers, SAMWU contends that the strike is unprotected on the following five grounds:

a) firstly, the municipality is a state employer and ought thus to have been given at least seven days' notice of the strike in terms of section 64(1)(d);

b) secondly, where section 64(4) is invoked, it is not competent to strike after the elapse of the period referred to in section 64(1)(a);

c) thirdly, the precautionary transfer did not constitute a unilateral change to terms and conditions of employment;

d) fourthly, insofar as the precautionary transfer did constitute a unilateral change to terms and conditions of employment, it involves a contractual dispute between the parties which SAMWU has the right to refer to the this court in terms of section 77(3) of the BCEA, with the result that the strike is hit by the section 65(1)(c) limitation of the right to strike; and

e) fifthly, insofar as SAMWU alleges (as it did in its application for condonation in respect of the late referral of the dispute to conciliation) that the precautionary transfer is causing its members "suppression, abuse or injustice", the dispute amounts to an unfair labour practice in terms of section 186(2)(b), with the result that the strike is again hit by the section 65(1)(c) limitation of the right to strike.

Evaluation and analysis

[4] Regarding *the first ground*, in order for section 64(1)(d) to be applicable, the municipality would have to fall within the phrase "the State is the employer". In *City of Matlosana v SA Local Government Bargaining Council & others* (2009) 30 *ILJ* 1293 (LC), Pillay J found that "a municipality … must … be the State at

local government level",[2] and accordingly that section 64(1)(d) applied to a municipality. I am unaware of any direct authority to the contrary, and thus accept this as the prevailing legal position, with the result that the strike is unprotected on account of short notice having been issued.

[5] The question that arises from this is whether the strike would only be unprotected until the seven days' notice (calculated from 16h04 on Thursday 3 August 2017) runs out, or whether SAMWU is obliged to give the municipality seven days' notice afresh in order for the strike to be protected. To my mind, a fresh notice would have to be issued. This is so because the municipality is entitled to know when the strike is to commence,[3] and the threatened time of commencement (05h00 on Tuesday 8 August 2017), which was unlawful, has come and gone.[4]

[6] Regarding *the second ground*, the municipality places reliance on the judgment of Snyman AJ in *Sibanye Gold Ltd v AMCU & others* (2017) 38 *ILJ* 1193 (LC) ("*Sibanye (1)*"), particularly on this passage:

> "[70] In simple terms, it is about what forms the basis of the alleged unilateral change in employment conditions. If the unilateral change if founded on a vested right, whether by policy, contractually or *ex lege*, the right to strike lapses when the time period as contemplated by section 64(1)(a)(i) or (ii) expires. If not, then the employees may continue with their strike after the time period as contemplated by section 64(1)(a)(i) or (ii) expired, provided proper notice of intention to strike is then given in terms of section 64(1)(b)."

[7] I am not persuaded that this passage assists the municipality. The finding was made in the context of the fact that AMCU had invoked section 64(4) and resorted to a retaliatory strike over a unilateral change to terms and conditions of employment, with Snyman AJ having found that the strike could not endure

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[2] At 1297.

[3] *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union (2)* (1997) 18 *ILJ* 671 (LAC) at 676.

[4] See *City of Matlosana* (*supra*) at 1298: "A fresh notice is required in any event because the date for commencing the strike on 4 August 2008 has passed."

on a protected basis after the elapse of the period referred to in section 64(1)(a) – this in circumstances where he considered the dispute to be about benefits and thus a dispute of right. In the present case, despite having purported to invoke section 64(4) in its referral to conciliation, SAMWU has not engaged in a section 64(4) strike, and seeks instead to strike in the ordinary course – this after having complied with all the requirements of section 64. I thus do not consider the passage from Snyman AJ's judgment to be of application (but this does not detract from my view in relation to the fourth ground addressed below). In any event, the rule *nisi* issued by Snyman AJ pursuant to the above-mentioned finding was discharged by Van Niekerk J on the return date, who disagreed with Snyman AJ on the law (see *Sibanye Gold Ltd v AMCU & others* (2017) 38 *ILJ* 1193 (LC) ("*Sibanye (2)*") at paras 16-17).

[8] Regarding *the third ground*, I do not consider this to be of any moment because SAMWU is not engaging in a section 64(4) strike. In any event, the municipality has not established on the papers that the precautionary transfer did not constitute a unilateral change to terms and conditions of employment. Indeed, the fourth ground advanced by the municipality (see below) is potentially at odds with this.

[9] Regarding *the fourth ground*, it is useful to expand upon how the municipality's case was advanced before me – it having been contended as follows: SAMWU's complaint is that the precautionary transfer constituted a unilateral change to terms and conditions of employment; this equates to an allegation of a breach of its members' contracts of employment; this is actionable in terms of section 77(3) of the BCEA in this court; and, accordingly, the strike is hit by the section 65(1)(c) limitation of the right to strike.

[10] In assessing this ground, it is noteworthy that section 65(1)(c) was amended by way of the 2014 amendments to the LRA to read (the underlining reflects the amendment): "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 <u>or any other</u>

employment law". This would cover the BCEA, and section 77(3) thereof, which clothes this court with (employment) contractual jurisdiction.[5] Of relevance here is *Mawethu Civils (Pty) Ltd & another v National Union of Mineworkers & others* (2016) 37 *ILJ* 1851 (LAC), where Murphy AJA appears to have indicated that insofar as a dispute is actionable in terms of section 77(3) of the BCEA in this court, a strike over the dispute would be hit by the section 65(1)(c) limitation of the right to strike (see paras 14 and 18 of the LAC's judgment). At best, however, the indication is *obiter* and not binding on this court, but is (potentially) of persuasive value. The indication given by Murphy AJA accords with the approach of Snyman AJ in *Sibanye (1)*, who found the same thing in relation to benefits (i.e. if the unilateral amendment relates to a benefit, then the strike is hit by the section 65(1)(c) limitation of the right to strike, because a benefits dispute is a dispute of right).

[11] But Van Niekerk J adopted a different approach in *Sibanye (2)*. As far as he was concerned, a dispute about a unilateral change to terms and conditions of employment is a specific / peculilar type of dispute, and does not change its character because it involves a unilateral amendment which might be actionable as a dispute of right (for example, a benefits dispute). In this key passage, Van Niekerk J went on to find:

> "[17] This is not a dispute that concerns rights rather than interests, or to be more precise, it is not a dispute in respect of which strike action is prohibited because the dispute is required by the LRA or another employment law to be referred to arbitration or to this court for adjudication. I am unaware of any provision in the LRA (or any other law) that provides that a party has the right to refer a dispute about a unilateral change to a term and condition of employment to either of these institutions. In the absence of such a provision, it seems to me that the dispute concerning the unilateral change to the acting allowance policy is one that is capable of being the subject of a protected strike, at least in the sense that it is not a dispute that any party has the right to refer to arbitration or adjudication." (Own emphasis.)

[5] As the LAC put it in *Rand Water v Stoop and others* [2013] 2 BLLR 162 (LAC) at para 39.2, "the Labour Court has jurisdiction over any claim as long as it involves a contract of employment".

[12] This court is thus confronted with conflicting judgments and approaches. On the approach of Murphy AJA in *Mawethu Civils* (albeit tentative and at best *obiter*), which is consistent with that of Snyman AJ in *Sibanye (1)*, the strike herein is unprotected because, although styled as a dispute about a unilateral change to terms and conditions of employment, the dispute is actionable in terms of section 77(3) of the BCEA as a breach of contract, with the result that the strike is hit by the section 65(1)(c) limitation of the right to strike. But on the approach of Van Niekerk J in *Sibanye (2)*, the fact that SAMWU might otherwise have characterised the dispute as a breach of contract, does not detract from the fact that the actual nature of the dispute herein is a dispute about a unilateral change to terms and conditions of employment, with there being nothing that provides that such a dispute may be referred to arbitration or to this court for adjudication. Accordingly, on the latter approach, the strike is not hit by the section 65(1)(c) limitation of the right to strike.

[13] In the urgent circumstances in which this application was brought and argued, it was not possible for me take a definitive view on which of these approaches is correct. The issue is complex and each of the approaches has its merits. For present purposes, I am, however, of the view that the municipality has succeeded in at least establishing a *prima facie* right to relief on this ground. By that I mean a right "even though open to some doubt".[6]

[14] Regarding *the fifth ground*, section 186(2)(b) defines an unfair labour practice as involving "the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee". Given that SAMWU does not invoke the section, and that the municipality itself disavows the precautionary transfer as constituting a suspension or disciplinary action, the section is clearly inapplicable. In the result, there is no merit in this ground.

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[6] *Webster v Mitchell* 1948 (1) SA 1186 (W); *Palace Group Investments (Pty) Ltd & another v Mackie* (2014) 35 *ILJ* 973 (LAC) at para 18. In para 19 of the latter judgment, the LAC said this about a *prima facie* right: "With regard to the first prerequisite, it is necessary to assess whether an applicant has, *prima facie*, established a right capable of protection."

Conclusion

[15] In summary and conclusion, I am of the view that the municipality established – on a *prima facie* basis warranting the grant of interim relief – that the strike is unprotected on the first and fourth grounds discussed above. (Of course, having been decided on a *prima facie* basis, the finding is not binding on this court on the return date.)

[16] I accordingly granted the interim order that I did on 7 August 2017.

Myburgh, AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: Adv C Malan instructed by Moodie & Robertson