



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 2689-17

In the matter between:

IMPERIAL CARGO (PTY) LTD

Applicant

and

DETAWU and MEMBERS

Respondents

Heard: 19 October 2017

Delivered: 25 October 2017

JUDGMENT

WHITCHER, J:

- [1] The applicant provides road freight transport services to clients from its base in Paarl, Western Cape. The respondents intend embarking on a strike in support of four demands. A referral and conciliation that complies with section 64 of the Labour Relations Act 66 of 1995 was held. The sole issues for determination are whether the intended strike action in respect of all or any of the strike demands, is protected.

- [2] Section 65(1)(a) of the LRA provides that no person may take part in a strike if that person is bound by a collective agreement that prohibits a strike in respect of the issue in dispute.
- [3] Section 65(3)(a) of the LRA provides that, subject to a collective agreement, no person may take part in a strike if that person is bound by any collective agreement that regulates the issue in dispute.
- [4] The parties fall under the National Bargaining Council for the Road Freight and Logistics Industry and the Main Agreement concluded there applies to the parties.
- [5] Clause 2 of the Main Agreement provides that the agreement is binding on the parties until 28 February 2019.
- [6] Clause 57 provides that the Council is the exclusive forum for the negotiation and conclusion of agreements on *substantive issues* between employers/employer organisations and employees/trade unions. The clause further provides that no trade union or employer may call a strike or lockout or in any other way seek to induce or compel negotiations on *substantive issues* at any level other than the Council. The agreement goes on to define *substantive issues* as *all issues involving costs and affecting the wage packets of employees*.
- [7] In labour parlance, the term *substantive issues* is usually used to refer to terms and conditions of employment - the terms under which employees work, or their benefits, rather than mere working practices.
- [8] It is clear that in terms of the Main Agreement all and any negotiation in relation to substantive issues must be negotiated at the Bargaining Council and that the respondents may not resort to industrial action concerning these issues.
- [9] The applicant contends that all the demands over which the individual respondents intend to strike amount to substantive issues and moreover substantive issues which will involve severe cost implications for the

applicant. Accordingly, the strike is hit by the prohibitions in section 65 of the LRA.

- [10] It is necessary to analyse each demand separately, as it may be that a strike is protected in respect of one or more demands, but not in respect of others.¹

First Demand

- [11] The applicant employs truck drivers, who drive the various freight trucks, and in respect of short routes or where client requirements dictate, van assistants to assist with tarping and offloading. On the longer routes, it is common cause that the applicant has for a period of over 10 to 15 years paid to each driver what has become commonly known as a *guard fee* for the performance of tarping and offloading duties. The payment of the guard fee is not the subject of a collective agreement. According to the respondents, the performance of these duties and the payment of a guard in respect thereof is thus an implied term of the employment contract. Applicant contends that the payment of a guard fee is merely a work practice to recognise that they perform duties that, although they fall within the definition of driver's work in the Main Agreement, they were often performed by assistants, until the use of on-board assistants was largely phased out.

- [12] The demand is that the applicant:

"...must employ general workers to accompany or work with the drivers to perform duties of the general worker in the truck whilst on route or loading and unloading or any duties connected with that which is the work of a general worker".

- [13] Drivers must however continue to receive their guard fee allowance. I say this because the respondents, with reference to their declaration of dispute notice, state the following in their opposing affidavit:

¹ See: *Unitrans Fuel and Chemical (Pty) Ltd v TAWUSA and another* [2011] 2 BLLR 153 (LAC); *Transport and Allied Workers Union of South Africa obo MW Ngedle and 93 Others v Unitrans Fuel and Chemical (Pty) Limited* [2016] ZACC 28.

“In our demands we had never said the company must do away with the guard fees, but we have demanded it to employ general workers to perform duties of a general worker”.

- [14] On the respondents' own version, the demand for the appointment of general workers is premised on the fact that the Main Agreement defines a general worker as an employee who assists in the loading or unloading of any goods, containers or vehicles and the throwing over or removing of tarpaulins or coverings, amongst other things. The respondents contend that this means that it is not the duty of a driver to perform the work of loading, off-loading and tarping. They contend that this interpretation is reinforced by the fact that clause 4 of their contracts of employment states that drivers *supervise* the loading and off-loading of the vehicle and the vehicle assistant is a company employee employed by the company.
- [15] The applicant, on the other hand, contends that the definitions of *drive* and *hours of work* in the Main Agreement and the fact that there is no specific definition of driver in the Main Agreement envisage that the roles of drivers will include activities other than actual driving.
- [16] The word *drive* in the Main Agreement is defined as including all periods of driving, all periods during which the driver is obliged to remain at his post in readiness to drive and any other time spent by the driver in connection with the vehicles or its load.
- [17] *Hours of work* is defined to include all periods of driving and any time spent by a driver connected with the vehicle or the load and all periods during which the driver is obliged to remain at his post in readiness to work when required to do so, but does not include any meal intervals prescribed in terms of clause 5 or any period in respect of which a subsistence allowance is payable to an employee in terms of clause 36, if during such interval or period the driver does no work other than remaining in charge of the vehicle and its load.
- [18] I agree with the applicant that to meet this first demand it would have to employ additional staff at significant additional cost and it would lead to a term of employment that drivers are entitled to have van assistants. This is clearly

a substantive matter, which moreover *involves costs*. Such issues must be negotiated at sectoral level at the Bargaining Council.

- [19] This demand is hit by a further prohibition, namely section 65(1)(c) of the LRA which holds that no person may take part in a strike or a lock-out if the issue in dispute is one that a party may refer to arbitration in terms of the LRA.
- [20] The demand is premised on a dispute between the parties as to the interpretation of the Main Agreement, and in particular whether the Main Agreement reserves duties of tarping and loading/offloading to be performed exclusively by 'general workers, or whether drivers can also be expected to perform such duties. Accordingly, it is arguable that the real dispute concerns the interpretation and application of a collective agreement.
- [21] However, as indicated earlier on it, is necessary to analyse each demand separately, as it may be that the strike is protected in respect of one or more of the other demands.

Second Demand

- [22] The respondents have taken issue with the scheduling of weekend trips for long distance drivers.
- [23] They demand that the applicant schedule single crews to leave their place of residence or depots on Saturday afternoon where they are expected to deliver their cargo to the client on a Monday. In the case of a double crew, they want to leave their place of residence or depot on a Sunday where they are expected to deliver their cargo to the client on a Monday.
- [24] The applicant contends that this demand concerns a substantive issue because the practical effect of it would be that drivers earn overtime rates on Saturday afternoons and evenings, and double pay on Sundays, whereas currently the drivers will arrive at the destination depot by Saturday lunch time, and then earn a subsistence allowance in terms of clause 36 of the Main Agreement (but not normal wages) over the course of the weekend, while waiting to deliver the load to the client first thing on a Monday morning.

Rescheduling would thus involve a significant increase to the applicant's wage (overtime) bill.

- [25] In my view this demand does not concern a substantive issue. It concerns a work practice with regard to the specific operations of the applicant – not the sector.
- [26] There is nothing on the papers to indicate that the scheduling of trips is capable of being contractually regulated at a sectoral level or can be turned into a term capable of being applied across the sectoral board.
- [27] On the applicant's own version it is a work practice that falls within management's prerogative.
- [27] The fact that capitulation to the demand may result in the drivers earning overtime on Saturday afternoons and evenings, and double pay on Sundays does not render it a substantive issue involving costs. The demand is not about overtime. There is no integral or internal cost element in the demand itself. It does not amount to a demand for an amount of money.
- [28] Employees may strike in support of a demand to change a work practice where the strike has been processed in terms of section 64(1), which was done in this case.²

The third demand

- [29] The respondents demand that the applicant provide food or food allowances to drivers when they work more than three hours overtime.
- [30] This is clearly a substantive issue, which should be dealt with in the centralised bargaining structure.

The fourth demand

² See *Intercape Ferreira Mainliner (Pty) Ltd and another v NUMSA and others* (2015) ZALCCT 22 at paragraphs [13] to [17].

- [31] The demand is that off days for drivers must take place in the course of their 5 or 6 day shift, and drivers must be able to spend their off day at home.
- [32] I agree with the applicant that this demand concerns a substantive issue that is regulated by the Main Agreement, which requires that drivers' scheduled shifts be continuous – i.e. that the full contingent of days be worked continuously.
- [33] If the respondents want an amendment to the Main Agreement, there is nothing stopping them from presenting such a demand at the next round of sectoral bargaining.

Are the demands severable?

- [34] The demands are clearly severable and each can stand alone.

Conclusion

- [35] I have found that only one of the four demands is permissible. This, however, will not render the intended strike unprotected.
- [36] The Constitutional Court in *Transport and Allied Workers Union of South Africa obo MW Ngedle and 93 Others v Unitrans Fuel and Chemical (Pty) Limited* [2016] ZACC 28 held:

[33] It is clear that Waglay DJP held that if one or two of the demands being pursued during a strike is permissible, that strike in respect of this permissible demand is lawful even if TAWUSA had added impermissible demands severable from the permissible demands. It follows that since the Shell seven workers' demand was lawful and severable from the other demands, the addition of an impermissible demand could not render the Shell seven workers' demand unlawful.

- [34] The right to strike in pursuit of a permissible demand does not evaporate upon the addition of impermissible demands....

[35] ...It follows that when the permissible demand is extinguished following the employer's acceptance of such demand the collective refusal to work becomes unprotected.

[38] In this case, I am satisfied that the introduction of the impermissible wage cut demand in respect of the other workers did not extinguish the permissible wage cut demand...Therefore, the strike remained protected by virtue of and within the ambit of the Shell seven workers' wage cut demand.

[39] In the result, the strike was protected from 28 October 2010 until 1 November 2010 when the employer capitulated to the [permissible demand]... From that moment, the workers could not persist in their conduct of withholding their labour as the other demands were impermissible demands and no longer enjoyed the protection provided by the Shell seven workers' wage cut demand. Their actions in participating in an unprotected strike from 1 November 2010 amounted to misconduct.

[37] In light of my findings that the second demand is lawful and that the remaining demands are severable (each can stand alone), the applicant cannot succeed to have the strike interdicted.

Strike notice

[38] Considering that the strike notice which set out the commencement date of the strike is now academic and the applicant must be given at least 48 hours' notice of the commencement of the strike, the respondents must issue a fresh notice of the commencement date of the strike in the event they decide to proceed with the strike.

Costs

[39] I do not deem it fair to issue a cost order against the applicant. The respondents did not really assist in the determination of this matter,

considering their opposition consisted of one submission really, that the dispute concerns a matter of mutual interest.

Order

[40] In the premises, the following order is made:

1. The application is dismissed with no order as to costs.

B. Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

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For the Respondents:

J H Groenewald

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LABOUR COURT