



Not reportable

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

Case no: J 651/17

In the matter between:

**UNITRANS SUPPLY CHAIN
SOLUTIONS (PTY) LTD**

Applicant

and

**ASSOCIATION OF MINEWORKERS
AND CONSTRUCTION UNION**

First Respondent

INDIVIDUAL RESPONDENTS

**Second to Further
Respondents**

Heard: 3 November 2017

Delivered: 19 December 2017

Summary: (Strike interdict – confirmation of the rule)

REASONS FOR JUDGMENT

LAGRANGE J

Introduction

- [1] This application concerns the return day of a strike interdict. A rule nisi interdicting strike action had initially been issued on 22 March 2017 and thereafter extended twice on 11 May 2017 and on 3 November 2017.
- [2] On 19 December 2017, I found that the refusal of the applicant's drivers performing delivery duties for Pick n Pay to assist Pick n Pay staff with the offloading of goods at Pick n Pay stores constitutes unprotected strike action and confirmed the rule. No order was made as to costs. Below are my reasons for my findings.

Narrative

- [3] On 20 March 2017, the first respondent ('AMCU') sent the following letter to the applicant ('Unitrans'):

"SUBJECT: WITHDRAWAL OF ADDITIONAL DUTIES (LOADING AND OFFLOADING)

Dear Sirs

1. Kindly take note that just come to the union that its members employed as drivers at your workplace performing duties beyond the Road Freight [Main] Collective Agreement and the recent SOP prescribed for drivers.

2. During a recent consultation with the drivers' representatives at the AMCU Regional offices in Carltonville, it was revealed that the drivers of forced or required to offload goods at the stores.

3. Kindly be advised that this practice is inconsistent with both the Main Collective Agreement which describes the duties of a driver and those of a general worker.

4. Take further notice that the SOP further prescribes the administrative duties of the driver in as far as securing stock is concerned, therefore, the union does not have a problem with such administrative duties, save where they are not prescribed by the Main Collective Agreement.

5. In light of the SOP, the duties of the drivers are crisp, and do not include loading and offloading.

6. Take note that SOP is considered a collective agreement between the employer and employees, therefore binding on the parties.

7. The employer cannot arbitrarily or unilaterally change or introduce, policies and regulations without consultation.

8. Section 64 (4) of the Act makes it clear that a dispute about a unilateral change to terms conditions of employment can give rise to an employee's right to strike in terms of section 64 (1) (h) of the Act.

9. In *Monyela & others v Bruce Jacobs t/a LV Construction* (1998) 19 ILJ 75 (LC), Zondo J (as he then was) stated the following at 82J-83A: "It is clear that employees are given the right to strike over a dispute about a unilateral change of terms and conditions of employment despite it being a rights dispute".

10. Kindly note that AMCU hereby tenders its 48 hour notice to Unitrans to restore the main collective agreement and the SOP status quo, failure to comply with this notice result in the drivers continuing with the duties of driving and the duties as per SOP, except the duties of offloading in this case, this will not constitute withdrawal of duties or strike.

11. Take further notice that should the above conduct be found to be a strike, it will be a strike in terms of S 64 (4)(1)(a) and S 64(4) of the LRA.

..."

(Emphasis added)

At this juncture, it should be noted that in terms of paragraphs 6 and 10 of the letter, although the union referred to the main collective agreement, it was clearly of the view that drivers were obliged to comply with the applicable SOP and its demand related to restoration of what it believed was the applicable SOP.

[4] The pertinent provisions of section 64 of the Labour Relations Act, 66 of 1995 (' the LRA') read:

64. Right to strike and recourse to lock out

(1) Every employee has the right to strike and every employer has recourse to lock out if-

(a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and-

(i) a certificate stating that the dispute remains unresolved has been issued; or

(ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that-

(b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless-

(i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or

(ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or

(c) in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or

(d) the case of a proposed strike or lock-out where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c).

...

(3) The requirements of subsection (1) do not apply to a strike or a lock-out if-

(a) the parties to the dispute are members of a council, and the dispute has been dealt with by that council in accordance with its constitution;

(b) the strike or lock-out conforms with the procedures in a collective agreement;

(c) the employees strike in response to a lock-out by their employer that does not comply with the provisions of this Chapter;

(d) the employer locks out its employees in response to their taking part in a strike that does not conform with the provisions of this Chapter; or

(e) the employer fails to comply with the requirements of subsections (4) and (5).

(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

(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."

(Emphasis added)

- [5] It is not in dispute that, despite the union specifically couching the proposed withdrawal of offloading work by Unitrans's drivers as being in compliance with the SOP and the Main Agreement, it did not refer the dispute to the CCMA or a bargaining council and therefore did not comply with the requirements of section 64 (4) even though it gave the employer 48 hours' notice to reinstate what it alleged the lawful duties of drivers were. Accordingly, Unitrans contends that the union could not rely on that provision even if it was correct that drivers were being required to do tasks outside of the scope of their terms and conditions of employment (which it maintains they were not).
- [6] Secondly, Unitrans contends that because drivers were not been asked to perform tasks outside their conditions of employment as described in the SOP and the Main Agreement the planned action by AMCU's members could not constitute the type of *status quo* action contemplated by section 64 (4) and would amount to strike action, which was unprotected.
- [7] In relation to the applicable SOP, it appears to be common cause that Unitrans's SOP forms part of Unitrans's drivers' terms and conditions of

employment. Where the parties differ is on the applicable SOP. Prior to December 2016 the relevant portion of the SOP titled “Unitrans Foods PnP – Perishables Driver SOP” under the subheading “When you arrive at the store you are ready to adhere to the following” read:

“7. Once the receiving (*sic*) are ready to receive you, **you are responsible to move all the pallets or Roll tainers onto the tail lift of the vehicle**, at which point the receiving will take responsibility for the stock and move it into the store.”

(Original emphasis)

- [8] In December 2016 a new procedure was introduced which required drivers to check a freight list confirming that stock offloaded was the stock recorded on the invoice. A data analyst was given permission to include this change in SOP. However in addition he added the following provision:

“Delivery of products

1 ...

2. Drivers are to ensure that the receiving manager verifies and breaks the steel on the vehicle, and there after the driver opens the doors. The store staff then climbs into the vehicle and moves the HUs¹ onto the tail lift, and the driver then lowers the tail lift ground level.”

- [9] This amendment was issued to training officers and shop stewards on the site without being verified by contract managers. Within 24 hours, the erroneous addition was removed. However, drivers and AMCU maintain that the amendment is applicable and the drivers offloading duties are restricted to what is set out in paragraph 2 quoted above. It was argued that the erroneous amendment was never withdrawn but that argument is at odds with the undisputed evidence that a meeting was called with shop stewards advising them of the error, and that the amendment was retracted and a correct version reissued. I am satisfied that, on the papers, the applicable SOP is the one quoted in paragraph 7 above and accordingly to the extent that there might temporarily have been a variation in the drivers duties in terms of the erroneous notice, that

¹ At the hearing, it was common cause that this is an acronym for a motorised unit for moving pallets

variation was no longer applicable when the union issued its letter of demand and accordingly could not lay the basis for action under section 64 (4), because they would not be complying with their contractual obligations by insisting on performing their duties in accordance with erroneously issued notice which was promptly withdrawn.

- [10] As such, performing in accordance with the duties described in the erroneously issued December notice would entail partial non-compliance with the terms and conditions of employment to compel the employer to adhere to the terms of the withdrawn SOP. This would amount to a partial refusal to work to compel Unitrans give effect to the withdrawn SOP provision and would constitute strike action. For this reason also the action would be unprotected strike action because there was no referral of an interest dispute under section 64 (1). For that reason alone, the strike could not be protected even if there was no other procedural bar to union making the demand, such as the existence of provisions in the main agreement regulating negotiations in the sector.
- [11] In relation to the last mentioned aspect, Unitrans further contends that as a dispute of interest, it is affected by clause 57 of the main agreement, which stipulates that the bargaining Council is the exclusive forum negotiating substantive issues. Unitrans argues that the issue in dispute is a substantive one, because if it were to concede to the demand it would have to make alternative arrangements for offloading vehicles. Matters affecting costs or wage packets are defined as substantive matters in the main agreement. Consequently, the union cannot insist that this issue falls within the ambit of non-substantive negotiations on operating procedures, on which parties are entitled to negotiate outside the bargaining Council in terms of clause 57 (2) of the main agreement.
- [12] In my view, any demand to reduce the scope of an employee's duties would ordinarily necessarily entail that the work must be done by another person or device which must be paid for and consequently would have cost implications. As such, the issue is one that ought to be negotiated at the bargaining Council and an attempt to compel negotiations on the issue outside that forum to strike action, would be in breach of that provision and

therefore would be unprotected in terms of section 65 (3) (a) (i) of the LRA which provides:

“(3) Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out-

(a) if that person is bound by-

(i) any arbitration award or collective agreement that regulates the issue in dispute;...”

[13] Lastly, insofar as there is any conflict between the duties performed by drivers and the main agreement, Unitrans submits that this is a matter which constitutes a dispute about the interpretation of the main agreement and accordingly, it is not for the court to determine whether the duties it's drivers are required to perform fall within the terms and conditions of a driver under the main agreement. Rather, that is a dispute which must be determined by arbitration under the provisions of s 24(1) of the LRA. To that end, it had referred such a dispute to the bargaining Council towards the latter part of 2017. I agree that the court cannot usurp that function, which it would be doing if it made a determination on that issue at this stage of granting final relief. In any event, as no referral was made under s 64(4) the union is not entitled to embark on corrective action on that basis either.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant

**A Franklin, SC assisted by G Fourie
instructed by Cliff Dekker Inc.**

For the Respondent:

V Masinga of AMCU

LABOUR COURT