



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J1408/18

In the matter between:

SUN INTERNATIONAL LTD

AND 15 OTHERS.

Applicants

and

SOUTH AFRICAN COMMERCIAL CATERING AND

ALLIED WORKERS UNION ('SACCAWU') TOGETHER

WITH INDIVIDUAL RESPONDENTS LISTED IN ANNEXURES

'A' TO 'O'

Respondents

Heard: 31 August 2018

Delivered: 11 September 2018

Summary: Return day – Final order sought to interdict a strike action. Where the demand is an issue regulated by a collective agreement and or the provisions of the LRA – employees prohibited to strike. Duty of the court to determine what the true dispute is – if the dispute as determined falls within those upon which employees may not strike terms of a collective agreement – strike is unprotected.

Held: (1) The *Rule nisi* is discharged Held: (2) Each party to pay its own costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] Today is the return day for a *rule nisi* issued by this Court on 26 April 2018. On this day, the applicants sought confirmation of the rule, whereas the respondent sought a discharge of the rule. The crisp issue to be determined by this court is whether the demand by the respondents is one that the respondents are prohibited to strike over in terms of the Labour Relations Act¹ (LRA) or a collective agreement. There is no dispute between the parties that procedurally, the intended strike action is protected. In this judgment, I shall not direct my attention to issues pertaining to procedural compliance. I shall devote my attention to the question whether the true demand is prohibited substantively or not.

Background facts

[2] Given the crisp issue before me, I shall not consider historical facts which are not directed at the question – what is the true issue in dispute? On 26 January 2017 a dispute arose between the applicants and the respondents. In the referral form, which was made to the Commission for Conciliation Mediation and Arbitration (CCMA) on 15 February 2017, the referring party described the dispute thus:

“The union is in dispute with the company over the inability by the company to reach an agreement over the inclusion of slots technicians, grips, auditors and all positions as per attached list (annexure C)”

¹ 66 of 1995, as amended.

- [3] In the same form, the referring party described the nature of the dispute as one of mutual interest. On 12 April 2017, the parties attempted to resolve the dispute through a conciliation process. The CCMA commissioner characterized the dispute as one of mutual interest. After failing to resolve the dispute, the CCMA, through commissioner Kekana, certified that the referred dispute remained unresolved. On 13 October 2017, another conciliation meeting took place. Following that, on 23 October 2017, commissioner Kekana issued an advisory award within the contemplation of section 135 (3) (c) of the LRA. The advice given was that the applicants before me must reconsider their position. On or about 31 October 2017, a memorandum was issued to all the employees. In that memorandum, the applicants advised the employees about an advanced scheduling. On 9 February 2018, the respondent union formally declared a dispute in accordance with the relationship agreement. Three issues were identified, namely, company must stop the planned implementation of advanced scheduling; company must revert back to the normal way of doing the roster whereby departmental managers are responsible for scheduling of employees and company must convert PPT employees to PFT. The respondent union suggested a meeting within seven days of the formal declaration of the dispute.
- [4] On 26 February 2018, the respondents referred the dispute declared on 9 February 2018 to the CCMA for resolution. On 14 March 2018, commissioner Williams certified that the dispute remained unresolved. On or about 27 and 28 March 2018, the Central Forum held a meeting. The meeting dealt with amongst others the issues raised on 9 February 2018 and to be discussed in the next meeting was various issues inclusive of the extension of negotiated benefits to employees in annexure C. Allegedly, it was rumoured that the respondents were planning a strike action. On 19 April 2018, the applicants addressed correspondence to the respondent union, seeking confirmation of the rumor that was circulating. It is important at this stage to describe the rumor heard by the applicants:

“It has also come to our attention that the strike will be to convince Sun International to amend the current bargaining unit and include all job titles as listed in Annexure C.”²

[5] The union respondent refused to respond to a rumour and referred to the 48 hours’ notice should a strike action be contemplated. Following that, the union sought to resort to the Regulations of Gatherings Act³ (RGA) to deal with its demands. The purpose of the gatherings was to voice their unhappiness about exclusion of certain positions in the bargaining unit and the refusal to convert part time employees into full time employees. There is no indication on the papers whether the gathering took place as planned. On 23 April 2018, the applicants warned the respondents of the illegality of their planned action. In response, the respondent union disputed the allegations of illegality.

[6] On 23 April 2018, the respondents issued a notice in terms of section 64 of the LRA. In terms of the notice, the strike was to commence on 27 April 2018 and end on 30 April 2018. The notice describes the dispute thus:

“Kindly take note that since the parties are in dispute in respect of extension of Bargaining Unit to include supervisors, table inspectors... and all other positions listed on Annexure C”⁴

[7] On 24 April 2018, the applicants launched the present application to be heard on 26 April 2018. As pointed out above, a *rule nisi* was issued returnable on 31 August 2018.

Why should the intended strike be declared unprotected and accordingly curtailable?

[8] The basis upon which the applicants contend that the strike action is to be limited is that section 65(1)(a)⁵ read with section 65 (3)(1)⁶ of the LRA finds application.

² Letter addressed to the respondent union.

³ 205 of 1993.

⁴ Strike notice.

⁵ **65. Limitations on right to strike or recourse to lock-out**

(1) No person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or a lock out if –

Evaluation

- [9] In matters of this nature, the starting point is, as always, the Constitution of the Republic of South Africa. Section 23(2)(c) of the Constitution, provides that ‘every worker has the right to strike’. The right to strike is an individual right guaranteed in the supreme law of this country. Like many other rights guaranteed in the Bill of Rights, the right to strike is subject to limitations in terms of the law of general application. The law that seeks to limit the right to strike in this instance is the LRA.

Does section 65 (1) (a) find application?

- [10] As far as the applicants are concerned, there is a collective agreement that prohibits a strike action in respect of the issue in dispute. On the other hand, the respondents contend that the section does not find application. The LRA defines an *issue in dispute* in a strike situation as the demand, the grievance or the dispute that forms the subject matter of the strike. The task of the court in this regard is to consider and determine what the true dispute is. In *Brinant Security Services (Pty) Ltd v UPSWU and 115 others*⁷, my sister Basson J, sitting in the Labour Court said:

- [12] ...Secondly, in order to determine what the true or actual issue in dispute is, the Court will have regard to the referral form (LRA7: 11) as well as facts placed before it... The most effective way of determining the real issue in dispute is to ask the following questions: What must the employer do in order to avoid the commencement of the strike? Where the strike has already begun the question would be: what must the employer do in order to bring an end to the strike? ...”

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- (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute.

⁶ 65 (3) (1) 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...

⁷ Case number J3339/12 delivered on 18 March 2013.

- [11] I am in agreement with this approach. The approach is informed by what the LAC has already said.⁸ Regard being had to the referral form; the strike notice and the admitted facts, if the applicants had extended the Bargaining Unit to include certain employees in the positions as set out in annexure C, the strike would not have commenced. Therefore, that is the issue in dispute. Is the issue of the extension of the Bargaining Unit prohibited in a collective agreement? The Relationship Agreement (RA) concluded in 1999 does not make reference to the inclusion in and or extension of the Bargaining Unit. It simply regulates the relationship between the applicants and the Union. With regard to the Bargaining Unit, all it does is to define the phrase in so far as it is employed in the agreement. It seeks to aid the interpretation of the phrase whenever employed in the agreement. The peace obligation specifically prohibits strike action on any issue which is the subject matter of an agreement. Therefore, my reading of the RA does not suggest that striking over the extension of the Bargaining Unit is prohibited. The Substantive Agreement (SA) concluded for 2018 to 2021, 2009 to 2010/2011 and 2011 to 2012 do not prohibit a strike action over the extension of the Bargaining Unit.
- [12] In the 2011 to 2012 SA, the parties did recognize that the negotiated benefits will be extended. The parties undertook to engage in negotiations aimed at reviewing the structure and composition of the current Bargaining Unit subject to certain provisos. I therefore conclude that striking over the issue of the extension of the Bargaining Unit is not prohibited in terms of the section. The argument by Mr Van Zyl, for the applicants, suggests that because a criterion has been agreed to for determining the employees in the Bargaining Unit, then employees cannot make any demands to seek an extension. This cannot be correct. The employees are simply demanding an extension, which as it is apparent from clause 10.1 of the 2011 to 2012 SA, was agreed to by the applicants. In order to avert the strike what was required was to simply extend the Bargaining Unit.

Does section 65 (3) (a) (i) find application?

⁸ See *Ceramic Industries Ltd t/a Betta Sanitaryware v NCBAWU and others* (2) [1997] 18 ILJ 671 (LAC)

[13] I have already found that the issue in dispute is the extension of the Bargaining Unit. The question relevant herein is whether there is any collective agreement that regulates the extension of the Bargaining Unit. The dictionary meaning of the word regulate is to control, govern, or direct by rule or regulations⁹. Other than a promise to extend the benefits in clause 10.1 referred to above, there is no other clause that seeks to control or govern the extension of the Bargaining Unit. The applicants' case in the founding affidavit is limited to reference to the agreed criteria as to who shall constitute a Bargaining Unit. That, to my mind does not regulate a demand to extend the Bargaining Unit. Therefore, in my view section 65 (3)(1)(a) does not find application.

The issue is academic

[14] Section 64 (1)(c) obliges that a 48 hours' notice be given on the commencement of the strike action. There are various judgments of this court to the effect that if the strike notice is unclear and defective, the strike action would be unprotected. In terms of the notice relevant to this matter, the strike action was to commence after 05h00 on 27 April 2018 and end on the 30th April 2018 at 05h00. Therefore, on the return day, the strike would have ended. Even if it was unprotected, it was not going to continue after 30 April 2018. Issuing a final order would have been academic. None of the parties before me dealt with this issue. I do not know the reason why. This court can refuse to issue an order where there are no longer live issues. This matter is in my view moot and should be dealt with on those bases.

Conclusion

[15] For all the above reasons, I conclude that the strike action was going to be protected, however, despite that, the application is nonetheless moot.

[16] In the results I make the following order:

⁹ Shorter Oxford English Dictionary Sixth Edition Volume 2.

Order

- 1 The *rule nisi* issued on 26 April 2018 is hereby discharged;
- 2 Each party to pay its own costs.

GN Moshwana

Judge of the Labour Court of South Africa.

Appearances

For the Applicant: Advocate B Van Zyl.

Instructed by: Van Zyl Rudd Inc Attorneys, Port Elizabeth.

For the Respondents: Advocate B Ford.

Instructed by: Ndumiso Voyi Inc, Midrand.