

OF INTEREST
IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO **D645/2001**

DATE 2001/05/25

REVISED 2001/07/05

In the matter between:

DEFY APPLIANCES LIMITED

First Applicant

DEFY REFIGERATION LIMITED

Second Applicant

and

NUMSA & ANOTHER

First Respondent

P ANWAR & OTHERS

Second Respondent

**JUDGMENT DELIVERED BY THE HONOURABLE JUDGE PILLAY
ON 25 MAY 2001**

TRANSCRIBER
SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

J U D G M E N T

PILLAY J

The crisp issue for determination in this matter is whether recommendation issued by the Bargaining Council can qualify as an advisory award so that there is compliance with Section 64(2) of the Labour Relations Act No 66 of 1995 (the LRA).

The Union had referred a dispute to the Bargaining Council about various issues which could broadly be classified as refusal to bargain issues. The Bargaining Council issued a recommendation in the format of a letter addressed to the Union. It reads as follows:

"With reference to the above Dispute and after discussions with Council's Regional Manager it has been agreed that due to the complexity of this matter and in fairness to both parties, that a recommendation in terms of Section 135(3)(c) is that the matter is referred to Independent Arbitration prior to any other action being instituted."

The process which precedes an advisory arbitration award, particularly when industrial action is contemplated, is fundamental to the design of the resolution of refusal to bargain disputes. It is a process separate and distinguishable from conciliation that precedes it in terms of section 135. Conciliation is consensual. Arbitration, including advisory arbitration, is adjudicative. The mindset of the parties, the process adopted, the outcome of each process are some of the major differences between arbitration and conciliation. Section 135(3)(c) anticipates that advisory arbitration may be used to resolve a dispute that is referred for conciliation. This does not make the content of conciliation the same as arbitration. BY prescribing advisory arbitration as an absolute prerequisite the legislature clearly intended that the parties undergo a process of arbitration.

Ms **Chinsamy** for the union submitted that as section 64(2) referred to section 135(3)(c) the recommendation was sufficient compliance and that an award was

not necessary.

It is common cause that the dispute is a refusal to bargain dispute. It is also common cause that no arbitration was held before the recommendation was made. The recommendation by the Bargaining Council is merely procedural. It does not address the substantive issues in dispute as an advisory award is likely to do in such circumstances.

The Court finds in favour of the applicant and confirms that there has not been compliance with section 64(2).

The Court grants an order in the following terms:

The respondent is interdicted and restrained from aiding and/or abetting and/or encouraging the second and other respondents from embarking upon an unprocedural strike on 21 May 2001 or thereafter in contravention of the provisions of sections 64 and 65 of the Labour Relations Act of 1995 in terms of the first respondent's notice of intention to strike dated 17 May 2001.

The second and other respondents are interdicted and restrained from embarking on an unprotected strike on 21 May 2001 or thereafter in contravention of the provisions of sections 64 and 65 of the Labour Relations Act of 1995 in terms of the first respondent's notice of intention to strike dated 17 May 2001.

The respondents are jointly and severally ordered to pay the costs of this application.

The service of this order is to be effected,

by serving a copy on the first respondent's representative in Durban by way of a facsimile transmission;

by serving a copy on the senior shop steward at each of the applicants' factories in Jacobs, East London and Esakheni respectively or, failing the presence of the senior shop steward, on any shop steward that may be present at the premises in question;

4.3 by posting and keeping a copy of the order on the applicants' staff notice board at each of its premises in Jacobs, East London and

Esakheni respectively.

FOR THE APPLICANTS: MR R C W PEMBERTON
GARLICKE & BOUSFIELD INC

FOR THE RESPONDENTS: MS ELAINE CHINSAMY
NUMSA