

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO J3113/2001

In the matter between:

**NATIONAL UNION OF METALWORKERS OF SOUTH
AFRICA ON BEHALF OF G DAVIS AND OTHERS**

Applicant

and

ESCOM

Respondent

JUDGMENT

JAMMY AJ

The Applicant in this matter seeks an order interdicting the unilateral implementation by the Respondent of its increased wage offer, following a failed statutory conciliation process in its current wage dispute with the Respondent. The fact that there is no case law on the issue raised in this urgent application has been emphasised to me and ideally, having regard to the complexities which have been argued, I would have preferred more time to consider it, rather than to be in a position where I feel that it is necessary to make an *ex tempore* finding. But obviously there are time implications involved and it would not be appropriate to delay the process unnecessarily.

Having heard the submissions that have been made therefore, my view is that the wording of section 64(4) of the Labour Relations Act 1995, insofar as it incorporates a

reference to section 64(1)(a), must be given its literal interpretation having regard to the language which is used. That is a trite aspect of statute interpretation.

Section 64(4), which was invoked by the Applicants in their referral to the CCMA of a dispute with the Respondent regarding an alleged unilateral change to conditions of employment, makes reference in its preamble to “a period referred to in sub-section (1) (a)”. There is only one period reflected in section 64(1) and that is the period of 30 days or any extension thereof, referred to in section 64(1)(a)(ii), which has elapsed since the referral was received by the Commission. The reference in section 64(1)(a)(i) to a certificate stating that the dispute remains unresolved and the issuing of such a certificate, is not a reference to a period of time but to the happening of an event and the conclusion which I have reached in that context is that it is only section 64(1)(a)(ii) which is intended to be referred to in section 64(4).

On that basis, it is that section, - which requires the employer, for the period referred to in section 1(a), not to implement unilaterally the alleged change in question, - that is applicable in the present circumstances. The Respondent, having announced its intention to implement its offer unilaterally, having irreversibly commenced that process in respect of the current month and notwithstanding the immediate referral of that issue by the Applicant to the CCMA with specific reference to section 64(4) and having thereby, the Applicant contends, consciously disregarded its restrictive provisions, will, if it is permitted to do so again whilst the wage dispute remains unresolved, remain in clear breach of that section.

I agree with that submission and what must therefore now be considered is the second argument advanced on behalf of the Respondent in that context. That, if I understood it correctly, is to the effect that its entitlement to implement its offer unilaterally was established as soon as conciliation in the main wage dispute failed and that if section 64(4) became applicable with the referral of that dispute to the Commission, then the period of 30 days prescribed in section 64(1) began to run from the date of that referral and had already expired when the Respondent’s intention to implement the offer was made known.

That submission, in my opinion, is without substance. In the first instance, the wage dispute initially referred to the Commission was not one contemplated by section 64(4) and section 64(1)(a)(ii) could therefore have no application. Secondly, when the dispute was certified as unresolved, the parties became positioned in the power play situation which has been referred to by counsel. The Applicants were in a position to implement strike action on proper notice, as in fact they did. The employer, had it wished to do so, could on its own initiative have instituted a lock-out. That is the adversarial situation which in that context the statute envisages but there was, in essence, a *novus actus interveniens* which created a new state of affairs. That was the decision of the employer to implement unilaterally the wage increase offered by it and that decision created a new and independent dispute.

In my view, it was not entitled to do that until 30 days had elapsed from the time that that specific issue was referred to the Commission for conciliation. Colloquially speaking, it jumped the gun. That constituted a contravention of section 64(4) of the Act and in the context that it was a contravention, it will remain a contravention if it is sought to be done again within that 30 day period, which at this time, has not yet expired.

I reiterate that the implementation of the unilateral wage increase on 27 July, which I accept is a process which cannot now be reversed, will constitute a breach of section 64(4) of the Act. The fact that it is irreversible does not mean to say that it can be repeated if there is a basis for stopping it and the order that I therefore make is that the Respondent is interdicted from pursuing that course again within a period of 30 days from the date upon which this specific dispute was referred to the CCMA.

What happens after that is not an issue with which I have to deal at this stage. Mr Sutherland has suggested that this is a matter where costs should follow the result. I agree, and in the circumstances the Respondent is ordered to pay the Applicant's costs of this application on the appropriate scale.

Acting Judge of the Labour Court

25 July 2001

Representation:

ants: . Attorney R Edmonds

ndent: Advocate R Sutherland S.C.