REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JA 57/2011

FOOD AND ALLIEDWORKERS UNION **Appellant**

and

TSB SUGAR RSA LTD **First Respondent**

SOUTH AFRICAN TRANSPORT AND

AND ALLIED WORKERS UNION **Second Respondent**

NATIONAL ASSOCIATION OF SUGAR

REFINERY AND ALLIED INDUSTRY

EMPLOYEES UNION **Third Respondent**

Delivered: 13 June 2013

CORAM: Waglay DJP, Davis JA and Tlaletsi JA

JUDGMENT

TLALETSI, JA

Introduction

[1] This appeal is against the judgment and order of the Labour Court (Bhoola J) confirming a *rule nisi* and interim interdict on 27 June 2011 in an application brought by the first respondent. The effect of the order was to declare the strike action by the appellant as well as second and third respondent, which commenced at 07h00 on 16 June 2011 and of which notice was given to the first respondent on 13 June 2011 to be an unprotected strike as contemplated in section 68 of the Labour Relations Act, 66 of 1995 ("the LRA") as well as interdicting and restraining the appellant and further respondents who were employees listed in annexure "X" from participating in the strike. The appellant was ordered to pay the costs of the application. The appeal is with leave of the court *a quo*.

Factual background

[2] It is common cause that the strike action pertained to disputes concerning two demands namely, an incentive scheme and funeral benefit.

[3] The first respondent runs sugar farms, three mills and two refineries in three areas, namely Malelane, Komatipoort and Pongola. However, no dispute was declared in respect of Pongola operations for the purposes of this matter. There is a Bargaining Council in existence with jurisdiction over the sugar manufacturing and refining industry. The appellant and the first respondent have concluded collective bargaining agreements which entrench certain provisions of the collective agreements concluded at that Council and which themselves deal with certain conditions of employment.

[4] It is not disputed that during February 2010 first respondent resolved to apply an incentive scheme for the financial year commencing 01 April 2010 and terminating on 31 March 2011. The incentive scheme and the rules applicable to it are encapsulated in a document headed "Staff Incentive Scheme for TSB Sugar (RSA)".

[5] The amount of remuneration for the various divisions differed. It depended on the earnings generated by the division and the manner in which each division

achieved other drivers (goals), such as its safety record and other agreed drivers which support the profitability of the relevant division.

[6] The practice of the incentive scheme commenced during 2007. It was introduced then to obtain the buy-in of and incentivise the first respondent's employees in respect of the earning targets by management, after approval by the first respondent's shareholders. The incentive scheme was in previous financial years successfully implemented and employees obtained variable bonus payments per division.

[7] It is not disputed that certain targets were set for the first respondent for the 2010/2011 financial year in terms of a document attached as Annexure "A". This meant that should those targets be met the first respondent's employees qualified for an incentive bonus payment after the end of the 2010/2011 financial year.

[8] According to the appellant, their members were in the past made to understand that once each division had achieved 70% of the targets set by management, that division would become eligible for payment of a *pro rata* bonus. Each month bar graphs were placed on the notice board of each division including, with dotted lines, the actual targets achieved in that division each month. The appellant avers further that based on the graphs that have been placed on the notice boards during the second half of 2010; the employees were expecting to receive bonuses paid during May 2011 since each division had achieved at least 70% of each target set. Their expectation, they contend, was reinforced when braais were held and each employee received a chicken and a T-shirt because targets had been achieved.

[9] It is common cause that during November 2010 the first respondent's Chief Executive Officer ("CEO") during a "road show" showed the employees a bar chart that depicted a significant drop in turn over from the previous year against the budget. According to the first respondent a letter dated 27 January 2011 annexed to the affidavit was distributed to the employees. The letter advised *inter alia*, that the criteria for the payment of the incentive bonus would probably not be achieved. The appellant denies that the said letter was distributed to the employees or sent to it. In my view, nothing turns on this

denial because it is common cause that first appellant's view then was that the targets that would entitle payment of the incentive bonus were not met for that financial year.

[10] It is further common cause that on 05 April 2011 management of the first respondent received a memorandum from the unions including the appellant, indicating, *inter alia*, that the employees at Malelane looked forward to an increased incentive based on the fact that the intended target had been reached according to management and that "management itself is very proud of us" (sic). The memorandum concluded that action would be taken should they not "see the bonus on 24.05.2011. We are going to take action against that".

[11] On 19 April 2011, the appellant sent a letter to first respondent in which they stated that 'we would like to remind your company to pay the incentive bonus for Komati Mill employees on the pay day of Thursday 21st April 2011'.

[12] During May 2011, first respondent's CEO undertook another "roadshow" to explain, *inter alia*, the results for the financial year to 31 March 2011. He also displayed a document (Annexure "F") that showed that profit was merely 74% of that budgeted for.

[13] It is common cause that the incentive bonus payment that would have been paid in May was not paid because according to the first respondent, targets were not met. On 19 May 2011, the appellant referred a dispute about the incentive bonus payment to the Bargaining Council. In the referral document, on the summary of the facts of the dispute, they wrote:

> '[F]ailure of the Company to pay incentive bonus to its Komati and Malelane Sugar Mills employees whilst the required production target have been met.'

[14] The dispute concerning the application of the incentive scheme was conciliated on 02 June 2011. During the conciliation, the first respondent's approach was that this was not a dispute of interest but one about the payment, or non-payment of remuneration to which the appellant and its members were, or were not entitled. First respondent contended, further, that this dispute could properly be resolved by the Labour Court and that

resolution by power play was inappropriate. A certificate of non-resolution indicating that the dispute may be resolved by strike was issued by the Bargaining Council.

[15] I now proceed to discuss the background facts relating to the second issue which is the subject of the dispute. It is common cause that all employees of first respondent are obliged as a condition of employment, to join either of the TSB Retirement Fund or the TSB Provident Fund. In terms of both Funds, the first respondent funds funeral policy benefits for its employees.

[16] On 26 November 2010, first respondent met with the appellant's representatives and proposed that the funeral policy fund under the name of Food and Allied Workers Funeral Fund Plan (FAWFP) be implemented for its members and that stop order facilitates and a subsidiary be granted by first respondent for this purpose. First respondent responded by way of a letter dated 09 December 2010. The body of the said letter read thus:

> 'Our meeting on Friday 26 November 2010, refers.
>
> As discussed, the request for making available stoporder facilities for deduction of payment of funeral cover for membership of FAWFP, as well as a request for subsidising membership was presented to the Tsb Executive member responsible.
>
> The executive confirmed as follows:
>
> - Tsb policy remains not to allocate any new stoporders facilities on Tsb payroll.
> - All employees receive payment via their bank accounts and the FAWFP is free to recruit participants paying via debit orders or bank generated stoporders from bank accounts.
> - An additional funeral cover provider was introduced in 1 May 2007 on request of FAWU shopstewards at the time. Tsb has made stoporder facilities available to the scheme driven by FAWU and underwritten by KGA. The scheme and facility is still in place as additional voluntary cover.

- Due to all permanent employees belonging to a retirement fund as a condition of employment and all Tsb related funds provide funeral cover paid by the employer portion, no consideration can be given to subsidise membership of any additional cover.

- All employees are free to choose to buy additional funeral cover from any provider and paying premiums via bank accounts".

[17] On 14 February 2011, the appellant wrote to the first respondent setting out its demands and proposing a meeting on 01 March 2011. The body of the letter reads thus:

> 're: Food and Allied Workers Funeral Plan
>
> The above refers
>
> The content of your letter dated 09 December 2010 regarding the above has been noted and reported to the members on the 09th February 2011. Please note that the General meeting resolved and maintained us of the following for discussion with yourselfs.
>
> 1. Replacement of the current funeral scheme to the food and Allied Workers Funeral Plan.
>
> 2. Stop order facility on TSB Payroll.
>
> 3. Funeral Plan subsidy by TSB of R45.75c at R20.000 funeral benefits cover for member's family.
>
> We propose to meet with yourselfs to discuss the above as follows:
>
> Date: 01 March 2011
>
> Time: 9hrs
>
> Venue: TSB Malelane
>
> Hope for your response to the above.
>
> Regards'

The appellant's representative(s) did not arrive for the 1st March 2011 meeting and first respondent left the matter there.

[18] On 17 March 2011,the appellant wrote to first respondent regarding the dispute. They registered their disappointment that first respondent did not acknowledge receipt or respond to their previous letter and that their members had been left with no option but to instruct appellant to declare a dispute of "matter of mutual interest on issues contained in the very same above dated letter".

[19] On 05 April 2011, the appellant referred a dispute about the funeral policy to the Bargaining Council. The summary of the dispute on the referral form was described as:

> 'The employer refuses to agree on proposed issue by the union of a stop order, funeral policy and 100% cover on funeral benefit.'

The dispute was conciliated on 02 June 2011. The first respondent contended that it was prepared to grant a stop order facilities sought by appellant but could not replace the existing compulsory scheme. On 10 June 2011, the Bargaining Council issued a certificate in respect of the funeral policy dispute indicating *inter alia*, that the unresolved dispute could be referred to strike or lockout action.

[20] It is common cause that the bargaining relationship between first respondent and the appellant is dealt with in two collective agreements namely; one of 30 November 1999 and another of 03 November 2005. There has been no amendment to the agreements subsequent to 03 November 2005.

[21] On 13 June 2011, appellant gave notice that they intended embarking on a strike in respect of the two disputes. The notice stated *inter alia* that:

> 'This serve to formally notify the company that our members and members of other two unions will embark on a protected strike, emanating from the two unresolved dispute heard by the council. The above is a compliance of section 64 of the Labour Relations Act 66 of 1995.
>
> The 48 hours notice shall calculate from 7 hours am on Tuesday to 7 hours am on the Thursday when the strike shall be starting.

Please note that the doors of the Union are still open to further the negotiations to settle the dispute.

Hope to hear from you.' (sic)

Findings of the Labour Court

[22] The Labour Court made the followings and conclusions:

22.1 A scheme was in place and that there were certain production targets to be met in terms of the scheme; the members of the appellant and second respondent understood that they had reached the targets;

22.2 The dispute relates to the failure of the first respondent to pay the promised bonuses, with the employees having reached the targets;

22.3 This would relate to a classic dispute of right which would render the strike prohibited in terms of section 65(1)(c) of the LRA;

22.4 The dispute relating to funeral benefits is a reference to the appellant's letter dated 14 February 2011, which is the demand that there be a replacement of the current scheme.

22.5 It appears common cause that the current funeral scheme is regulated by collective agreement, hence the demand seems to relate to an issue regulated by a collective agreement and it would not be appropriate that this should form the subject of the strike.

As pointed out already the Labour Court declared the strike unprotected and interdicted the appellant and persons listed in the annexure to the notice of motion from embarking in the strike action.

The Appeal

[23] The grounds on which the judgment of the Labour Court is challenged are that the court erred in:

23.1 finding that it was open to the first respondent, having relied on an alleged express agreement with respondents in its founding affidavit, which it later admitted was false, to thereafter rely on alleged implied or tacit agreement with its workforce, since this was the case the appellant was called upon to meet,

23.2 finding that the issues in dispute are rights issues that cannot be enforced by strike action.

23.3 in taking into account the employees' belief in their achievement of the production targets when this was irrelevant and/or insufficient to elevate the issue in dispute to a dispute of right.

23.4 in awarding the first respondent costs since the first respondent did not ask for such costs at the hearing.

[24] Section 23(2)(c) of the Constitution guarantees the right to strike for every worker. The LRA in giving effect to the constitutional right to strike regulates the right to strike in sections 64-77.

[25] The LRA gives statutory protection to the constitutionally entrenched right to strike while at the same time sets out procedural and substantive limits to the exercise of the right. The two permissible limits relevant to this appeal are found in section 65(1) of the Act which provides that:

> '65(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if-
>
> (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect ofthe issue in dispute;
>
> (b that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;
>
> (c) the issue in dispute is one that a party has the right to refer to arbitration or to theLabour Court in terms of this Act;
>
> (d) ...'

[26] The contentions on behalf of the appellant in this Court, which are essentially its grounds of appeal and the same submissions made in the court *a quo* may be summarised as hereunder. That the first respondent should not have been granted the final order because the case made out in the founding affidavit was that the incentive bonus scheme was an express term of the employees` contracts of employment and later in reply first respondent's case was that the incentive scheme demand must be a dispute of right because the union said

they “expected” the payment of the bonus. Secondly, that everything about the bonus is unilaterally determined and is at the sole discretion of the board and reference to targets being met is no more than motivation of the demand and as such cannot be elevated to being a condition of employment. Thirdly, that the demand for the implementation and subsidy of the funeral scheme or benefit had nothing to do with the employer’s existing provident and pension funds. Lastly, that the demands are severable and give rise to separate relief.

[27] Hard as I tried, I could not find merit on the above submissions on behalf of the appellant regard being had to the facts and evidence in the case. The fact is, whether the bonus scheme was introduced unilaterally or not, the first respondents and its employees were in agreement on the rules of the bonus scheme and that it applied for the financial year commencing 01 April 2010 and terminating on 31 March 2011. The incentive scheme and the rules applicable to it are encapsulated in the document headed “Staff Incentive Scheme for TSB Sugar (RSA)”.

[28] In my view, everything point to the fact that the appellant was not mistaken about its demand. In the dispute referral the appellant clearly indicated that it understood and described the issue in dispute as “failure of the company to pay the incentive bonus whilst the required production targets have been met”. As a special feature or additional information in the referral form the appellant stated that ‘The Company Have Promised To Pay TheEmployees THE Incentive Bonus If They Reach The Targets’. The matter does not end there. In the answering affidavit, the deponent stated categorically that:

> ‘[W]e accept that different divisions will be remunerated differently. We only require this differentiation to be calculated according to fixed and defined criteria based on the pro rata achievement of targets, as has been the case since 2007.’

[29] It is illogical, in my view, to contend that the demand relating to payment of the bonus is not a right issue. The correspondence from the appellant’s referred to above refer to payment of the bonus as per the criteria set out and applicable at first respondent. Had the first respondent complied with the strike notice and paid the bonuses as per the targets, there would not have

been any reason for the dispute because the appellants would have received what they demanded.

[30] With regard to the second demand, the dispute referred to conciliation is the introduction of a new policy to be paid by the first respondent. Accordingly, appellants wish to introduce a new condition of employment. The collective agreement, the contents of which are common cause, determines that the employees retain their current condition of employment and benefits. The appellant's demand, be it replacement of the supplementary voluntary funeral scheme or the compulsory provident and retirement fund funeral scheme is regulated by the collective agreement.

[31] It is not open to the appellants to introduce a new demand in the answering affidavit under the guise of clarifying the strike notice. The notice was clear as to what the appellant intended pursuing through strike action and what was required of the first respondent to meet the appellant's demands. There was no need for the first respondent to go beyond what was clear and request clarification as suggested.

[32] In my view, the Labour Court committed no misdirection and was correct in its findings. As regards the order for costs, it was conceded that the first respondent did not abandon its prayer for costs in the court *a quo*. It would, in my view, be improper to interfere with the discretion exercised by the court *a quo* in awarding the first respondent costs. It is also in accordance with the requirements of the law and fairness that the first respondent be awarded its costs on appeal.

[33] In the result, the following order is made:

1. The appeal is dismissed with costs.

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TLALETSI, JA

Judge of the Labour Appeal Court

Waglay DJP and Davis JA concur in the judgment of Tlaletsi JA.

Appearances:

For the appellant:	Mark Euijen
Instructed by:	Cheadle Thompson &Haysom
For the respondent:	N Cassim SC
Instructed by:	Savage Jooste& Adams Inc