IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case no: PA2/14

In the matter between:

MAWETHU CIVILS (PTY) LTD **First Appellant**

MAWETHU PLANT (PTY) LTD **Second Appellant**

and

NATIONAL UNION OF MINEWORKERS AND OTHERS **Respondents**

Heard: **10 March 2016**

Delivered: **20 April 2016**

Summary: Common practice at employers' workplace that employees work five and half hours the week preceding a public holiday so that they may have a full paid long weekend. Employee refusing to work the preceding week prior to the public and employer not paying employees for the day of which they did not work. Union declaring a dispute and issuing a strike notice – Although Labour Court issuing an interim order restraining the strike, it discharged the rule *nisi* on the return date. Appeal – employers contending that issues in dispute was a dispute of right which should be adjudicated - court finding that issue in dispute is that of unfair labour practice and that the prohibition in section 65(1)(c) of the LRA did apply both in fact and in law - issue in dispute ought to have been referred to arbitration in terms of section 191(5)(iv) of the LRA - strike was prohibited and unprotected - Labour Court erring in discharging the rule *nisi* – appeal upheld.

Coram: Waglay JP, Sutherland JA *et* Murphy AJA

JUDGMENT

MURPHY AJA

[1] The appellants appeal against the judgment of Lallie J in which she discharged a rule *nisi* including an interim interdict restraining the respondents from participating in a strike.

[2] The strike in question arose in relation to a dispute about the appellants' alleged non-compliance with a long-standing practice in relation to payment for special leave for days proximate to public holidays at the workplace of the appellants.

[3] The respondents did not file any opposing papers. Consequently, the facts set out in the founding papers are common cause.

[4] The appellants state that there is a long-standing employment practice at their workplace in terms of which employees would work additional hours in the week before a particular public holiday, at no extra remuneration, in exchange for which they would receive a paid day's leave at the time of the public holiday thus allowing employees a long-weekend. In the present instance the dispute arose in relation to the work during the week in which the public holiday of 9 August 2012 fell on a Thursday. In accordance with the practice, employees were expected to work five and a half hours unpaid overtime in the preceding week in exchange for which they would be entitled to paid leave for Friday 10 August 2012, the day after the public holiday. The appellants maintain that the practice had become an agreed term of employment of the employees.

[5] In the week in question, the employees refused to work the additional five and a half hours in the preceding week and did not report for duty on Friday 10 August 2012.

[6] The appellants decided not to take disciplinary action against the employees. Instead they simply did not pay the employees for Friday 10 August 2012, in accordance with the principle of "no work, no pay".

[7] A dispute arose between the appellants and the first respondent trade union and the employees regarding the non-payment of wages for Friday 10 August 2012.

[8] On 20 September 2012, the respondents referred a dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). The referral form describes the dispute cryptically and misstates the nature of the actual grievance. The description reads:

> 'Employer is refusing to pay 5½ hours as agreed that will be paid to workers.'

The actual grievance was that the employer refused to pay the employees a full day's pay for Friday 10 August 2012.

[9] The issue in dispute between the parties was whether it was a term of the contract that the employees had to work the unpaid overtime in order to receive payment for Friday 10 August 2012.

[10] Following unsuccessful conciliation of the dispute at the CCMA on 15 November 2012, the CCMA issued a Certificate of Outcome, identifying the dispute between the parties to have been one of mutual interest, declaring that it remained unresolved and recording that a strike could be proceeded with as the appropriate means for resolving the dispute.

[11] The following day, 16 November 2012, the legal representatives of the appellants addressed a letter to the respondents as follows:

> 'We refer to the above dispute of so-called "Mutual Interest" and the fact that Commissioner Marius Kotze has issued a Certificate of Non-Resolution on 15 November 2012.
>
> The subject matter of the dispute is clearly the alleged non-payment of wages as described in your LRA 7.11 referral form and expanded upon at the conciliation. This is not a dispute in which the CCMA has jurisdiction. Commissioner Marius Kotze should have ruled so. It is contractual dispute or at best, one that must be dealt with by the Department of Labour. However, the fact that a CCMA certificate has now been issued, theoretically entitles you to give 48 hours to embark on a protected strike.

> Clearly, there is an error in law which will be corrected by the Labour Court. We therefore wish to inform you unequivocally that should you utilize the opportunity that the certificate provides you to embark upon a strike, we shall, on behalf of our client:
>
> 1. Immediately apply for an urgent interdict which will be successful based on current law; and
>
> 2. We shall ask for a costs order against yourself, the union (NUM) and the CCMA, jointly and severally.
>
> That having been clearly said, our client is still prepared to engage you to find a reasonable and responsible solution to the alleged dispute.'

[12] There was no response to this letter. Instead, after issuing a strike notice on 23 November 2012, the respondents embarked upon a strike on 26 November 2012, and the appellants launched an urgent application to declare the strike unprotected and to interdict it. The learned judge *a quo* granted the interim interdict on 29 November 2012. On the return date of 12 February 2013, she discharged the interdict. The appeal is against this order.

[13] In her judgment, the judge correctly focused on the wording of section 65(1)(c) of the Labour Relations Act[1] ("LRA"), being the provision on which the appellants had relied to support their claim that the strike was unprotected. It reads:

> '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) ….
>
> (b) ….
>
> (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act.'

[14] The appellants' argument before the Labour Court was to the effect that the prohibition in section 65(1)(c) of the LRA should be interpreted extensively to

[1] Act 66 of 1995.

include disputes that could be referred to the Department of Labour or the Labour Court in terms of the Basic Conditions of Employment Act[2] ("BCEA"). The appellants thus assumed that the dispute was not one which the respondents had the right to refer to arbitration or the Labour Court in terms of the LRA. The rationale of their argument rather was that the dispute was quintessentially a rights dispute which should not be resolved as if it were an interest dispute by resort to industrial action.

[15] The Labour Court held that in light of the right to strike being a fundamental right under our Constitution, section 65(1)(c) of the LRA must be given a strict interpretation. It accordingly declined to interpret the words "in terms of this Act" in the section to mean in terms of the LRA or any other employment legislation. For that reason, the Labour Court held that the fact that the respondents had the right to refer the dispute to the Department of Labour or to the Labour Court under the BCEA was no bar to their exercising the right to strike in relation to the dispute.

[16] Much effort was spent in the heads of argument filed in this appeal to persuade us to adopt the appellants' arguments and to purposively interpret section 65(1)(c) of the LRA to exclude the right to strike in relation to rights disputes which can be resolved by adjudicative means under statutes other than the LRA. Subsequent to this dispute arising, the provisions of section 65(1)(c) of the LRA were amended to achieve that purpose. With effect from 1 January 2015, section 65(1)(a) of the LRA now reads:

> '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) ….
>
> (b) ….
>
> (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act *or any other employment law*.'

[2] Act 75 of 1997.

It is common cause that the amendment does not operate retrospectively.

[17] I do not propose to engage with the arguments put forward by the appellants in support of reading in the provisions of the amendment into the earlier version of section 65(1)(c) of the LRA prior to its amendment. They are unpersuasive and the Labour Court was correct not to read in the additional wording. The omission in the section was properly a matter for the legislature. In any event, for reasons that will appear presently, it is not necessary to interpret the provision extensively.

[18] The dispute about payment for the leave day is indeed a dispute of right. The undisputed averment of the appellants in the founding papers was that the arrangement was a "practice". In argument, it was contended further that such practice had become a contractual term. Whatever the niceties, the underlying dispute was plainly not about the creation of fresh rights, and thus lacked the dimension of an interest dispute aimed at the modification of existing rights. The parties were essentially *ad idem* that the dispute related to the entitlement of payment for leave taken by the individual respondents on 10 August 2012. They agreed that it could have been resolved by adjudication in a reference to the Labour Court in terms of section 77 of the BCEA. The dispute was quite obviously one amenable to resolution through a process of adjudication to determine any enforceable rights or expectations. The workers were not demanding rights they did not have; they wanted enforcement of a right they claimed entitled them to wages for the day's leave they took.

[19] The categorisation of the dispute as either one of right or interest is strictly speaking not determinative. That is not the issue the Labour Court had to decide in order to reach a conclusion on whether the strike was prohibited under section 65(1)(c) of the LRA prior to its amendment in 2014. The issue the court had to decide was whether the respondents had the right to refer the issue in dispute to arbitration or to the Labour Court in terms of the LRA. The answer to that question appears to me to be in the affirmative. In my opinion, the issue in dispute involves an alleged unfair labour practice which could and should have been referred to the CCMA in terms of section 191(1)(a) of the LRA. If and when conciliation failed, the respondents would at that point have

acquired the right to request arbitration in terms of section 191(5)(iv) of the LRA.

[20] Section 186(2) of the LRA defines an unfair labour practice to include *inter alia* any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the provision of benefits to an employee. The practice of giving employees a full day's paid leave in exchange for overtime for a lesser period in the preceding week undoubtedly falls within the concept of a "benefit". The arrangement arises *ex contractu* and bestows an advantage or privilege granted in terms of a policy or practice followed by the employer in its discretion. It does not consist solely of the payment of remuneration in exchange for labour. It involves a beneficial arrangement beyond the normal terms of the standard *quid pro quo*. It is a labour practice at the workplace and allegations about the fairness of the respective conduct of the parties relating to it are amenable to resolution by arbitration.

[21] In the premises, the prohibition in section 65(1)(c) of the LRA did apply both in fact and in law. The issue in dispute was one which the respondents had the right to refer to arbitration in terms of section 191(5)(iv) of the LRA and thus the strike was indeed prohibited and unprotected with the result that the Labour Court should have confirmed the rule *nisi* and not discharged it.

[22] The fact of the issue in dispute involving an alleged unfair labour practice was not raised in the court *a quo*, but emerged for the first time during the appeal. Be that as it may, it is the order of the court not its reasoning that is appealable. If in fact and law the issue in dispute could have been referred to arbitration, the appeal against the refusal to confirm the rule *nisi* must succeed.

[23] Counsel for the respondents argued that the appeal has become moot with the passage of time and will have no practical effect. That is not correct. There is a live dispute between the parties about the legal character and consequences of the strike that has continued relevance in the on-going industrial relations in which they are involved. The appellants legitimately seek

judicial affirmation of their stance in regard to the appropriate means of resolution of a dispute of this nature.

[24] The appellants have not pressed us to award them costs.

[25] In the premises, the order of the Labour Court of 12 February 2013 is set aside and substituted with the following:

"The rule *nisi* is confirmed and a final order is granted."

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JR Murphy AJA

I agree

_____

Waglay JP

I agree

_____

Sutherland JA

APPEARANCES:

FOR THE APPELLANTS: Mr Snyman of Snyman Attorneys

FOR THE RESPONDENTS: Adv J Grogan SC

Instructed by Wesley Pretorius Attorneys