IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C770/2000

DATE: 20-10-2000

In the matter between:

Applicant

and

First and Further Respondents

J U D G M E N T

WAGLAY, J:

1. The applicant in this matter sought to interdict the trade union and not its members from participating in promoting or inciting any strike action at the applicant's plant in Saldanha, Western Cape. The application was opposed by the respondent.

2. After hearing argument from the parties late yesterday afternoon, I gave an order that the application was dismissed with costs, without giving

reasons for such an order. The reasons now follow. The applicant provides specialist materials handling services in the metal industry, serving in the main Saldanha Steel, a steel manufacturing enterprise. Without the services of the applicant the entire Saldanha Steel operation would be compromised and forced to a standstill, causing it substantial damage.

3. Although the applicant does not have a recognition agreement with the respondent, both parties belong to the National Bargaining Council for the iron and Steel engineering and metal engineering industries (hereafter "Council") and are bound to the main agreement concluded at the council.

4. The background to the present interdict can be summarised as follows:

1. The applicant conducted its operation on a three shift system on a 24 hour basis. Because of the volume of work and the three shift system, applicant's employees were required to work a considerable period of overtime.

2. The employees, all of whom appear to be members of the respondent, complained that their family life was compromised and they were exhausted and were generally unhappy with the hours they had to work.

3. As a result of the above complaints in the course of this year, respondent and its members demanded that the three shift system change to a four shift system. Applicant attempted to dissuade the respondent and its

members from pursuing the four shift system for various reasons.

4. Respondent and its members remained unmoved and persisted that applicant change to a four shift system, and in and during May applicant indicated its willingness to seriously investigate the possibility of a change to a four shift system. On 18 August 2000, applicant by letter to the respondent, advised the respondent that it had decided to implement the four shift system as and from Monday 21 August 2000, as was requested by respondent's members.

5. The respondent members immediately complained about the change to the four shift system and demanded that applicant revert to the three shift system because the system as implemented by the respondent was done so unilaterally.

6. Meetings held between the parties failed to resolve the dispute, with applicant being of the view that the implementation of the four shift system was not unilateral in that it was implemented after a number of meetings and consequent upon a demand made by the respondent's members.

7. Having regard to the letter forwarded by respondent's members' representative to the applicant, it appears that the respondent's members at least considered the implementation of the four shift system to be unilateral changes to the terms and conditions of employment because applicant had refused to inform, consult, discuss with the respondent members of how the four shift system would be effected,

address the financial losses that the members would suffer as a consequence of the change, and other issues.

8. On 6 September 2000, respondent referred the dispute to the Council describing the dispute in effect as one concerning the unilateral change to terms and conditions of employment and a certificate to the effect that the dispute remain unresolved concerning an alleged unilateral change in terms and conditions of employment as provided for in section 64(4), was issued by the Council on 10 October 2000.

9. On 17 October, the respondent gave notice to the applicant of its members' intention to commence with a strike action on 20 October 2000.

5. The applicant's submission is that this Court is empowered to interdict the strike on various grounds, the first being that it did not unilaterally change the terms and conditions of employment because, in essence, it conceded to the demand made by the respondent and therefore respondent cannot lay claim that the change was unilateral. According to the applicant there was a valid agreement between the parties based on an offer and acceptance. This argument is rather simplistic. While it is correct that the respondent did demand a change from a three shift to a four shift system, to resist this demand by raising the problems that may attach to meeting such a demand and then to say it would consider such a demand and thereafter simply on a Friday to advise the

respondent that it was meeting respondent's demand and will be implementing the four shift system as from Monday does not, to my mind, imply that an agreement has been concluded. Even if that was so that the applicant conceded to the respondent's demand, at least the implementation thereof had to be discussed with the respondent. This the applicant failed to do.

6. In any event where a party alleges that there is a dispute about the unilateral change in terms and conditions of employment, it is not for this Court in proceedings such as the present, to determine whether or not the dispute is a valid one in the sense that the Court must enquire into whether or not there has been a unilateral change to the terms and conditions of employment, as the Act defines a dispute to include "an alleged dispute"

7. In the circumstances the enquiry that this Court is required to make is to establish whether the alleged dispute which a party claims to have is one in respect of an issue over which it is entitled to embark on a strike, and if so, did the party alleging the dispute comply with the procedures set out in section 64. In this case the dispute is one over which respondent is entitled to embark upon a strike and respondent has complied with the statutory procedure.

8. In the circumstances I see no reason why I should interdict the proposed strike.

9. Applicant's further argument is that the dispute over which respondent seeks to strike is a rights dispute as it relates to whether or not the agreement was concluded or not, and therefore this Court should intervene and interdict the strike as a rights dispute should properly be referred to this Court or to arbitration for determination. I agree with the applicant that the dispute between the parties is essentially a rights dispute, however, the Act specifically provides for such a dispute to be resolved by resorting to power play and it is not for this Court to override the clear provisions of the Act.

10. Applicant's further argument is that this Court is empowered in terms of section 158(1)(a)(iii) which provides that a Court may make any appropriate order, including an order directing the performance of any particular Act which order, when implemented, will remedy a wrong and give effect to the primary objects of the Act, arguing that where an agreement is concluded between the parties, it should not be open to a party to declare a dispute and then, as in the present case, be allowed to embark on a strike as such action will compound a wrong. This argument, although not without merit, is premised on the belief that the parties herein concluded a valid agreement. I am not satisfied that this

is the case here and therefore do not need to decide thereon.

11. Furthermore, and in any event, before an application such as the present can be entertained by this Court, applicant is required to comply with section 68(2) of the Act which obliges an applicant to give at least 48 hours notice of the application to the respondent. Where shorter notice is given, as in the present, the Act requires that:

"(a) The applicant has given written notice to the respondent of the applicant's intention to apply for the granting of an order.

(b) The respondent has been given a reasonable opportunity to be heard before a decision concerning that application is taken, and

(c) The applicant has shown good cause why a period shorter than 48 hours should be permitted."

12. In this matter I am satisfied, based on the evidence presented, that good cause was shown for the shorter period of notice than the required 48 hours, as well as reasonable opportunity for respondent to be heard. I am not satisfied that applicant has complied with the notice requirement as

set out in section 68(2)(a) above. In fact, there is nothing before me to indicate compliance with section 68(2)(a). If I accept the statement made from the Bar by counsel for the applicant that the notice of motion was faxed to the respondent hours before the application was served, it

does not mean compliance with the above section. A notice of motion does not constitute a notice as required by the section, what is required is that the respondent must be given an opportunity to either give an undertaking or agree not to proceed with the intended strike within such time as is appropriate, failing which applicant will petition this Court for the specified relief at a certain date and time. This section could not have intended a notice of motion to serve such purpose because a notice of motion, either by itself or as part of the application, is no more than a notice to the respondent of applicant's decision to proceed and not an intention to do so.

13. Applicant has thus failed to comply with section 68(2)(a) of the Act and this reason alone is sufficient for me to have dismissed the application. With regard to costs I see no reason in law or equity why costs should not follow the result.

14. In the circumstances I reiterate the order I granted. The application is dismissed with costs.

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WAGLAY, J