IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REVISED JUDGMENT (30/06/ 2006)

CASE NO: J 472/06

In the matter between:

S A Transport and Allied Workers' Union

(SATAWU) **Applicant**

and

Natro Fright (Pty) Ltd **Respondent**

JUDGMENT

CELE AJ

Introduction

[1] This is an application in terms of section 158 (1) (a) (ii) of the Labour Relations Act No 66 of 1995 ("the Act"). The order sought by the applicant is in the following terms:

1. Dispensing with the periods set out in the rules for conduct of the

proceedings in the Labour Court and allowing this application to be heard as one of urgency;

2. Declaring that the strike embarked upon by the applicant's members from 24 March 2006 ("the strike") complies with the provisions of Chapter IV of the Labour Relations Act 66 0f 1995;

3. Restraining the respondent from disciplining or dismissing any of the applicant's members from participating in a strike;

4. Restraining the respondent from disciplining or dismissing any of the applicant's members on the basis of the " Notice to attend a disciplinary hearing" issued on the 27 March 2006;

5. Directing the respondent to pay costs of the application;

6. Granting further and alternative relief.

The application is opposed by the respondent.

Background facts

[2] The applicant is bringing the application on its own and on behalf of its members. Such members are those that are employees of the respondent. The respondent is a company registered in terms of the company laws of South Africa and operates in the transport industry.

[3] On 24 February 2006 the respondent indicated to the employees, employed mainly as drivers and general assistants that it intended to implement a new working plan as an operational requirement which would affect 11 of its drivers. This was consequent upon the

respondent having been awarded the Sasol Polymer Transport Tender in mid-January 2006, which was to take effect from 1 March 2006. The Sasol contract required a 24 hour/ 7 day a week operation.

[4] The change introduced by the respondent had the effects, among others, that each driver would no longer be allocated to a specific truck to use as had been the position before. Secondly, the new position changed arrangement in relation to the working hours. Thirdly the company employed new drivers on temporary basis, as an addition to its staff compliment. This had the result that employees did not welcome such a change and regarded it as a unilateral change of working conditions. Shop stewards expressed their concern to management about the change. No amicable solution was arrived at then. The applicant proceeded on 27 February 2006 to assist its members by referring a dispute about a unilateral change to terms and conditions of employment to the National Bargaining Council for the Road Fright Industry ("the Bargaining Council"). Such a referral was in terms of section 64 (4) of the Act.

[5] Also, on 27 February 2006 the applicant referred another dispute to the Bargaining Council which pertained to mutual interest issues. The issues do not relate to the first dispute. However, the hearing of both disputes was set down for 28 March 2006. The respondent admitted receipt only of the referral of the second dispute and not of the first.

[6] Notwithstanding the refusal of the employees to accept the change, the respondent went ahead on 2 March 2006 with the

implementation of the change. The employees retaliated by initiating and engaging into a protest action. A meeting was then held on that day between management and the disgruntled employees. In attendance at that meeting was also applicant's official. Seven issues were discussed in that meeting, by the employees, with unilateral restructuring of terms and conditions being top on the list. The response given by management to the unilateral change, was that management was not aware of any new system and they confirmed that terms and conditions would remain the same. Management undertook to investigate all other grievances raised by employees in the meeting and to give a response by 10 March 2006.

[7] On 3 March 2006 there was a follow up meeting between employees and management. Management reported that it had decided to run a two weeks trial period with the Sasol tender requirement. Employees were told that contract drivers who had been employed were there for the trial period only and would not replace permanent drivers. Management said that there would be a change in working hours and workers were notified that there would no longer be dedicated to a truck. Drivers would then be utilised on the trucks on a rotational basis. The company directors, who were present at the meeting, gave an undertaking to do a review at the end of the trial period and to compensate the affected drivers for any pay shortages which might have resulted during the trial period. Parties agreed that the meeting would reconvene on 6 March 2006. On 6 March 2006 the meeting was reconvened and management repeated the undertakings it had made on 3 March

2006. The meeting ended without a date being stipulated for the next one.

[8] On 10 March 2006, the respondent issued a letter addressed to Natro Fright drivers for Sasol Project. It reads:

> "We refer to various meetings held with the staff and shop stewards that have been transferred to the Sasol contract and confirm as follows:
>
> Whilst management are in the process of implementation of this project, you will accept that the working procedures need to be refined continuously, until such time that we are satisfied that the best working solution has been found.
>
> Management accepts that this may result in certain employees experiencing a lot of time that they are not actively busy.
>
> We have therefore decided that all employees associated and affected with the Sasol implementation will be paid the normal 9 hours and 4 hours overtime per day as a minimum. Any overtime above this will be added.
>
> This is effective as of 1st march 2006.
>
> All staff working on this project must report to the training office where they will be given a written instruction from their manager of their duties whether on standby, off duty or driving.
>
> We stress that this is an interim arrangement until such time that this project is running smoothly."

[9] The next meeting held, was on the 13 March 2006. Management

indicated that the Sasol tender was a new project that required new ways of working in order to satisfy legal as well as Sasol requirements. The union official indicated that the change to working conditions effected by the respondent constituted a unilateral change to terms and conditions as proper consultation and agreement were not made and reached with workers. Management took the position that business could not be stopped pending negotiations and they requested that an interim decision be reached to still service Sasol and to keep the business going. The Union official and the shop stewards indicated that they could not make a decision without fully understanding the process and request a written explanation of the system with particular reference to the management of the driver rotation, driving hours and overtime hours before a mandate could be reached on the way forward. It was however, agreed that the 11 permanent drivers would be put back on the dedicated trucks. The meeting ended with a recordal that a mass meeting had been scheduled for 20 March 2006 from 7 am to 8 am to provide a report to the workers.

[10] There is a document which the respondent subsequently produced for its employees as an apparent recordal of the new system. The conclusion thereof reads:

> "It is management (sic) desire that everyone working in this project is fully committed to its success. The working conditions and benefit for everyone working in this project are not changed unilaterally, management is committed to consultation for any issues that might affect or change working conditions and benefits of all Natro Fright employees"

[11] On 24 March 2006 the applicant's members employed by the respondent embarked on a strike. The employees presented a memorandum dated 24 March 2006 to management. It reads:

> "**THE EMPLOYEES OF NATRO NOTIFY THE DIRECTORS ABOUT A DECISION WE'VE TAKEN A WORK STOPPAGE.**
>
> Sir you've bridged (sic) the agreement between you and us as employees and Union officials to stop implementing the selection system at Sasol you're continuing to force people to work under that system clearly you don't want to solve anything well as you (sic) that the dispute is there we cant work under this system we've given you enough time to solve all these problems and you don't we talk about issues and rich an agreement but behind us you instruct your superiors to continue with this system know (sic) we've came (sic) to a decision to stop and wait for the Bargaining Council to solve this problem on the 28/03/06 your refusal is going to affect all the depots as they also our (sic) members
>
> Workers/ shop stewards"

[12] Management then issued an ultimatum in relation to "unprocedural/ unprotected strike ("illegal strike"). It reads:

> "1. You have engaged in an illegal strike since 07:30 this Morning 24 March 2006.

2. In addition to the above illegal action, you have locked the main gate. You have gathered and are still gathered at and around the main gate on our premises, thereby preventing vehicles and persons from entering or exiting our premises. We are therefore unable to conduct any business. Your presence on our premises is illegal and constitutes an act of intimidation and harassment.

3. If you wish to persist with your illegal strike, then your herby (sic) instructed to immediately remove yourself from our premises and to immediately cease blocking our entrance and exit areas.

4. Further note that you are requested to resume your normal duties by no later that 12:00 today, 24 March 2006, failing which Management will commence with disciplinary action, which may include dismissal.

5. Your Union has been advised of your illegal strike and has been forwarded this letter, containing our demands"

[13] A second ultimatum entitled "Final ultimatum" was issued by management. It reads:

"1. As you have not adhered to our request to resume your normal duties by 12h00 today, 24 March 2006, you are hereby notified that should you not resume your normal duties by Monday, 27 March (normal starting time 07h30), we will immediately commence with disciplinary action, which may include dismissal.

2. Your (sic) reminded that participation in an illegal strike is

very serious offence for which you could be dismissed.

3. We therefore urge you to comply with our request as per paragraph 1 above, unless you desire to lose your jobs.

4. We also note that certain strikers have not left our premises. We reiterate that if you wish to continue with your illegal strike you leave our premises immediately. If you do not do this we will take the necessary action to remove you from our premises.

5. We reserve all our rights."

[14] Still on the 24 March 2006, management sent out a letter to the applicant and attached thereto the memorandum it had received from striking employees and an ultimatum it had then issued.

[15] On 27 March 2006 the respondent handed notices to the applicant's members in which notices it required of them to attend internal disciplinary enquiries on 29 March 2006. They were charged, *inter alia,* for participation in an unprotected strike.

[16] On 28 March 2006 the applicant and the respondent attended a conciliation meeting at the bargaining council. The respondent indicated that it had not been served with a referral for the unilateral change of working conditions. It indicated further that it was of the belief that the strike was unprotected as 30 days had not yet elapsed between the date when the dispute was referred and the date when the strike commenced. The conciliation meeting was postponed till 4 April 2006, the date on which this application was argued. On 4 April 2006 it was postponed till 25 April 2006.

The issue

[17] I am called upon to determine whether or not the strike action which applicant's members commenced on 24 March 2006 was a protected or unprotected strike. To acquire the protection accorded by the Act, employees, whether acting on their own or through a union, when contemplating a strike or protected action must follow the prescribed statutory procedure. One exception is where there are different procedures prescribed by an applicable collective agreement.

Submissions by parties

[18] The applicant relies on section 64 (4) of the Act to submit that the actions of its members amounted to a legal strike. Subsection (4) is better seen in the context of section 64 (1) (a) which reads:

> **"64 Rights to strike and recourse to lock-out**
>
> 1) Every employee has the right to strike and every employer has recourse to lock out if-
>
> a) The issue in dispute has been referred to a council or to the Commission as required by this Act, and-
>
> (i) a certificate stating that the dispute remains unresolved has been issued, or
>
> (ii) a period of 30 days , or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the commission; …."

[19] Section 64 (4) then reads:

> "Any employee who or any trade union that refers a dispute about a unilateral change to terms and conditions of employment to a council or the Commission in terms of the subsection (1) (a) may, in the referral , and for the period referred to in subsection (1) (a) –
>
> (a) require the employer not to implement unilateral change to terms and conditions of employment, or
>
> (b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change"

[20] Section 64 (5) then reads:

> "(5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of the service of the referral on the employer"

[21] It is common cause that the applicant referred a dispute about a unilateral change of working conditions on 27 February 2006 to the Bargaining Council. The respondent's case is that it was never served with such a referral. The applicant was settled with an onus of proving that it effected service of the referral in question. The applicant was confronted with a difficulty that its faxing machine would not endorse the fax number of the intended recipient on its fax report. The applicant asked that I draw an inference that there was proper service. It relied on the undisputed fact that the respondent received the referral faxed to it, also on 27 February

2006, by the applicant, concerning the mutual interest matter, which referral had similarly not been endorsed. The approach by the applicant, in this regard, is oblivious of human error which could account for an omission to fax the referral in question to the respondent. In my view, it is not the only reasonable inference to draw from the facts that service of the referral was properly executed.

[22] In the alternative, the applicant submitted that the respondent came to know of a referral of the dispute concerning a unilateral change of working conditions on 28 February 2006, when it attended a conciliation meeting. A concern raised by the respondent was that the applicant failed throughout the negotiations to disclose to it that it had referred a dispute concerning the unilateral change of working conditions to the Bargaining Council.

[23] The alternative submission by the applicant ignores legal consequences attendant to a date of referral. As already indicated, an employer must comply with a requirement in terms of subsection (4) within 48 hours of service of the referral **on the employer** (my emphasis) – see section 64 (5). To use a date on which parties appear before the council instead of the referral date for purposes of section 64 would go against the clear purpose of the section. In my view, the respondent is not to blame for its non-compliance with section 64 (5), namely, to re-establish the *status quo* within 48 hours of the service of the referral on it, in the absence of proof of proper service. Accordingly section 64 (3) (c) of the Act cannot be of assistance to the applicant.

[24] I accordingly find that the requirements of subsection (1) did apply

to the strike embarked on by applicant's members on 24 March 2006. For the strike action to have been legal or protected, in this case, either a certificate stating that the dispute remained unresolved should have been issued or 30 days or any extended period agreed to by the parties should have elapsed since the referral was received by the Bargaining Council. None of the two positions prevailed at the time. In my view therefore, the strike of the 24 March 2006 by the applicant's members was not protected.

[25] The order prayed for in the notice of motion is in the form of a final interdict. The prerequisite for a final interdict are a clear right, an injury actually committed or reasonably apprehended and the absence of any suitable alternative remedy – see **Fawu v Premier Foods Industries Ltd (Epic Foods Division) (1997) 15 ILJ 1082 (LC).** The applicant has, in my view, failed to prove that it had such clear right, to the relief sought.

[26] The following order will accordingly issue.

The application is dismissed with costs.

CELE AJ

Date of hearing : O4 APRIL 2006

Date of Judgment: 10 APRIL 2006

Appearances

For the Applicant: Mr VAN AS

Instructed by : CHEADLE THOMPSON & HAYSOM

For the Respondent: LOUSE CHAROUX

Instructed by : YUSUF NAGDEE ATTORNEYS