REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D 1238/16

In the matter between:

LIBERTY LIQUORS (PTY) LTD Applicant

and

SACTWU First respondent

Mxolisi VUSUMUZI & 22 others Second and further respondents

Heard: 27 September 2016
Delivered: 29 September 2016
Summary: Urgent application – strike interdict – LRA s 65(3)(a). *Res judicata* considered.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Liberty Liquors, seeks to interdict a strike called by the first respondent, SACTWU. It argues that the strike will be unprotected by virtue of s 65(3)(a) of the Labour Relations Act[1] because the union and its members are bound by a collective agreement between Liberty and the majority union, SACCAWU.[2]

Background facts

[2] Liberty Liquors conducts a liquor retail business at three outlets in KwaZulu-Natal – two in Durban (Argyle Road and Queen Street) and one in Pietermaritzburg. It employs 17 employees at Queen Street, 25 at Pietrmaritzburg and 30 at Argyle Road. Most of the employees who fall within the bargaining unit are members of either SACTWU or SACCAWU. Membership has changed over time. Liberty treats all three outlets as one "workplace" for the purposes of collective bargaining and calculating union membership; SACTWU says they should be treated as three workplaces.

[3] In May 2016 Liberty concluded a collective agreement with SACCAWU in respective of all three outlets. SACTWU referred a "refusal to bargain" dispute to the CCMA. The parties settled in these terms at conciliation: "The parties agree to meet on Monday 23 May 2016 at 2 pm at the employer's premises to discuss wage increments." They met but could not reach a further agreement.

[4] SACTWU referred a fresh mutual interest dispute over increased wages to the CCMA. Conciliation was unsuccessful. The CCMA issues a certificate to that effect on 22 June 2016. SACTWU gave 48 hours' notice of a strike to start on 1 July 2016.

[5] The applicant launched an urgent application to interdict the strike. A rule *nisi* was issued on 30 June 2016. On the return day, 29 July 2016, it came before Whitcher J. She held that SACCAWU was not the majority union (it had 48,7% membership at the time) and that SACTWU had complied with

[1] Act 66 of 1995 (the LRA).

[22] Ironically, this is one of many workplaces where fraternal COSATU unions are fighting for members. The old mantra of "one industry, one union" clearly no longer holds true.

s 64. She dischargd the rule *nisi* with costs on the attorney and client scale.

[6] In the interim SACCAWU did become the majority union. On 25 July 2016 Liberty and SACCAWU concluded a further collective agreement covering wages retrospectively from 1 April 2016 until 31 March 2017.

[7] On 12 September 2016 SACTWU issued a fresh strike notice for a strike to start on 28 September 2016. It is that strike that the applicant wants to interdict.

The applicant's case

[8] The applicant relies on s 65(3)(a)(i) of the LRA for a clear right. That subsection provides that:

> "Subject to a collective agreement, no person may take part in a strike …
>
> (a) if that person is bound by –
>
> (i) any … collective agreement that regulates the issue in dispute."

[9] The applicant says the issue in dispute is a wage increase. That is covered by the collective agreement between Liberty and SACCAWU, the majority union. And the agreement binds all employees in the bargaining unit at all three branches. It says so. And in terms of s 23(1)(d) of the LRA, a collective agreement binds:

> "employees who are not members of the registered trade union or trade unions party to the agreement if –
>
> (i) the employees are identified in the agreement;
>
> (ii) the agreement expressly binds the employees; and
>
> (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace."

The union's response

[10] SACTWU raises the following defences:

10.1 The issue of the "lawfulness" of the respondents' right to strike is *res judicata* (I take that to mean the issue of whether the strike is protected or not);

10.2 the new collective agreement of 25 July 2016 cannot operate with retrospective effect; and

10.3 there is a dispute about what constitutes the workplace, and only the CCMA has jurisdiction to determine that dispute.

Evaluation / Analysis

[11] I shall consider each of the defences in turn.

Res judicata

[12] Whitcher J discharged the rule *nisi* in the earlier application because the collective agreement on which the applicant relied was struck with SACCAWU when it did not have a majority; and because SACTWU's strike notices had complied with s 64.

[13] To succeed with a plea of *res judicata*, the judgment relied upon must be a judgment given in litigation to which the parties are the same; and the cause of action must be the same:[3]

> "Die gemeenregtelike vereistes vir die toepassing van die verweer van *res judicata* is (i) dat twee aksies tussen dieselfde partye aanhangig gemaak is; (ii) dat die skuldoorsaak in beide gedinge diselfde was; and (iii) dat dieselfde regshulp in beide aksies gevorder is."

[14] In this case, the parties are not quite the same, although it may appear so at first blush. The applicant and the first respondent (SACTWU) are the same; but the individual union members (the further respondents) are not. In the case that came before Whitcher J there were 26 further respondents; in this case there are 23.

[15] More importantly, the cause of action is not the same. The Whitcher judgment dealt with an application based on the collective agreement of May 2016, at a time when SACCAWU was not the majority union. This application rests on s 65(3)(a)(i) with reference to the new collective agreement struck with SACCAWU as the majority union – and binding all employees in the bargaining unit – on 25 July 2016.

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[3] *Le Roux v Le Roux* 1967 (1) SA 446 (A); *National Sorghum Breweries (Pty) Ltd v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) para [9].

[16] The plea of *res judicata* fails.

Retrospective effect

[17] There is no bar that I am aware of against the retrospective effect of collective agreements that are properly concluded in terms of s 23.[4] I do not agree with Ms *Harries* that the retrospectivity of the collective agreement takes it out of the purview of s 65(3)(a)(i).

The workplace

[18] It is so that SACTWU disputes the employer's characterisation of all three outlets as the "workplace". Ms *Harries* has persuasively argued that it may be best for the CCMA to decide what the workplace is and whether SACCAWU has the majority in the "workplace" comprising all three outlets or at each outlet. But the CCMA does not have exclusive jurisdiction to entertain that dispute; and I am not persuaded that the strike would be protected pending the resolution of that issue by the CCMA.[5]

Conclusion

[19] The applicant has set out a clear right for the relief it seeks. It has also provided proof of an injury reasonably apprehended – the economic loss it will suffer as a result of the strike is the inevitable consequence of a strike against which the strikers are protected in the case of a protected strike, but which an employer should not suffer because of an unprotected strike. And the applicant has no other satisfactory remedy available to it.[6]

[20] With regard to costs, I take into account that there is an ongoing relationship between the parties and that the union had little choice but to defend the application. I do not consider a costs award to be appropriate in law or fairness.

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[4] See, for example, *Waverley Blankets v CCMA* (2000) 21 *ILJ* 2738 (LC) para [10]; *SA Airways (Pty) Ltd v Jansen van Vuuren* (2014) 35 *ILJ* 2774 (LAC) para [7].

[5] *Chamber of Mines of SA v AMCU* (2014) 35 *ILJ* 3111 (LC); *TAWUSA* v *Putco* (2016) 37 *ILJ* 1091 (CC).

[6] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

Order

I therefore order that the respondents are interdicted from participating in a strike in contravention of the provisions of ss 64 and 65 of the LRA.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Gardner van Niekerk SC Instructed by Millar & Reardon.
RESPONDENTS:	Julie Harries of Brett Purdon attorneys.