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Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO: J 1633/10

In the matter between:

UNITRANS FUEL AND CHEMICAL (PTY) LTD **APPLICANT**

and

TRANSPORT AND ALLIED WORKERS UNION OF SOUTH AFRICA **1ST RESPONDENT**

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY **2ND RESPONDENT**

REASONS FOR JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an urgent application in which the applicant seeks to interdict the first respondent ('the union') and its members *inter alia* from participating in a strike in furtherance of a strike notice issued by the union on 6 August 2010. On 3 September 2010 I dismissed the application with no order as to costs. These are my brief reasons for that order.

The facts

[2] The background facts are not in dispute, and can be briefly summarised as follows. The applicant is in the haulage business. In February 2009, a contract between the applicant and Shell Petroleum terminated. Of the 1109 employees engaged on the contract, 31 remained in the applicant's employ. Some 24 of those employees signed new employment contracts in terms of which they accepted a reduced level of remuneration. Seven of the 31 employees, members of the union, refused to sign the contracts. However, since February 2009, the seven employees have continued working on the terms offered by the applicant.

[3] On 15 March 2010, the union sent the applicant a telefax headed 'workers concerns', in which it raised a number of issues concerning the allocation of long distance work, the registration of employees wage discrepancies, wage cuts, coupling, clarification of bargaining council benefits, provident fund trustees, and report back meetings during working time.

[4] The parties met on 11 May 2010 to discuss the issues listed in the letter. After further correspondence and attempts to convene a further meeting, on 5 July 2010, the union referred a number of disputes to the bargaining council. There were three separate referrals. I do not intend to describe the terms of these referrals in any detail, save to say that the first referral made reference to an alleged refusal by the applicant to allow feedback by shop stewards to members, the second made reference to the allocation of two drivers per truck and a refusal to pay them in terms of a previous agreement with Roadway Logistics, and that the third referral had attached to it the union's letter dated 15 March 2010. After a conciliation meeting, the union claims that only the issues of wage discrepancies, wage cuts, coupling (more particularly, a demand for an additional R500 per month for those drivers performing what was referred to as coupling) and the issue of the administration of the provident fund remained on the agenda. The conciliation meeting appears mainly to have addressed a claim

by the union that the applicant had unilaterally introduced changes to terms and conditions of employment, and that the disputes referred to conciliation were disputes of this nature. This issue assumes some significance in the founding affidavit, as it appears to be the primary basis on which the strike called by the union is claimed to be unprotected, and on which the commissioner's conduct is attacked. In particular, the applicant claims that none of the disputes over which the strike has been called are in truth disputes over the unilateral variation of terms and conditions of employment. In any event, a certificate of outcome was issued on 29 July 2010, reflecting that a dispute concerning "unilateral terms and conditions of employment changes" remained unresolved, and that it could be referred to industrial action. The same issues that the union claims remained on the agenda after the conciliation meeting were the subject of a notice of intention to strike issued by the union on 5 August 2010. This application was filed on 11 August 2010.

The applicant's contentions

[5] In essence, the applicant contends that to the extent that the disputes referred to conciliation were claimed to concern a change to terms and conditions of employment, it had effected no such change. In particular, the applicant contends that in terms of s 64 (4) of the LRA, the union could only have issued a strike notice had there been a failure by the applicant to refrain from unilaterally implementing any changes to terms and conditions of employment, and that in the absence of such a failure, there is no basis for the strike. The applicant also attacks the certificate of outcome, and in particular, the jurisdiction of the commissioner to issue the certificate. The certificate is the subject of a separate application for review, and for reasons that will become apparent, it is not necessary to pursue this matter any further.

The relevant legal principles

[6] Section 64 of the LRA does not require conciliation or the issuing of a certificate of outcome as a pre-condition for a protected strike. I have previously expressed the view that a certificate of outcome has no legal significance other than to state that a dispute referred to conciliation remains unresolved as at a particular date; it certainly is not definitive of the nature of any dispute either referred for conciliation or that remains unresolved after the conciliation process (see *Bombardier Transportation (Pty) Ltd V Mitya NO & others* [2010] 8 BLLR 840 (LC)). The court is required to look at the substance of any dispute referred to conciliation and that is the subject of a call to industrial action, and is not bound by the label that the parties or a commissioner choose to give it. The question to be asked in an application such as the present is whether the strike called by the union satisfies the substantive and procedural requirements established by the LRA for protected strike action. Section 64 (1) of the LRA provides that the issue in dispute must have been referred to the CCMA or a bargaining council with jurisdiction, and that either a certificate stating that the dispute remains unresolved has been issued, or a period of 30 days, or any agreed extension of that period, has elapsed since the referral. In the present matter, the strike notice was issued more than 30 days after the referral of the dispute. What transpired at the conciliation was therefore irrelevant.

[7] To the extent that the applicant contends that the referrals were made out of time, the LRA does not prescribe a time limit for the referral of disputes such as those referred on 5 July 2010. While it is true that disputes must be referred in a reasonable time, in the present instance, the demands were tabled in March 2010, and pursued by the union between then and the referral on 5 July.

[8] To the extent that the applicant relies in these proceedings on a substantive attack on the nature of the issues in dispute, I would observe that the

LRA defines a “dispute” to include “An alleged dispute”. This is a strong indication that it is not for the court to interrogate each matter placed in dispute by a party in a collective bargaining process for the purposes of determining whether the dispute is indeed a dispute between the parties. It is not necessary for me to canvass this issue any further, since it is clear to me that the disputes in respect of which the strike has been called are disputes, that they are disputes that are capable of being the subject of industrial action and that they remain unresolved at the time that the strike notice was issued. In particular, the dispute concerning wage parity concerns a demand that the applicant introduce parity across all contracts .i.e. that it abandons the practice of paying differential wages in respect of different contracts. The ‘wage reduction’ dispute similarly is one in which the seven employees who have refused to sign new contracts be paid the wage they received during the currency of the Shell contract. To the extent that the applicant claims that the affected employees have waived their rights to make demands in respect of this issue, there is nothing in the papers before me to indicate that this demand has been either abandoned or waived (see *Free State Consolidated Gold Mines Ltd v NUM* (1987) 8 ILJ 606 (O)), which concerned a delay in commencing strike action, but where the principle that waiver should not readily be implied in labour disputes remains applicable). The dispute concerning ‘coupling’ is centered on a demand that drivers who perform this work should be paid an extra R500 per month. The applicant claims that this is a matter that should be bargained at sectoral level. There is nothing in the papers before me to indicate that the union is prohibited from raising a demand of this nature at plant level. Finally, the dispute concerning the administration of the provident fund was discussed at the meeting held on 11 May, and is clearly a matter over which none of the substantive limitations contained s 65 apply.

[9] In short: the issues over which the strike has been called are issues that may competently be the subject of protected strike action. The union has complied with all of the relevant procedural requirements, and in particular, more than 30 days have elapsed since the referral of the dispute. In these

circumstances, what transpired at the conciliation meeting and the conduct of the conciliator is of no consequence. The application therefore stands to be dismissed.

Costs

[10] Finally, in relation to costs, the approach applied in this court, which has its origins in *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* 1992 (1) SA 700 (A), is that where parties to a collective bargaining relationship are parties to litigation, the court should be slow to make costs orders against one or the other. The parties are engaged in a collective bargaining relationship and so as not to prejudice the nature of that relationship, and in the absence of any compelling reason why the respondent should be awarded its costs, I do not intend to make any order in that regard.

[11] For these reasons, I made the order reflected in paragraph [1] above.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of application: 31 August 2010
Date of judgment: 3 September 2010
Reasons filed: 8 September 2010

Appearances:

For the applicant Adv B Jackson, instructed by Marshall Attorneys

For the respondent: Adv Wilke, instructed by Ramushu Mashile Twala Inc.