REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J3339/12

In the matter between:

BRINANT SECURITY SERVICES (PTY) LTD	**Applicant**
and	
UNITED PRIVATE SECTOR WORKERS UNION (UPSWU)	**First Respondent**
PATRICK TLAKA & 115 OTHERS	**Second to 117th Respondents**

Heard : **17 January 2013**

Order : **17 January 2013**

Judgment : **18 March 2013**

Summary : **Return date. True nature of the dispute relates to a refusal to bargain. Intended strike unprotected. Rule *Nisi* confirmed.**

JUDGMENT- REASONS FOR ORDER

AC BASSON J

Introduction

[1] On 20 December 2012 Lallie, J gave an order in the following terms:

"1. The non-compliance with the Rules of this Court in respect of forms and times is condoned and the matter is heard as one of urgency;

2. A rule nisi with return date on 14 February 2013 at 10:00, or as soon thereafter as the matter may be heard, is issued calling upon the Respondents to show cause why the following order should not be made final:

2.1 The strike action embarked upon by the 1st Respondent union and its members (the 2nd to further Respondents, a list of which is annexed hereto as Annexure "X") employed by the Applicant, as from 05:45 on 19 December 2012, is declared to be unprotected strike action;

2.2 The 1st Respondent union and its members are interdicted and restrained from inciting or participating in any conduct in contemplation or furtherance of the unprotected strike action;

2.3 The 1st Respondent union and its members (the 2nd to 117th Respondents) are ordered to pay the Applicant's costs of the application on the attorney and own client scale, jointly and severally, the one paying the others to be absolved;

3. The order as per paragraphs 2.1 and 2.3 shall operate as an interim order with immediate effect, pending the return day rule nisi;

4. Service of the Court order must be effected on Respondent union and its members by means of affixing a copy of this order to the main entrances of the sites where the Second to 117th Respondents render services and by transmitting a copy of this order to the principal office of the 1st Respondent union by means of telefax."

[2] This matter came before this Court on the return day of a rule *nis*i issued by Lallie, J on 20 December 2012 in which the first respondent (United Private Sector Workers Union – hereinafter referred to "the union") and second respondents (Patrick Tlaka and 115 others) were interdicted from participating or inciting conduct in contemplation of an unprotected strike. (I will refer to the first and second respondents collectively as 'the respondents' except where

the context necessitates reference to a specific respondent). The respondents opposed the confirmation of the rule *nisi*.

[3] The applicant is a private security firm that employs approximately 800 employees at various sites. These employees render private security services to a number of clients.

[4] From the papers it appears that the union ostensibly recruited a number of members amongst the employees of the applicant and on 16 October 2012 the union submitted a list to the applicant containing the names of the 116 individuals who purportedly joined the union. The letter attached to the list of employees recorded that the union sought the following rights from the applicant in terms of the Labour Relations Act[1] ("the LRA": The right to access (section 12 of the LRA); the right to stop order deductions (section 13 of the LRA) and the right to union representation (section 14 of the LRA).

[5] It was not disputed that, before the parties could meet to discuss the request, the union referred a dispute to the CCMA on 23 October 2012. The date upon which the dispute arose is recorded on the referral form (LRA7:11) as 16 October 2013 which is the exact same date as the date on which the union presented the introductory letter and the list of names of individual members to the applicant.

[6] On 12 November 2012 the parties met at the CCMA in an attempt to conciliate the dispute referred to the CCMA. The applicant advised the union at the conciliation meeting that it will not bargain with the union prior to the finalisation of a proper verification exercise of the names on the list attached to the introductory letter. The parties then met again on 29 November 2012 and a follow-up meeting was scheduled for 12 November 2012 to discuss the verification of membership and the issue of bargaining.

[7] It is common cause that the certificate of non-resolution was issued on 26 November 2012 at the insistence of the union. The certificate recorded that the union may embark on strike action.

[1] Act 66 of 1995

[8] The union issued a strike notice to the applicant on 12 December 2012 in terms of section 64(1)(a)(i) of the LRA. The notice indicated that the strike will commence on 19 December 2012 at 5:45. Furthermore, if regard is had to the strike notice issued by the union it is clear that the union did not articulate the grievances or demands that must be met by the applicant in order to avoid or resolve the threatened strike action which in turn would also render the intended strike action unprotected. (I will return to the issue of the defective notice hereinbelow.)

[9] The applicant advised the union on 14 December 2012 that the strike would be unprotected and also advised the union that the Labour Court would be approached and that a punitive cost order would be sought against the union and their members should the strike not be suspended until the verification process has been completed. No response was received from the union and the applicant approached the Labour Court for urgent relief.

Was the strike unprotected?

[10] I have perused the papers and it is, in my view, clear that the true dispute between the parties pertained to a refusal to bargain. (I will return to my reasons in more detail herein below.) As no advisory award – which is peremptory before the union can give notice of the intention to strike – was issued, the strike was consequently unprotected.

[11] The respondents relied on the fact that because the certificate of non-resolution gave them the option to strike (which option they elected) they were entitled to strike. Furthermore, according to the respondents, the applicant should have applied for an order reviewing and setting aside the certificate. According to the respondents, the certificate of non-resolution therefore remained valid until set aside by the Labour Court.

Evaluation of the merits

[12] Firstly, it is trite law that a dispute over a refusal to bargain must be referred for an advisory award before notice may be given in terms of the LRA of the

intention to strike.[2] Secondly, in order to determine what the true or actual issue in dispute is, the Court will have regard to the referral form (LRA7:11) as well as the facts placed before it. It is further trite that the characterisation of the dispute by a party is therefore not conclusive of the true nature of the dispute. The Court is therefore enjoyed to have regard at the surrounding facts and not only to the LRA7:11 which contains a characterisation of the dispute by one of the parties.[3] The most effective way of determining the real issue in dispute is to ask the following question:[4] What must the employer do in order to avoid the commencement of the strike. Where the strike has already begun the question would then be: what must the employer do in order to bring an end to the strike. Furthermore, employees must clarify the issue in dispute before they embark upon strike action – they cannot merely embark on strike action over an issue that has not been dealt with at conciliation.[5]

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[2] Section 64(2) reads as follows: If the issue in dispute concerns a refusal to bargain, an advisory award must have been made in terms of section 135(3)(c) before notice is given in terms of subsection (1)(b) or (c). A refusal to bargain includes-

(a) a refusal-
  (i) to recognise a trade union as a collective bargaining agent; or
  (ii) to agree to establish a bargaining council;
(b) a withdrawal of recognition of a collective bargaining agent;
(c) a resignation of a party from a bargaining council;
(d) a dispute about-
  (i) appropriate bargaining units;
  (ii) appropriate bargaining levels; or
  (iii) bargaining subjects. "

[3] Coin Security Group (Pty) Ltd v Adams & Others(2000) 21 ILJ 924 (LAC): '[16] It is the court's duty to ascertain the true or real issue in dispute: Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building & Allied Workers Union & others (2) (1997) 18 ILJ 671 (LAC); Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union & others (1) (1998) 19 ILJ 260 (LAC). In conducting that enquiry a court looks at the substance of the dispute and not at the form in which it is presented (Fidelity at 269G-H; Ceramic at 678C). The characterization of a dispute by a party is not necessarily conclusive (Ceramic at 677H-I; 678A-C). There is in my view no difference in the approach of these decisions. In each case the court was concerned to establish the substance of the dispute. The importance of doing this lies in s 65 of the Act which provides that no person may take part in a strike if '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 . . .' The phrase 'issue in dispute' is, in relation to a strike, defined as 'the demand, the grievance, or dispute that forms the subject matter of the strike'**. '**

[4] See in general in respect of the requirements fo a strike notice: Ceramic Industries Lta t/A Betta Sanitary Ware v National Construction Building & Allied Workers Union (2)(1997) 18 ILJ 671 (LAC).

[5] Food & General Workers Union & Others v Minister Of Safety & Security & Others (1999) 20 ILJ 1258 (LC): '[28] While it is so that the dispute between the parties in this matter was initiated by a standard demand for a wage increase and improvement in certain conditions of service, this is not enough in itself to categorize the ensuing dispute as one concerning a mere matter of mutual interest,…

[14] I have considered the papers and it is in my view clear that the real dispute between the parties was a complaint about the refusal to bargain despite the fact that the respondents have referred a dispute about organisational rights to the CCMA. I have already indicated that the characterisation of a dispute in the referral form is not conclusive. Furthermore, if regard is had to the papers it is clear that the real issue in dispute was the refusal to bargain with the union in circumstances where the union regarded itself as the representative of the members in the workplace. This conclusion is supported by the papers: The following paragraph contained in the founding affidavit was admitted by the respondents in the answering affidavit and supports the applicant's case in respect of the true nature of the dispute:

'*The outcome that the union sought was "to grant the union organisational rights". It is evidently clear that the union is alleging that the Applicant refuses to bargain with them and that the view them as being representative of the Applicant's workplace if regard is has (sic) to the rights they are seeking to exercise….'*

[15] Furthermore, the respondents also did not deny that the applicant had advised the union at the conciliation meeting that it would not bargain with it (the union) until a proper verification exercise of the purported list of members has been completed. More importantly, the respondents also did not deny the averment contained in the founding affidavit that the certificate of outcome issued by the CCMA was erroneous since the true issue in dispute that was referred to the CCMA pertained to an alleged refusal to bargain.

[16] I have already pointed out that the respondents' argument was that the certificate of non-resolution gave them the option of a strike which they have elected to do. The strike would therefore, according to the respondents, have

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[29] The meaning of the phrase 'refusal to recognize a trade union as a collective bargaining agent' has not yet received judicial attention. Mr Nduzulwana contended that the phrase should be restrictively construed so as to embrace only disputes arising out of the refusal by an employer to enter into a formal recognition agreement with a trade union. Although I am conscious that, insofar as they curtail the constitutional right to strike, restrictions imposed by the Act on strike action should be narrowly interpreted (see, for example, Adams & others v Coin Security Group (Pty) Ltd Labour Court case no C163/97 dated 3 September 1998 unreported) in my view the phrase 'refusal to recognize a trade union as a collective bargaining agent' embraces situations, such as those in casu, in which the employer refuses to negotiate with a trade union over wages and conditions of service.'

been protected as they have acquired the right to strike by virtue of the certificate of non-resolution.

[17] It is, however, trite in light of the above that the mere fact that the certificate of non-resolution purportedly afforded the union a right to strike, does not mean that in law the respondents were in fact entitled to embark on a protected strike. Moreover, the Labour Court has the exclusive jurisdiction to determine whether a strike was protected: The CCMA and Bargaining Councils do not have the necessary jurisdiction to make conclusive pronouncements over their own jurisdiction.[6]

[18] I am therefore satisfied that the true issue in dispute was the refusal to bargain. Consequently the respondents should have awaited an advisory award before embarking on a strike. It is common cause that no advisory award was issued in terms of section 135(3)(c) of the LRA before the strike notice was issued. The strike is therefore unprotected. [7]

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[6] Cape Gate (Pty) Ltd V National Union Of Metalworkers of SA & Others (2007) 28 ILJ 871 (LC): "[31] The fact that the commissioner dealt with and made findings on the same arguments now raised in these proceedings cannot be regarded as having any binding effect on this court. I agree with Francis J in the Mittal Steel matter that neither the CCMA nor the bargaining council and their commissioners have the necessary jurisdiction to determine whether a strike is prohibited or protected, particularly at the stage of an attempt to conciliate the dispute.
[32] Nor does the issuing of a certificate of outcome have the effect contended for on behalf of NUMSA, namely that it would render a strike lawful, protected and immune from challenge in the Labour Court.
[33] I accordingly conclude that this court is not precluded either by the commissioner's ruling on jurisdiction or by the certificate of outcome from determining the legal status of the intended strike action.' See also: Lesedi Local Municipality v SA Municipal Workers Union on behalf of Members(2008) 29 ILJ 2780 (LC): '16] In Cape Gate (Pty) v National Union of Metalworkers of SA & others (2007) 28 ILJ 871 (LC) Kennedy AJ held that:

> 'Neither the CCMA nor the bargaining council and the commissioners have the necessary jurisdiction to determine whether the strike is prohibited or protected particularly at this stage of an attempt to conciliate the dispute.'

[17] Thus whether or not a strike is protected cannot be determined by the mere entry in the certificate of non-resolution that the dispute should be referred to a particular process. Section 64(1)(a) (i) of the LRA simply requires the conciliating commissioner to issue a certificate indicating that the dispute remains unresolved. There is nothing in the LRA that gives the commissioner the power to determine the true nature of the dispute including whether or not the strike is protected.
[18] The entry in the certificate by the commissioner indicating where the dispute should be referred serves as a mere guidance to the parties as to the next step they may wish to follow in taking forward the resolution of their dispute. This is however not determinative of the true nature of the dispute.
[19] This court is therefore not precluded from determining whether or not the strike is protected because of the entry made by the commissioner that the dispute be referred to arbitration. The court has the power to determine what the true nature of the dispute is, despite the classification or categorization of the dispute by the commissioner in the certificate.'

[7] See in this regard: Platinum Mile Investments (Pty) Ltd t/a Transition Transport V SA Transport & Allied Workers Union & Others (2010) 31 ILJ 2037 (LAC).

[19] Lastly, I have already indicated that the strike notice is defective in that it contains no information whatsoever about what the employer must do in order to avoid the commencement of the strike. [8] In the event the strike is unprotected on this ground alone. In respect of costs I can find no reason why the cost order should not be confirmed. The applicant was forced to approach this Court on an urgent basis over the festive season. Furthermore, the respondents have further failed to show cause why a punitive cost order should not be granted against them.

[20] In the event the rule *nisi* is confirmed.

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AC BASSON J

Judge of the Labour Court

[8] See in this regard: SA Airways (Pty) Ltd v SA Transport & Allied Workers Union (2010) 31 ILJ 1219 (LC): "[27] The same purposive approach adopted by the Labour Appeal Court requires that a strike notice should sufficiently clearly articulate a union's demands so as to place the employer in a position where it can take an informed decision to resist or accede to those demands. In other words, the employer must be in a position to know with some degree of precision which demands a union and its members intend pursuing through strike action, and what is required of it to meet those demands."

APPEARANCES:

For the Applicant	: Advocate W P Bekker
Instructed by	: Nothnagel Attorneys
For the Respondent	: Gwabeni Incorporated