



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case number: J 911/2013

In the matter between:

SCAW SOUTH AFRICA (PTY) LTD

Applicant

and

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA

First Respondent

INDIVIDUAL RESPONDENTS WHOSE NAMES

ARE LISTED ON ANNEXURE 'A'

Second Respondent

Heard: 9 May 2013

Delivered: 10 May 2013

Summary: Strike—Collective agreement—Prohibition on strike where issue in dispute is regulated by collective agreement—Section 65(3)(a) (i) of LRA 1995

JUDGMENT

PRINSLOO AJ

Introduction:

[1] On 3 May 2013, this Court per Steenkamp J granted the Applicant an interim interdict prohibiting the Respondent union and its members employed by the

Applicant from participating in unprotected and unlawful in strike action. At that stage, the matter was unopposed. The return day was 9 May 2013 when the matter came again before this Court. The matter is now opposed.

Brief history

- [2] It is not in dispute that the “MEIBC Settlement Agreement”, which is the settlement agreement for the industry for the period 1 July 2011 to 30 June 2014 is binding on the parties. In respect of ‘Union Facilities’ the settlement agreement provides that clause 46(b) of the Main Agreement be amended to include that: “The parties agree that the issue of full time shop stewards and health and safety representatives will be a matter for plant level agreement”. It further provides that the parties may agree further rights at plant level.
- [3] The Applicant and the representative unions (NUMSA, Solidarity and MEWUSA) signed a recognition agreement in April 2011 for an indefinite period. It provides that the parties may review the agreement, subject to any amendment to the Labour Relations Act 66 of 1995 (the Act) with one month notice.
- [4] The recognition agreement deals with a number of issues and organisational rights and relevant to this application is the provision in respect of shop stewards. The recognition agreement provides for the election of shop stewards, the roles and responsibilities of shop stewards, meetings and training of shop stewards. It is specifically provided that shop stewards shall not leave their place of work for the purpose of carrying out their duties as shop stewards, without the permission of their immediate supervisor, taking into consideration the operational requirements in the section, the role and duties of the shop steward and the ability of the supervisor to cover the shop steward’s duties in his absence.
- [5] The parties further agreed to a dispute resolution procedure in the event that they reach a deadlock in respect of disputes that are not the subject of negotiations at bargaining council level. Limitations on industrial action are that neither party shall encourage, organise or participate in any strike or lock-out that is not in compliance with the provisions of the Act.

- [6] On 28 January 2013, the First Respondent referred a dispute to the Metal and Engineering Industries Bargaining Council (“MEIBC”) and the nature of the dispute was defined as a matter of mutual interest related to the fact that the Applicant was not prepared to allow the union to have a full time shop steward. The matter was set down for conciliation on 19 February 2013 on which date the parties agreed to extend the conciliation period with 30 days in order to attempt to resolve the dispute.
- [7] The dispute was not resolved and the matter was remitted to the CCMA for conciliation. On 27 March 2013, the CCMA issued a certificate of outcome indicating that the matter of mutual interest remained unresolved and that the Respondents could embark on strike action. Subsequent to the certificate of outcome, the Applicant’s attorneys addressed a letter to the First Respondent indicating that the demand that a shop steward be permitted to have time off on a full time basis with pay falls within section 14 of the Act and hence the union had to follow the specific dispute resolution procedures set out in section 21 and 22 of the Act. The referral was not in compliance with the provisions of the Act and hence the strike action would be unprotected.
- [8] Despite this letter and on 2 May 2013, the First Respondent issued a notice to the Applicant that strike action would commence within 48 hours and that the issue in dispute is the refusal to allow the union to have a full time shop steward.
- [9] The Applicant approached this Court on an urgent basis on 3 May 2013 seeking to interdict the intended strike action on the basis that it is unlawful and unprotected.

The urgent application

- [10] The Applicant approached the Court on an urgent basis and averred that the intended strike action would be unprotected for two reasons. Firstly, the matter relates to organisational rights in terms of the Act and, accordingly, the provisions of section 21 of the Act apply. The Respondents have not complied with the provisions and hence there is no dispute between the parties, the referral to the CCMA was premature and the CCMA did not have jurisdiction to conciliate the dispute and issue a certificate of outcome.

[11] Secondly, the dispute relates to an issue that is governed by a collective agreement and thus not a dispute over which the Respondents can strike. The demand for a full time shop steward is a dispute pertaining to an issue governed by the recognition agreement.

[12] The Respondents are opposing the application and in its opposing affidavit denied that the dispute relates to organisational rights or that it was an issue governed by a collective agreement. The Respondents averred that the issue is a matter of mutual interest and that the provisions of section 21 of the Act do not apply.

The arguments and merits

[13] The Applicant argued that the issue in dispute pertains to a demand by the First Respondent for a full time shop steward. The Applicant challenged the proposed strike action on two main grounds. The parties have a recognition agreement, which governs shop stewards and time off for union activities, and hence the matter is regulated by a collective agreement and thus not a dispute over which the Respondents may strike. Section 65(3)(a)(i) of the Act precludes the Respondents from participating in a strike over this issue and for this reason alone the strike is unprotected.

[14] Secondly, the dispute is about organisational rights and relates to a matter governed by section 14 of the Act and, accordingly, the dispute falls within the parameters of section 21 of the Act. The First Respondent has not complied with the provisions of section 21, which provisions are prescriptive. Ms Davey for the Applicant submitted that section 14(5) of the Act provides for reasonable time off for shop stewards to perform functions of a trade union and that the union's demand for a full time shop steward falls squarely within section 14 and hence constitutes an organisational right. She submitted that the Respondents' denial that the dispute relates to organisational rights is without merit. Disputes of this nature are governed by section 21 read with section 65(2)(a) of the Act.

[15] Ms Davey submitted that the Applicant has a clear right to the relief it seeks as there had been no compliance with section 21 read with sections 64(1) and 65(2) of the Act and the issue in dispute is covered by a collective agreement.

- [16] Ms Edmonds submitted that section 21 is not applicable as the Respondents' dispute is not about organisational rights. She submitted that section 14 of the Act deals with part time shop stewards and not full time shop stewards. The Respondents are seeking a full time shop steward, which they are not entitled to in terms of the provisions of section 14. The Respondents could have a full time shop steward only if the Applicant agrees to that or by embarking on industrial action to demand a full time shop steward. This is a matter of mutual interest.
- [17] Ms Edmonds further submitted that the issue in dispute is not covered by the recognition agreement as the agreement does not deal with full time shop stewards, but only provides for part time shop stewards. The Respondents are entitled to strike as Chapter 3 of the Act does not regulate the dispute, section 21 does not have to be complied with and there is no collective agreement that covers the issue of full time shop stewards.

Full time shop steward and the recognition agreement

- [18] What is a full time shop steward and is that covered in the recognition agreement?
- [19] In *SA Municipal Workers Union on behalf of Members v Ekurhuleni Metropolitan Municipality*,¹ it was held that:

'The task of the full-time shop steward is to act for the benefit of the union and its members on a full-time basis and in doing so he or she will, inter alia, liaise with the employer whenever necessary. The anomaly of the position of the full-time shop steward is the fact that although he/she remains employed by the employer and as such is entitled and subject to the same conditions of service, policies, rules and regulations which prevail at his/her employer, the full-time shop steward will not render a service to, or work for the employer for the benefit of that employer: The full-time shop steward works for the union and for the benefit of the union.'

- [20] The recognition agreement provides that shop stewards shall not leave their place of work for the purpose of carrying out their duties as shop stewards, without the permission of their immediate supervisor, taking into consideration

¹ (2012) 33 ILJ 2961 (LC) at para 16.

the operational requirements in the section, the role and duties of the shop steward and the ability of the supervisor to cover the shop steward's duties in his absence.

[21] It is evident from the provisions of the recognition agreement that a shop steward may not leave their place of work without permission and with due consideration of the employer's operational requirements. This is not referring to full time shop stewards, who would act for the benefit of the union and its members on a full time basis and not rendering a service to or work for the employer. A full time shop steward would not need permission to take time off or to leave his or her workstation to attend to union activities.

[22] The issue in dispute relating to full time shop stewards is not regulated by the recognition agreement. Section 65(3)(a)(i) of the Act, therefore, cannot preclude the Respondents from participating in a strike over this issue for reasons that it is not regulated in the agreement.

The provisions of section 14 and 21 of the Act

[23] Ms Edmonds submitted that section 21 of the Act is not applicable as the Respondents' dispute is not about organisational rights. She submitted that section 14 of the Act deals with part time shop stewards and not full time shop stewards.

[24] Ms Davey on the other hand submitted that section 14(5) of the Act provides for reasonable time off for shop stewards to perform functions of a trade union and that the union's demand for a full time shop steward falls squarely within section 14 and hence constitutes an organisational right.

[25] It is evident from the provisions of section 14 of the Act that it refers to 'reasonable time off' for trade union representatives and section 14 does not refer to or regulates full time shop stewards.

[26] In *Digistics (Pty) Ltd v SA Transport and Allied Workers Union and Others*,² the Court did not preclude the union and its members from engaging in strike action in pursuit of demands relating to the appointment of full-time shop stewards. It was held that:

² (2010) 31 ILJ 2896 (LC).

'I should mention, for the sake of completeness if nothing else, that while paid time-off for shop stewards is a right established by the LRA (see s 14(5)), the Act does not establish a right to the appointment of full-time shop stewards. To this extent, the union has an election to strike or to refer the dispute to arbitration in relation to its demand for paid time-off, but there is no election in relation to the demand that a full-time shop steward be appointed. This is a matter in respect of which the provisions of part A of chapter III of the Act do not apply.'³

[27] It is evident that section 14 does not establish a right to the appointment of full time shop stewards and that the provisions of section 21, in fact the entire Chapter 3 of the Act, do not apply.

[28] The Applicant's argument that the dispute is about organisational rights and relates to a matter governed by section 14 of the Act and, accordingly, falls within the parameters of section 21 of the Act and the Respondents have not complied with the provisions of section 21 cannot be sustained.

[29] The attack on the strike based on the fact that there had been no compliance with section 21 read with sections 64(1) and 65(2) of the Act, is without merit.

Is the strike action unprotected

[30] The Applicant's case is that the strike action is unprotected because the matter relates to organisational rights and the Respondents have not complied with the provisions of section 21 of the Act and, secondly, because the dispute relates to an issue that is governed by a collective agreement and thus not a dispute over which the Respondents can strike. Both these grounds have been dealt with and are not sustainable to support a notion that the strike is not protected for the reasons so raised.

[31] Section 64 of the Act sets out the requirements for a protected strike. Firstly, the dispute should have been referred and a certificate stating that the dispute remains unresolved should have been issued.

[32] In *Air Chefs (Pty) Ltd v SA Transport and Allied Workers Union and Others*,⁴ the Court dealt with the certificate and held that:

³ Id at para 12.

⁴ (2013) 34 ILJ 119 (LC) at para 15.

'It is now trite law that the significance of a certificate of outcome being issued is that it essentially marks the end of the conciliation phase of a dispute and the description of the dispute on the certificate is nothing more than indicative of what the dispute might concern. It is not a finding by the author of the certificate. Consequently, it cannot be said that the employer ought to have set aside the certificate before it could raise its argument that the dispute concerns a dispute of rights rather than one of interest. In passing, it might also be mentioned that the term 'matter of mutual interest' is often erroneously used as a synonym for a dispute of interest, whereas disputes of mutual interest may be either disputes of rights or disputes of interest.'

- [33] The First Respondent indeed referred a mutual interest dispute regarding the appointment of a full time shop steward to the bargaining council and CCMA. A certificate of outcome was issued and hence there is compliance with section 64(1)(a)(i) of the Act.
- [34] The second requirement is that at least 48 hours notice of the commencement of the strike should have been given to the employer in writing. The Respondents has issued a 48 hours notice of intention to strike to the Applicant on 2 May 2013.
- [35] The Respondents complied with the provisions of section 64 and can claim protection in terms of the provisions of the Act.

Conclusion

- [36] In summary, the various reasons advanced by the Applicant why a strike in support of the union's demand for the appointment of full time shop stewards would be unprotected must be dismissed.
- [37] I am satisfied that if the Respondents embark on a strike in support of a demand for the appointment of full time shop stewards, in respect of the dispute referred to the bargaining council in January 2013, that strike would be protected.
- [38] I am also inclined to the view that there should be no order as to costs, having regard to the outcome of these proceedings, the fact of an on-going collective bargaining relationship between the parties, and the prospect of prejudice to

that relationship and the successful resolution of outstanding issues should an order for costs be made.

[39] In the premises. I make the following order:

1. The rule nisi issued on 3 May 2013 is discharged;
2. The First, Second and further respondents may engage in strike action in pursuit of the demand relating to the appointment of a full time shop steward;
3. No order as to costs.

Prinsloo AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: Attorney Davey of Bowman Gilfillan Inc

For the Respondents: Attorney Edmonds of Ruth Edmonds Attorneys

LABOUR COURT