IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: **J2801/16**

In the matter between:

XINERGISTRIX (PTY) LTD **Applicant**

And

MOTOR TRANSPORT WORKERS UNION OF SOUTH AFRICA (MTWUSA) **First Respondent**

THE PERSONS WHOSE NAMES APPEARON ANNEXURE 'X1' TO THE NOTICE OF MOTION **Second to Further Respondents**

Heard: **30 November 2016**

Delivered: **January 2017**

JUDGMENT

TLHOTLHALEMAJE, J

[1] The Applicant seek an order interdicting the intended strike action of the Second to Further Respondents (The Employees) in respect of demands related to the provision of transport. The matter initially came before Prinsloo J on 23 November 2016 and was postponed by agreement to 30 November 2016 to allow for further filing of pleadings.

Background

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[2] The Applicant is a Logistics and Transport Company and has a contract with another entity, Nampak, to transport through heavy motor vehicles, glass and bottles manufactured by Nampak from the latter's facilities in Roodekop, Germiston to various clients within Gauteng. The Applicant has a large depot situated at Alrode, Alberton, which has facilities for drivers to utilize for staying overnight. The Nampak contract was concluded in January 2013 and commenced from March/April 2013.

[3] There is a dispute related to whether the Applicant has ever provided transport to its drivers or general workers employed as part of the Nampak contract between the Alrode depot and the Nampak site. The Applicant's contention was that no transport was ever provided between the two sites, whilst the Respondents hold the view that this has always been the case before and after the Nampak contract was concluded.

[4] The Applicant's contentions in regards to the disputed facts are summarized as follows;

4.1 In February 2016, four drivers were brought in from Cape Town to assist with the Nampak contract on a temporary basis for two weeks. These drivers were based in Johannesburg and had resided at the Alrode depot. As a result of the need to be briefed and debriefed at Nampak, at times they were transported thereto as that is where they had reported for duty. According to the Applicant, this indulgence was made for these drivers as they had no transport of their own whilst staying briefly at the Alrode depot. Other employees working on the Nampak transport however had their own transport or lived nearby, and had never been provided with transport.

4.2 In March 2016, MTWUSA alleged that the Applicant had made transport available to employees on the Nampak contract between Nampak premises and the Alrode depot in the past. Various meetings in that regard failed to resolve the dispute, resulting in it being referred to the NBCRFLI on 10 May 2016. The dispute referred pertained to an alleged unilateral change to terms and conditions of employment.

MTWUSA in the referral demanded that the *'withdrawal of transport from Alrode depot to Nampak be returned back'* (Sic)

4.3 Conciliation meetings were held on 22 June 2016 and 10 August 2016. At those meeting, the Applicant had raised preliminary points to the effect that since MTWUSA had proceeded in terms of the provisions of section 64 (4) of the Labour Relations Act, the right to strike was a temporary one, and would cease to exist upon termination of the conciliation phase. Secondly, it was alleged that the matter related to a new demand which could only be raised at national level negotiations in terms of clause 57 (1) of the Main Collective Agreement. In this regard, the Applicant's contention was that it did not know what the Respondents' area they were referring to, and the demand in any event involved significant costs and operational adjustments. The third issue was that if the matter was about the rights that had been removed, same would either be arbitrable or justiciable before this Court.

4.4 The Conciliating Commissioner dismissed the above preliminary points and held that the dispute could be dealt with in terms of the provisions of section 64 (4) of the LRA. A certificate of outcome was issued on 20 September 2016.

4.5 On 22 November 2016, the Applicant was issued with a strike notice by MTWUSA, indicating that its members would go on strike with effect from 12h01 on 24 November 2016. The reason for embarking on strike action was related to the *'Withdrawal of the transport between Nampak and Alrode Depot'.*

4.6 The Applicant's view is that the strike action envisaged by the Respondents is not protected in terms of the provisions of the LRA; that there was no unilateral change to the employees' terms and conditions of employment; and that if there had been an opportunity to strike, it no longer existed.

[5] The Respondents' submissions were as follows;

5.1 The Applicant unilaterally stopped providing transport to employees between its depot in Alrode and Nampak in Roodekop, and this constituted a unilateral change to the employees' terms and conditions of employment;

5.2 As part of the employees' remuneration package, the Applicant provided them with transport from Alrode to various clients through Johannesburg. This transport has been provided since February 2010 until October 2014. Thus, employees used to report at the Alrode depot at 07h00 and were then transported by the Applicant to Nampak in Roodekop where they would commence their duties. At 17h00, the employees were fetched from Nampak and transported back to Alrode where they would then use their own transport back home. Transport was also provided to those employees who had reported for overtime back to their homes.

5.3 The stopping of transport had resulted in a decrease of the employees' remuneration as they now had to pay for their own transport between Alrode and Roodekop which is about 8.4 kilometers apart. Despite withdrawing the transport facilities, the Applicant nevertheless continued to provide such facilities for its employees in Cape Town, between its depot in Brackenfell and various clients' sites.

5.4 When the dispute arose, a series of meetings were held with the Applicant between February 2016 and 1 November 2016, and this had not yielded any results. The dispute was then referred to the National Bargaining Council, and a certificate of outcome was issued by the Conciliator, which entitled the employees to embark on industrial action.

5.5 A strike notice was issued as far back as 31 October 2016, and the Applicant was informed that the strike action was to commence on 15 November 2016. The strike however did not proceed on the date intended, and a fresh strike notice was issued on 22 November 2016, which had complied with the provisions of section 64 (1) (b) of the LRA.

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The strike accordingly was protected, and it was denied that a new demand had been raised by the Respondents, as all that they sought was for the Applicant to revert to the previous terms and conditions of employment before they were unilaterally changed. To that end, it was denied that the provisions of clause 57 (1) of the Main Collective Agreement were applicable, and that the Applicant only sought to prevent the Respondents from exercising the right to strike.

[6] In its replying affidavit, the Applicant contended that the deponent to the answering affidavit, Nketse Nkadimeng, as a MTWUSA official could not have had personal knowledge of the Nampak contract, or the manner in which it was managed by the Applicant; had no personal knowledge in relation to whether transport was ever provided to employees in terms of the Nampak contract, and that any evidence he gave in that regard was accordingly hearsay and was to be rejected;

[7] Since the Applicant never provided transport to the employees during the course of the Nampak contract, there was no stoppage of such transport and thus it could not be argued that there was a unilateral change to terms and conditions of employment. To this end, any intended strike action would be unprotected as there was no unilateral changes to the employees' terms and conditions of employment;

[8] The contract with Nampak commenced in January 2013 for a period of 60 months, and there could therefore not have been transport provided prior to that contract or as of 2010 as alleged by the Respondents, and none of the Applicant's employees were placed at Nampak before that period or before April 2013;

[9] A comparison could not be made with the Applicant's employees based in Cape Town as those operations were entirely separate from the operations in Johannesburg, and could not be used as a basis for the allegations which related solely to the operations in Johannesburg. In this regard, it was submitted that in Cape town, the Applicant operated from its depot, and not from a client's site.

The legal framework and evaluation:

[10] Sections 64 and 65 of the Labour Relations Act makes provision for the right to strike and recourse to lock-out, and the limitations placed on those rights or recourse. In this case, I did not understand it to be the Applicant's case that there had been no compliance with section 64 (1) (a) (i) & (ii); and (b). Other than raising a dispute in respect of whether any conduct on its part constituted a unilateral change to the employees' terms and conditions of employment, the Applicant also contended that the proposed strike action was prohibited under section 65 (1) (b) of the LRA, as the issue in demand was covered by a collective agreement.

[11] In the light of the above, the Applicant sought an order that the proposed strike action by the Respondents was not in compliance with and is in breach of the provisions of section 64 and 65 of the LRA; that the proposed conduct of the Respondents in making demands for transport between Nampak and Alrode was unlawful; or that the proposed conduct was in breach of clause 57 of the Main Collective Agreement;

[12] As already indicated elsewhere in this judgment, there are material disputes of fact as to whether the Applicant had at any stage provided transport to the employees between the two sites in question. These material disputes of fact must be considered within a determination of *inter alia*, what the true or real nature of this issue in dispute is, irrespective of how the parties may have labelled it. Thus, the Court must ascertain what the real dispute before it is, and must look at the substance of the dispute and not the form in which it was presented[1]. In further elaboration on this issue, it was held in *City of*

[1] See Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building Workers Union & others (2) (1997) 18 ILJ 671 (LAC); and Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers' Union & others (1) (1998) 19 ILJ 260 (LAC); and Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members and Other (2014) 35 ILJ 983 (LAC) at para 47

Johannesburg Metropolitan Municipality v SA Municipal Workers Union and Others[2] that;

> *'The issue in dispute in relation to a strike is to be ascertained from the relevant facts. These include the referral form, any relevant correspondence, the negotiations between the parties and the affidavits filed in this court'.*

[13] To the extent that the Respondents alleged that the conduct of the Applicant constituted a unilateral change to terms and conditions of employment, in determining what the real issue in dispute is, the Court is also required to ask whether the conduct complained of in fact does constitute a unilateral change to terms and conditions of employment. If it does not, then that would be the end of the enquiry, as the right to strike does not accrue to the employees[3].

[14] A dispute concerning a unilateral change by an employer to employees' terms and conditions of employment is legitimately a matter in respect of which the right to strike may be exercised. This right accrues to employees by virtue of *inter alia*, the provisions of section 64 (4) which provides that;

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

[2] (2009) 30 ILJ 2064 (LC) 2069G-H.

[3] See Unitrans Supply Chain Solutions (Pty) Ltd v SA Transport and Allied Workers Union and Others (2014) 35 *ILJ* 265 (LC) at para 13

[15] In summarising the legal position in regards to the above provisions, Steenkamp J in *Intercape Ferreira Mainliner (PTY) Ltd & another v NUMSA*[4] held that;

> *'In summary, the position is this: in terms of section 64 (4), the union may call its members out on strike without further ado, and without following the procedures set out in section 64 (1), if the employer unilaterally changes workers' terms and conditions of employment. If those changes merely amounted to changes in work practice, it cannot do so. However, nothing precludes the union from declaring a dispute over a matter of mutual interest and calling its members out on strike after having followed the prescribed procedures in section 64 (1) and adhering to the time periods prescribed in that subsection.'*

[16] Central to this application is whether the Applicant has unilaterally changed the terms and conditions of employment of the employees. If this question is answered in the negative, there is therefore no dispute between the parties that entitles the Respondents to embark on a strike. The issue referred to the Bargaining Council for conciliation was framed in the following terms under **summary of facts** of the dispute;

> '*The withdrawal of transport from Alrode Depot to Nampak to be returned back'*

Under the **result of conciliation**, it was stated that;

> '*To bring back the transport or section 64 (i)(?) will apply (strike)'*

[17] As can further be gleaned from the strike notice issued on 22 November 2016, the Respondents reasons for embarking on strike action related to the alleged *'Withdrawal of the transport between Nampak and Alrode depot'.* As I understand the Respondents' case, in the past, and as far back as 2010, the Applicant provided employees with transport from its depot to Nampak, as well as to the employees' homes in the event they worked overtime. To the extent that the Applicant disputes that any such transport was made available to the employees, and further in the light of final relief being sought, in

[4] Case no: C 179/2015 at para [17]

resolving these disputed facts, the principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[5] will find application.

[18] Based on the material placed before the court, including the referral form for conciliation, the strike notice, the pleadings and legal principles as summarised elsewhere in this judgment, it is my view that there is no basis for a conclusion to be reached that the Applicant's conduct, if any, constituted a unilateral change to terms and conditions of employment. My conclusions are based on the following considerations;

18.1 The Respondents move from a premise that the Applicant has always provided transport between Alrode and Nampak, and in fact, as far back as 2010;

18.2 The Respondents' reference to *'transport between Alrode and Nampak'* in the referral form and the strike notice also confirmed that the issue in dispute relates to the alleged removal of transport facilities between the two sites. In my view, the contention by the Respondents that transport was also provided to other unnamed sites before and after the Nampak contract is a lame attempt at making a case that is not there, or it is indeed an attempt at making out a case as the dispute progressed. The issue surrounding transportation to other sites other than Nampak was not one referred for conciliation, nor was it an issue that the employees sought to strike over when they issued their notice. Their complaint was limited to the alleged removal of transport between Nampak and Alrode.

18.3 Notwithstanding the Respondents' stance, I accept that based on the evidentiary material placed before the court, the contract between the Applicant and Nampak came into existence in January 2013, and it follows that there is nothing placed before the Court by the Respondents to confirm that the Applicant had any cause to transport employees between the two sites prior to April 2013, when the contract

[5] 1984 (3) SA 623 (A) at 634E-635C

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with Nampak was fully implemented. It is not clear from the Respondent's pleadings as to what would have been the purpose of those transport arrangements, particularly since it could not be disputed that that the Nampak contract only came into existence in January 2013, and employees only started to go to the Nampak site in April 2013;

18.4 The Respondents' answering affidavit was deposed to by a MTWUSA official, who clearly in view of that union only being recognised by the Applicant in October 2015 could not have had personal knowledge of what took place between 2010 and October 2015. His contention that the Applicant's employees used to report at the Alrode depot at 07h00, transported to Nampak and back to Alrode at 17h00 is clearly indicative of his lack of knowledge of the Applicant's operations at the time. I have no cause to doubt that the employees in fact reported for duty at 06h00 and knocked off not earlier than 18h00. This was supported by the time sheets that the Applicant had attached to its replying affidavit as annexure 'MP1', and there is nothing placed before court to gainsay that evidence.

18.5 The Respondents nevertheless sought to rely on the confirmatory affidavits of Emmanuel Khanyile and Thapelo Tsotetsi, who were shop stewards and drivers, for the contention that transport was provided as far as 2010. These confirmatory affidavits do not however take the Respondents' case any further as on the Applicant's version, these individuals were not employed at the Alrode depot, and even if they happen to be at that depot, they were not assigned duties under the Nampak contract. Worst still, Tsotetsi's confirmatory affidavit is not signed or properly commissioned before a Commissioner of Oaths. This affidavit is not properly before the court.

18.6 In the light of the confirmatory affidavits deposed to by Rodney Chakwana, the Applicant's site manager at Nampak, and Shaun Naidu, the Applicant's Manager at the Alrode depot (from February 2008 until May 2015), who had confirmed that no such transport was provided

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between the two sites, it was not enough for Khanyile to simply confirm that transport was provided between the two sites. At the most, given the nature of the disputed facts, more than just a mere confirmation was required of him, especially since the averments of Nkadimeng were based on hearsay.

18.7 Despite the Respondent's contentions that the temporary transport arrangements for the four employees from Cape Town had not precipitated the dispute, this clearly appears to be the case. Those arrangements for these employees were temporary and put in place for practical purposes. They did not in themselves give rise to any rights or entitlement to other local employees for transport between the two sites.

[19] In the light of the above conclusions, it therefore follows that there can be no basis for a conclusion to be reached that any conduct on the part of the Applicant constituted a unilateral change to terms and conditions of employment. In line with *Unitrans Supply Chain Solutions (Pty) Ltd v SA Transport and Allied Workers Union and Others* and other authorities referred to, the enquiry then ends at that point, as the right to strike does not accrue to the Respondents.

[20] In regards to the issue of costs, it is trite that this court must consider the requirements of law and fairness. The approach of this court in regards to these requirements has always been to desist from granting costs on the basis that a relationship between the parties exists, and any cost order in such circumstances might sour that relationship. This approach however is not cast in stone. Where the conduct of employees or their union has caused the employer to incur unnecessary litigation costs in preventing a strike that ought not to take place in the first place, fairness dictates that the employer should not be burdened with those costs. Accordingly, the following order is made;

Order:

i. It is declared that the proposed conduct of the Second to Further Respondents constitute a strike which is not in compliance with and is in breach of the relevant provisions of chapter 4 of the Labour Relations Act, 66 of 1995 as amended.

ii. The proposed conduct of the Second to Further Respondents in making demands for transport between Nampak and Alrode depot is declared to be unlawful.

iii. The First and Second to Further Respondents are interdicted and restraint from commencing with, continuing with, participating in, or promoting the unprotected strike in pursuit of their demands.

iv. The First Respondent is ordered to inform its members (The Second to Further Respondents), that the proposed strike is unprotected, and is to give effect thereof by means of-

(a) Effective public announcement via loud hailer to those of its members who are present at the time, in such languages which are commonly used for communication on the Applicant's premises;

(b) Distribution of trade union leaflets bearing the First Respondent's respective name, watermark, logos and contact details and which is signed by the respective National Secretary, National organiser or President of the First Respondent which informs them of this Court order and urges them to comply with the said order.

(c) Distribution of Short Message Service (SMS) messages to the Second to Further Respondents to be sent to their cell phone numbers that are on record with the Applicant informing them of the Court order and urging them to comply with the said Order.

v. The First Respondent is ordered to pay the costs of this application.

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Edwin Tlhotlhalemaje

Judge of the Labour Court, South Africa

APPEARANCES:

For the Applicant:	Adv. A.N Snider
Instructed by:	*Cliffe Dekker Hofmeyr Inc*
For the Respondents:	Adv. S Swartz
Instructed by:	*Kruger Attorneys*

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