In the Labour Appeal Court of South Africa
Held at Johannesburg

Case nr: JA55/10

In the matter between

Unitrans Fuel and Chemical (Pty) Ltd — Appellant

and

Transport and Allied Workers Union Of South Africa (TAWUSA) — First Respondent

National Bargaining Council for The Road Freight Industry — Second Respondent

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JUDGEMENT

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Waglay DJP

Introduction

[1] This Appeal was heard as a matter of urgency and relates to the validity of a strike which the members of the Transport and Allied Workers Union of South Africa, the first respondent herein, intend embarking upon *post- haste.*

Background

[2] The appellant, a haulage business company which conveys goods such as petroleum products, oxygen, etc, in bulk, had a contract with Shell Petroleum Company ("Shell") to convey its products for

a period of 5 years. This contract terminated by effluxtion of time in February 2009.

[3] 110 drivers in the appellants employ were affected by the termination of the Shell contract and all but 31 obtained employment elsewhere. The appellant absorbed the 31 drivers in its business on various other haulage contracts that it had. The salaries of the 31 drivers, however, were reduced and the appellant sought these drivers to sign contracts of employment which indicated their acceptance of the reduced salaries.

[4] 7 of the 31 drivers refused to sign these contracts but continued to work for the appellant. Notwithstanding their refusal to agree to a reduction in salary the appellant implemented the reduction and continues to pay them accordingly.

[5] The 7 drivers who refused to sign the agreement joined the first respondent earlier this year. The first respondent raised the matter on their behalf together with a number of other issues which it said were of concern to its members and asked for a meeting with the appellant to discuss these issues. This it did by letter addressed to the appellant on 15 March 2010.

[6] Some 2 months later, the appellant and the first respondent met. The meeting was followed by the appellant putting its response to the concerns raised by the first respondent in writing. Three of the issues raised by the first respondent were the following: *"salary cuts"; "coupling"* and *"clarification on provident fund benefits"*. With respect to the salary cuts, the appellant explained that

previously the 31 drivers earned salaries that applied to the Shell contract, but, with the termination of that contract these drivers salaries were adjusted in accordance with the contracts that were now being serviced by these drivers: that is since the contracts were for a lesser amount then that paid by Shell the drivers salaries were reduced in accordance thereto.

[7] The appellant further stated that it was not prepared to negotiate payment related to "coupling" (to couple and uncouple a hose on a truck driven by the driver) because that was part of the driver's duty. The appellant stated that if payment for that task was sought then the first respondent had to negotiate same at the National Bargaining Council for the Road Freight Industry, ("Bargaining Council") where wages were negotiated in terms of the Collective Main Agreement that regulated the relationship between the appellant and the first respondent.

[8] From 21 May 2010 to 2 June 2010 correspondence passed between the parties with regard to arranging a further meeting to further discuss the issues raised by the first respondent but dates could not be agreed. On 5 July 2010 the first respondent referred three dispute to the CCMA for conciliation: The first dispute was summarised as follows: "*Company refuses to adhere to section 81 of the LRA by not allowing shop stewards feedback to members"*; the second *"Company has allocated two drivers in each truck but paying them not as per previous agreement with Roadway Legislation*; and the third simply stated *"We have discussed the matter in vain"* and referred to the issues in dispute as contained in Annexure 'A'. Annexure 'A' was the letter written by the first

respondent to the appellant dated 15 March 2010 in which it raised the issues that were of concern to its members (see paragraphs 5 and 6 above).

[9] Applying the test as set out in *Plascon Evans*[1], I accept the version as set out by the first respondent with regard to what transpired at the conciliation meeting that took place at the CCMA with regard to the issues to be conciliated. According to the first respondent it was the referral which raised the issues contained in "Annexure 'A'" that was before the Commissioner of the Bargaining Council and that the first respondent only sought conciliation with respect to the following issues: *"Wage discrepancies"; "wage cuts"; "coupling five hundred rands (R500) per week"*; and, *"Provident Trustees and transparency relating to death cover"*. The last item according to the first respondent was re-formulated at the conciliation meeting to record that it entailed a dispute concerning the unilateral change of the provident fund from a fund that was administered by the Bargaining Council to a fund administered by the appellant.

[10] The matter remained unresolved at the conciliation and the commissioner issued a certificate to that effect on 29 July 2010 stating that the dispute concerned *"Unilateral terms and conditions of employment changes"* and added that the dispute could be referred to a "*strike/lockout*".

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[1] Plascon-Evans Paints (Pty)Ltd v Van Riebeeck Paints (Pty)Ltd 1984 (3) SA 623 (A) relating to evaluating evidence in application proceedings.

[11] After the certificate was issued, on 6 August 2010 the first respondent issued a *"Notice of Intention to Strike"* to the appellant. In terms of this notice it gave the appellant 48 hours notice of the intention of its members to embark upon a strike. Attached to its notice was an annexure which set out the demands which the first respondent wanted appellant to meet to avoid the strike. The demands were listed as follows:

> *"2.1 Wage discrepancies*
>
> *2.2 Wage cut*
>
> *2.3 Coupling-R500-pw*
>
> *2.4 Unilateral change of the administration of the fund from the Bargaining Council to your in-house fund".*

[12] On receipt of the notice the appellant immediately launched an application in the Labour Court seeking *inter alia* an order *"Interdicting the first respondent (and any of its members) from promoting, encouraging, supporting, participating in or otherwise furthering any strike in support of the First Respondent's strike notice dated 6 August 2010."*

Labour Court

[13] Papers were duly filed on an expedited basis and the matter was heard by the Labour Court (Van Niekerk J). The Labour Court dismissed the application but made no order as to costs. There is no need to discuss the grounds upon which the appellant sought and was refused the order in the Labour Court because, after its application was dismissed and with the aid of a new legal team it applied for leave to appeal the decision of the Labour Court on

grounds different to those it had initially raised. Leave to appeal was granted by the Labour Court.

[14] The new grounds relied upon by the appellant are essentially legal in nature and were also canvassed in the founding affidavit. There is in any event no bar to the raising these grounds at the stage it did.[2] The new grounds did however refer to a number of Collective Agreements concluded between the trade unions and employers that form part of the industry in which the appellant and first respondent operate and to which it and the first respondent are parties. These Agreements constitute public documents and in terms of the Civil Proceedings Evidence Act 25 of 1965 the production of these documents is not a pre-requisite for them to be considered by any court of law. These Agreements have been duly promulgated and are therefore binding on those who are party thereto or to whom they apply. The promulgation of a Collective Agreement places it in the sphere of subordinate legislation and it must be considered more as a statute than a contract and as such can properly be referred to as a statute rather than a contract[3].

The Appeal

[15] Relying on the Collective Agreements the appellant contends that the intended strike called upon by the first respondent is unlawful because its members are precluded from pursuing a strike in respect of the demands it has communicated to the appellant. This

[2] See the matter of Group Six Security (Pty) Ltd and another v R. Moletsane and 2 others unreported LAC Case no JA 77/05 at paragraphs [35] and [37]

[3] See in this respect Platinum Mile Investments (Pty) Ltd t/a Transition Transport v. SATAWU and another (2010) 31 ILJ 2037 LAC paragraphs [41] to [46].

contention is based on the limitation contained in s 65 (1) (a) and (3) (a) (i) of the Labour Relations Act 66 of 1995 (the "LRA"). Section 65 (1) (a) and 3 (a) (i) provides as follows:

*65 <u>Limitations on the right to strike or recourse to lock out</u>*

*(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out if-*

*(a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;*

*(2)…*

*(3) Subject to a collective agreement, no person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or lock-out-*

*(a) if that person is bound by-*

*(i) any arbitration award or collective agreement that regulates the issue in dispute;…*

[16] The appellant relies on three collective agreements viz (i) the Main Collective Agreement; (ii) the Dispute Resolution Collective Agreement; and (iii) the Provident Fund Collective Agreement. The Main Collective Agreement provides in clause 50 (1) and (3) that:

50 (1) " *The forum for the negotiation and conclusion of substantive agreements on wages, benefits and other conditions of employment between the employers and*

*employers' organisations on the one hand and trade unions on the other hand, shall be the Council.*

50 (3) *"No trade union or employers organisation shall attempt to induce or compel, or be induced or compelled by, any natural or juristic person or organisation, by any form of strike or lockout to negotiate the issues referred to in sub-clause (1) above at any level other than the Council."*

[17] It is clear that in terms of this clause all and any negotiations in relation to wages and substantive issues must be negotiated at the Bargaining Council and that neither party may resort to industrial action (strike or a lock-out) concerning these issues. The Main Collective Agreement also goes on to define *"substantive issues"* as *"all issues involving costs and affecting the wage packets of employees."*

[18] According to the Appellant the first three demands of the first respondent, described as *"wage discrepancies"; "wage reduction"* and *"Coupling R500 pw"* are all related to and connected with wages and are substantive issues and as such the first respondent is prohibited in terms of clause 50 (1) and (3) read with s 65 (1) (a) and (3) (a) (i) from calling upon its members to strike in order to secure these demands. I accept that where a demand is made for an increase in remuneration or for remuneration to be paid in relation to a particular aspect of employment such demands relate to wages and are substantive issue. If the demands as we have them here are about wages and substantive issues then, as appellant has properly

argued, the first respondent is prohibited from calling on its members to embark on a strike in respect of those issues.

[19] I am however not persuaded that the first two demands made by the first respondent are demands which relate to an increase in wages. Seen in the context of what has transpired at the appellant's work place it is clear that the aforementioned demands relate to the fact that the appellant unilaterally decided to reduce the wages of those of its employees who previously serviced the Shell contract for the appellant. When appellant's contract with Shell came to an end it did not seek to reach an agreement (at least not with the 7 employees referred to earlier) with those employees who decided to remain in the appellant's employ but reduced their wages. The 7 employees were simply paid a lesser salary. This reinforces the first respondent's averment that the appellant unilaterally reduced the wages of its employees. Appellant's response is that the Shell contract was of a greater value than the present contracts on which these ex-Shell drivers were now placed. This may be so, but this does not mean that the appellant is entitled to unilaterally enforce a reduction in salary without concluding an agreement with the employees. The employees are entitled to demand that the appellant not apply wage discrepancies and wage reduction unilaterally and such demand is not a demand that seeks to increase their wages but to undo the appellant's unilateral implementation of a change in wage rates and reduction in wages.

[20] As counsel for the first respondent argued the demand for wage parity is not a demand for an amount of money but requires of the appellant to adjust wages so as to arrive at a uniform level of

remuneration for employees performing the same work *albeit* on different contracts.

[21] The demands of "*wage discrepancy*" and "*wage cut*" are thus not demands that fall within the purview of clause 50(1) and /or (3) of the Main Collective Agreement and are therefore not issues in respect of which the first respondent is prohibited from calling upon its members to strike.

[22] The appellant argued in the alternative that if this Court were to find the demands made by the first appellant did not fall within the boundaries of "*wages and substantive issues"* then the first respondent was still prohibited from embarking on a strike because clause 50 (2) of the Main Collective Agreement provides that the dispute must be resolved in terms of the Dispute Resolution Collective Agreement. In this respect Counsel for the appellant merely made the statement but did not pursue the matter with much vigour. Counsel for the first respondent however correctly pointed out that this argument is of no merit as the route followed by the first respondent in referring the matter to the Bargaining Council and thereafter giving the strike notice was indeed the correct procedural step. I agree with the first respondent. The Dispute Resolution Collective Agreement does not compel the first respondent to refer the dispute as set out above to arbitration as contended for by the appellant. The Agreement simply states that if the dispute between the parties is required by the LRA to be referred to arbitration then the dispute must be referred to `arbitration.

[23] Turning to the demand labelled as *"coupling R500 pw.*" This relates to the fact that despite *"coupling"* not being listed as a function which a driver is required to perform in the Main Collective Agreement it is a task that has always been performed by appellant's drivers and is included in their job description The demand here is that drivers be paid an extra R500,00 per week for performing the coupling task, a task which as I have said earlier the drivers in the appellant's employ have always performed. This demand in my view is clearly an issue which falls within the ambit of clause 50(1) and (3) as it is an issue that is connected and related to substantive issues because it involves costs and effects the employees wage packets. This demand is therefore hit by the prohibition contained in s 65 (1) of the LRA.

[24] In so far as the first respondent demands that the appellant undo its unilateral change of the administration of the provident fund from the Bargaining Council to itself, first respondent's demand is premised on the *"unilateral"* transfer by the appellant of the provident fund from the Bargaining Council to itself. The first respondent, however, conceded that the allegation may not be factually correct but advanced an argument to the effect that the factual basis for the demand need not be correct and that a mere allegation of the possible existence of a fact is sufficient. This is grossly erroneous. If there is no factual basis to allege that the appellant unilaterally did something there is no basis on which a demand can be made that the appellant undo its unilateral action. Quite clearly there is no factual basis for the first respondent to persist with this demand.

[25] In the circumstances I am of the view that the first respondent's demands that the appellant implement a system of wage parity for the drivers irrespective of which contract they service and that there be no reduction in salary without there being an agreement to that effect are demands which fall outside the ambit of clause 50 (1) and (3) of the Main Collective Agreement and as such the first respondent is not prohibited in terms of s65(1)(a) and (3)(a)(i) of the LRA from calling upon its members to strike in respect of these demands.

[26] Finally, I need to add that although I find that only two of the demands are demands upon which the first respondent is entitled to call upon its members to strike, because the four demands are severable and each can stand alone, the appellant cannot succeed to have the strike interdicted on the grounds that because some of the demands are demands on which the first respondent is prohibited from striking the intended strike is prohibited. The first respondent cannot however continue to persist with all of the demands it has made if it decides to proceed with its intended strike, the demands relating to *"coupling"* and the *"Provident Fund"* must be severed from its list of demands as it is not entitled to call upon its members to strike in respect of those issues.

[27] As regards costs I am of the view that this is a matter where there should be no order as to costs.

[28] In the result I make the following order:

1. The order of the Labour Court is set aside and substituted with the following:

(i) The application is dismissed with respect to the demands relating to *"wage cuts"* and *"wage discrepancies"*;

(ii) The first respondent and its members are prohibited from promoting, encouraging, supporting, participating in or otherwise furthering any strike in support of its demands fashioned as *"coupling R500 pw"* and *"Unilateral change of the administration of the Fund from the Bargaining Council to your in-house fund."*

(iii) There is no order as to costs.

2. There is no order as to costs in this appeal.

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Waglay DJP

I agree

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Mlambo JP

I agree

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Tlaletsi JA

APPEARANCES:

For the appellant: Adv A E Franklin SC together with G A Fourie

Instructed by: Glyn Marais Inc.

For the respondent: Adv F Wilke

Instructed by: Ramushu Mashile Twala Inc.

Date of hearing: 21 September 2010

Date of judgement: 23 September 2010