Delivered 03122010
Reportable

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: J 2401/2010

In the matter between:

CLIDET NO 957 (PTY) LTD	**APPLICANT**
and	
SOUTH AFRICAN MUNICIPAL WORKERS' UNION	**1ST RESPONDENT**
EMPLOYEES OF THE APPLICANT WHO ARE MEMBERS OF THE 1ST RESPONDENT	**2ND TO FURTHER RESPONDENTS**

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an urgent application in which the applicant seeks an interim order interdicting the respondents from engaging in a secondary strike. The primary strike is protected (this court having granted an order to that effect on 29 November 2010), and the first respondent (the union) has given the notice required by s 66 (2) (b) of the Labour Relations Act (LRA). The crisp issue in dispute in these proceedings is whether the proposed secondary strike meets the requirement established by s 66 (2) (c) of the LRA, i.e. whether the nature and extent of the secondary strike is reasonable having regard to the direct or indirect effect of the strike on the business of the primary employer.

Factual background

[2] The material facts are largely a matter of common cause. The primary employer is the Metropolitan Trading Company (MTC), a wholly owned subsidiary of the City of Johannesburg Metropolitan Council. MTC's business is the provision of certain services at bus stations, or more accurately, the provision of persons to render services relating to ticket sales, marshalling and the like. After MTC concluded what was termed an 'employment framework agreement' with taxi industry representatives, MTC gave the union notice of its intention not to renew certain fixed term contracts in terms of which union's members are employed. This notice was prompted by a term of the agreement to the effect that an agreed percentage of MTC's posts will be filled by taxi drivers whose taxis will be decommissioned. The union is in dispute with MTC over a demand that union members who are currently employed by MTC on fixed term contracts be appointed to permanent positions. As stated in the introduction, the union has given notice of its intention to commence a strike in support of this demand.

[3] The applicant is a private company and an independent entity, at least in the sense that there is no common shareholding as between it and the primary employer. The applicant carries on business as a bus operator, and provides a bus service to the City of Johannesburg Metropolitan municipality as party of the Rea Vaya Bus Rapid Transport system. The applicant receives a fee for providing bus transport services to the City, and transports between 30 000 and 35 000 commuters every day.

Condonation

[4] The first issue to be decided is whether the applicant's failure to give the required notice of this application should be condoned. On 19 November 2010,

the union gave 10 days' notice of the intended strike. Section 68(3) of the LRA provides that when notice is given at least 10 days before the commencement of a strike, the applicant must give at least five days' notice of any application to interdict the strike. The present application was filed on 26 November 2010, and set down for hearing on 29 November. The union contends that the applicant has therefore failed to afford the notice required by s 68 (3) and that for this reason, the application ought to be removed from the roll.

[5] Whether the applicant's failure to provide the required notice is fatal has been the subject of conflicting decisions by this court. In *Automobile Manufacturers Employers' Organisation v NUMSA* [1998] 11 BLLR 1116 (LC) Landman J held that notice of an application meant formal notice of the application with supporting affidavits, and that a failure to comply with s 68 (3) could not be condoned. In *City of Johannesburg v SA Municipal Workers Union & others* (2010) 31 *ILJ* 1175 (LC), Molahlehi J expressed a different view and condoned the filing of a similar application that had been served on three days' notice. Molahlehi J relied *inter alia* on *Queenstown Fuel Distributors CC v Labuschagne NO & others* (2000) 21 *ILJ* 166 (LAC), in which the Labour Appeal Court held that s 145 of the Act, while it does not expressly give the court the power to condone non-compliance with the six-week time limit established by that section, is directory, and that it should not be read so as to exclude the power to grant condonation for good cause shown. In my view, to regard the provisions of s 68 (3) as peremptory has the potential to occasion injustice, and for the reasons articulated by Molahlehi J, I intend to consider what is effectively an application for condonation by the applicant.

[6] The applicant's CEO states that the strike notice was received on Friday 19 November. The applicant sent the notice to its attorneys, who contacted the CEO on Monday 22 November. Thereafter enquiries were made to the attorneys representing MTC, when details of the primary dispute emerged. On 25 November a written undertaking was sought from the union to the effect that its

members would not embark on a secondary strike. The undertaking was not forthcoming, and on 26 November this application was filed for hearing on 29 November simultaneously with the application to interdict the primary strike. As events transpired, after the dismissal of that application, the parties agreed to postpone the application to 1 December 2010, and to a timetable for the filing of answering and replying affidavits. These were filed within the agreed periods, and the matter was heard on 1 December, five days after notice of the application. In these circumstances, while the applicant's explanation for its failure to give the required notice is thin, the respondent has not suffered any material prejudice, and the interests of justice would not be served by removing the matter from the roll only to be re-enrolled on the same papers within a day or two. The applicant's failure to give five days' notice of the application is accordingly condoned.

Secondary strikes

[7] The right to engage in secondary action is not unfettered. The model adopted by the LRA recognises that it is legitimate for a union to place additional pressure on the primary employer to meet its demands by calling out its members employed by another employer, subject to the procedural requirements introduced by s 66 (2) (a) and (b), and the reasonableness requirement introduced by s 66 (2) (c). In regard to the latter, the parties were agreed that the relevant legal principles were those enunciated in *SALGA v SAMWU* (2007) 28 *ILJ* 2603 (LC). In that case, the court said the following:

> *Whether or not a secondary strike is protected is determined by weighing up two factors - the reasonableness of the nature and extent of the secondary strike (this is an enquiry into the effect of the strike on the secondary employer and will require consideration, inter alia, of the duration and form of the strike, the number of employees involved, their conduct, the magnitude of the strike's impact on the secondary employer*

and the sector in which it occurs) and secondly, the effect of the secondary strike on the business of the primary employer, which is in essence an enquiry into the extent of the pressure that is placed on the primary employer (at paragraph [16] of the judgment).

[8] In the present instance, the two businesses represented by the primary and secondary employer are both service providers to an enterprise managed ultimately by a third party. MTC manages the bus stations; the applicant operates the busses, ultimately for the benefit of the City. In one sense, the two entities share a connection - the stations exist to serve the busses, and the busses could not operate effectively without the stations. But that is not the test. The legitimacy (or otherwise) of the secondary strike must be determined by determining the nature and extent of the proposed secondary strike, and weighing that against the harm that will be caused to the business of the primary employer. This approach is obviously better suited to employers that stand in a relationship of customer and supplier, or who enjoy a connection by way of a common shareholding or some other nexus that bears on the capacity of the secondary employer to place pressure on the primary employer to resolve its dispute with the union. Where both employers, as they are in the present instance, simply provide services for the benefit of a common client, it is difficult to appreciate how, ordinarily; the one is in a position to influence the other. The situation is different as between MTC and its client; indeed, the application dismissed on 29 November encompassed an interdict against the union from calling a secondary strike in respect of its members employed by the City.

[9] In the present instance, in regard to the nature and extent of the proposed secondary strike, the union appears to have called for a complete withdrawal of labour, for an indefinite period. The effect on the strike on the applicant's business is likely therefore to be significant. The applicant generates revenue on the basis of kilometers travelled by the buses it operates - if the busses do not

operate, it generates no revenue, and the uncontested evidence is that it will incur losses of some R200 000 per day.

[10] On the other hand, the effect of a secondary strike on the business of MTC is more difficult to assess. The applicant contends that the effect of a strike by its employees on MTC's business will be minimal - MTC is not a profit-making concern, and it has no financial funding obligations. If the buses operated by the applicant do not run, MTC incurs no finacial loss. While the applicant can be criticised for making much of the detail of its case in the replying affidavit, the point is foreshadowed by the founding affidavit, where the deponent claims that the secondary strike will have no substantial effect on MTC. A detailed analysis of the agreements between the station contractor agreement between MTC and the City is not necessary; it is clear to me that MTC, being the provider of limited services on bus stations that it is, will be marginally affected (if at all) by the proposed secondary strike.

[11] In these circumstances, I fail to appreciate what pressure will be placed on the business of MTC should the secondary action proceed. The only significant effect that the strike will have is the inconvenience to the thousands of commuters who rely on the applicant for their daily transport. They will be inconvenienced no doubt by the primary strike given the absence of cashiers and the like, but the effect of the secondary strike will be to deny them access to the transport on which they ordinarily rely. But the question here is not the extent of any inconvenience to commuters rather than whether on the test established by s 66, the applicant can be said to be reasonably capable of exerting pressure on MTC to meet the union's demand that its employees should be permanently employed. For the above reasons, in my view, that question must be answered in the negative.

[12] At the hearing of the application, the union's counsel submitted that I should issue an order that would have the effect of mitigating the effects of the

strike, should I find that the nature and extent of the strike were unreasonable. This was done in *Samancor Ltd & another v National Union of Metalworkers of SA* (1999) 20 *ILJ* 2941 (LC), when Landman J ordered that a secondary strike could take place only on Mondays and Tuesdays until the primary dispute was resolved. It does not seem to me that it is competent for this court to make such an order, unless, as was the case in *Samancor*, it is an order to which the parties consent. Even if it were, I would hesitate to prescribe to the union that it should limit its strike to a day or two a week, or to adopt whatever formula would serve to bring the strike within the band of protection established by s 66. It seems to me that if the union wishes to reconsider the nature and extent of any secondary action it should do so on its own terms.

[13] The applicant has applied for an interim order. The papers before me are comprehensive, and the substantive legal issue raised by this dispute has been fully ventilated. I fail to appreciate what purpose an interim order would serve, and intend to make a final order. Finally, in relation to costs, there is no reason why costs should not follow the result.

For these reasons, I make the following order:

1. The secondary strike called by the first respondent is unprotected.
2. The second and further respondents are interdicted from commencing with or participating in the strike, and the first respondent is interdicted from encouraging or promoting the strike.
3. The first respondent is to pay the costs of this application.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of application: 1 December 2010
Date of judgment 3 December 2010

For the applicant : Adv FJ Nalane, instructed by Cliffe Dekker Hofmeyr Inc.
For the respondents: Adv T Ngcukaitobi, instructed by Cheadle Thompson & Haysom Inc.