THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN CASE NO: D 413/05
REPORTABLE

In the matter between:

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION Applicant

and

COIN REACTION Respondent

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REASONS FOR THE ORDER MADE

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FRANCIS J

*Introduction*

1. The applicant, acting on its own behalf and of that of its members, brought an urgent application to declare the strike which its members have embarked upon at the respondent's premises to be lawful and in compliance with the provisions of the Labour Relations Act 66 of 1995 ("the Act"). The applicant also sought some ancillary relief.

2. On 17 June 2005 after having heard arguments, I made the following order:

*"2.1 The applicant's failure to comply with the provisions of the Rules of this Court is condoned.*

*2.2 The strike which the applicant's members embarked upon at the respondent's premises is declared to be protected and in compliance*

*with the provisions of the Labour Relations Act.*

*2.3 The respondent is interdicted from dismissing the applicant's members pursuant to the strike;*

*2.4 The respondent is to reinstate any employees which it might have dismissed pursuant to the said strike.*

*2.5 The respondent is to pay the costs of the application including those reserved on 10 June 2005."*

3. I said to the parties that I would provide reasons for the order that I made. These are my reasons.

*The background facts*

4. The applicant's members are employees of the respondent. During May or June 2004 the applicant approached the respondent at its Pinetown branch to negotiate wages. The respondent stated that it could not negotiate at regional level but at head office level. On 11 August 2004 the applicant sent a letter to the respondent. The subject matter of the letter was a "Salary Increase Proposal". The letter contained certain proposals and requested a date for salary negotiations. A meeting was held on 11 August 2004 where the applicant repeated its demand for a wage increase. The respondent refused to negotiate on the basis that the negotiations were done at head office level. The respondent responded in a fax dated 12 August and requested information about "all reaction officers becoming members of the applicant" referred to in the applicant's letter before agreeing to any meeting. On 17 August 2004 the respondent requested the information that it had sought from the applicant.

5. On 18 August 2004 the applicant referred a dispute to the CCMA for conciliation. The nature of the dispute was described as a "Refusal to Bargain". The facts were stated to be that "the respondent was approached for salary negotiations but were refusing". The outcome sought was "to enforce the respondent to come to the table for negotiations". On 16 September 2004 the respondent wrote to the applicant and stated amongst others that in considering the outcome sought for conciliation that it had at no stage indicated an unwillingness to negotiate. A negotiation meeting date was set for 29 September 2004. The respondent wanted confirmation that the referral to the CCMA would be withdrawn. The applicant responded in a letter dated 16 September 2004. It stated that a meeting was scheduled for 29 September 2004 but that the negotiations should be held under the auspices of the CCMA due to the mistrust that exists between the parties and that the meeting at the CCMA scheduled for 17 September 2004 would go on. Thereafter the applicant withdrew the referral to the CCMA and the parties agreed to negotiate.

6. The parties met on 29 September 2004 to negotiate wages as previously agreed upon. The applicant contended that the Basic Conditions of Employment Act applied whereas the respondent contended that a Sectoral Determination applied. It was agreed that an opinion would be obtained from the Department of Labour about whether the armed reaction personnel fell under the Sectoral Determination.

7. The applicant obtained an opinion from the Department of Labour on 13 December 2004. This was sent to the respondent on 10 January 2005. The gist of the opinion was that if the armed reaction officers are employees in the private security sector and if they are security officers, then the Sectoral Determination applies.

8. A meeting was arranged between the parties for 24 January 2005. The applicant's view was that the Sectoral Determination did not apply and the respondent's view was that it applied. The parties were unable to reach any consensus and the meeting ended. The applicant referred a dispute to the CCMA for conciliation on 25 January 2005. The dispute was described as a "mutual interest dispute" and the applicant sought to obtain the right to strike. An advisory arbitration award was issued on 22 February 2005. A certificate of outcome was issued on 23 February 2005 stating that the dispute remained unresolved and the parties could strike.

9. Several meetings took place after the certificate of non resolution was issued, in an attempt to resolve the dispute which failed. On 1 June 2005 the applicant gave notice to the respondent that a strike would commence on 4 June 2005. The respondent responded on 3 June 2005. It stated that it had agreed to negotiate and had met the demands of the 7.11 referral. The strike was accordingly illegal and unprotected.

10. On 4 June 2005 the applicant's members went on strike. At 07h00 the respondent issued a notice advising that it believed that the employees' actions were illegal. The applicant denied that the strike action was unprotected and stated that it was prepared to negotiate.

11. The strike continued on 6 June 2005. The applicant wrote to the respondent enquiring whether it was prepared to continue with the wage negotiations, and repeated that the applicant was prepared to resolve the strike provided that the respondent committed itself to wage negotiations. The respondent responded and stated that it was prepared to negotiate on 7 June 2005 at 06h00. The applicant responded that it was prepared to negotiate but at the respondent's

premises and at a reasonable time. The respondent repeated that the strike was unprotected and illegal. It issued a notice stating that the applicant's members had embarked in an unprotected strike and that steps would be taken. They were given an ultimatum to return at 15h00. Later the same day a notice for the employees to attend a disciplinary enquiry was issued.

12. On 8 June 2005 the applicant's wrote to the respondent stating that the strike was legal and that they were involved in lawful activity and that any attempts to dismiss or discipline its members would be unlawful. It sought reasons why the respondent contended that the strike was unprotected. The respondent responded that the strike was unprotected and they would proceed with the disciplinary action. It further indicated that on 10 June 2005 a verdict would be given. This prompted the applicant to bring the application on 10 June 2005. The matter was postponed to 17 June 2005 after certain undertakings were given by the respondent.

*Analysis of the facts and arguments raised*

13. The crisp issue in this matter relates to the question whether the dispute that forms the basis of the applicant's members strike has been referred to the CCMA as required in terms of section 64(1)(a ) of the Act.

14. The applicant's case is that the dispute referred to the CCMA essentially was one of wage negotiations and the respondent's failure to negotiate. The employees are on strike to enforce a demand for higher wages.

15. The respondent's case is that the issue in dispute over which the employees are striking is not the same issue referred for conciliation. What was referred for conciliation was an issue in dispute about the respondent's failure to negotiate or a refusal to bargain and not a dispute about wages which is the

dispute that forms the subject of the strike. It was contended that because of this, the applicant's members could not embark on any strike action relating to failure to negotiate.

16. It is trite that in determining a dispute such as the present, that the Court is required to ascertain the really underlying dispute. In conducting that enquiry the Court should look at the substance of the dispute and not at the form in which it is presented. The characterisation of a dispute is not necessarily conclusive. See *Ceramics Industries t/a Betta Sanitary Ware and another v NCBAWU & others* [1997] 6 BLLR 697 (LAC); *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union* (1) (1998) 19 ILJ 260 (LAC) and *Coin Security Group (Pty) Ltd v Adams & others* [2000] 4 BLLR 371 (LAC).

17. The true or real dispute should be ascertained from a consideration of the relevant facts including the referral form to conciliation, the correspondence immediately before and after the conciliation; the negotiations and discussions which took place at the conciliation and the content of the advisory award and the affidavits filed with this court.

18. It is common cause that the applicant had approached the respondent from May 2004 onwards to negotiate a wage increase. Correspondence followed and the main theme was "Salary Increase Proposal". It is further common cause that in August 2004 the applicant referred a "refusal to bargain" dispute to the CCMA. That dispute was resolved after the respondent agreed to bargain with the applicant.

19. A further dispute arose which was referred to the CCMA for conciliation on 25 January 2005. In the referral form the nature of the dispute is described as

a "mutual interest dispute" and not a "refusal to bargain". The facts that are summarised in the referral are that "the wage negotiations started in September 2004 since the employer is refusing to bargain (No wage increase. No bonus)". Under the heading the "result required" is stated: "To attempt to bring parties to earnest negotiations for wages or right to strike". This does not convert the dispute into one about the "refusal to bargain".

20. The commissioner issued an advisory award dated 22 February 2005. He recorded that the issue was referred to the CCMA by the applicant as a wage dispute after attempts to negotiate wages with the respondent had failed. The commissioner made certain recommendations that the parties have a duty to obtain jointly and/or severally, to obtain "decisive exclusion on whether or not they fall within the scope of the Security Sectoral Determination before embarking on any action in terms of section 64 of the Act". A certificate of outcome dated 23 February 2005 was issued stating that the dispute remained unresolved. It states that the dispute concerns mutual interests and relates to wages. It indicates further that the parties can strike.

21. The respondent did not bring an application to have the certificate of outcome reviewed. It remains valid until it is set aside by an order of this Court on review. In this regard see *Fidelity Guards Holdings (Pty) Ltd v Epstein NO & Others* [2002] 12 BLLR 1389 (LAC).

22. It is clear from the correspondence that the applicant wanted to engage the respondent in wage negotiations in 2004. The respondent's attitude was that the negotiations could not take place at branch level but rather at head office level. At some stage the applicant was of the view that the respondent was not prepared to bargain. A dispute was declared and referred to the CCMA for conciliation in August 2004. The parties agreed that they would bargain.

Some delays took place which prompted the applicant to refer a second dispute to the CCMA. Conciliation took place and a certificate of non resolution was issued. It is untrue that there were no negotiations prior to 24 January 2005 and that the respondent refused to bargain with the applicant. As at 24 January 2005, the issue pertaining to Sectoral Determination was a subsidiary issue that arose within the context of the wage dispute. The wage dispute was the real underlying dispute.

23. The fact that further negotiations took place or that the parties met after a certificate was issued is no bar from allowing the applicant's members in embarking on strike action. The requirements as set out in section 64(1) and (2) have been met.

24. Even if I were to find that the real dispute was a "refusal to bargain" dispute which was referred to conciliation on 25 January 2005, this will not assist the respondent at all. Once an advisory award is issued in terms of section 64(2) read with section 135(3) of the Act, 48 hours notice must be given before the strike. The advisory award was issued on 22 February 2005 and the notice of the strike was given on 2 June 2005. The applicant's complied with the provisions of section 64(1) and (2) of the Act. The "refusal to bargain" dispute is in any event "strikable". The applicant's members could therefore embark on strike action and such strike would be protected.

25. The conclusion that I reach is that the strike action that the applicant's members have embarked upon is protected. Since it is protected, the respondent cannot dismiss employees for participating in the strike action in terms of section 67(2). The same would apply to disciplinary proceedings unless the employees have committed misconduct.

26. Both parties had sought costs against the other despite the fact that they do have an ongoing relationship. There is no reason why costs should not follow the result.

27. It was for these reasons that I made the order of 17 June 2005.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

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| FOR THE APPLICANT | : | D CRAMPTON INSTRUCTED BY VON KLEMPERERS ATTORNEYS |
| FOR THE RESPONDENT | : | M BINGHAM INSTRUCTED MACROBERTS INC |
| DATE OF HEARING | : | 17 JUNE 2005 |
| DATE OF ORDER | : | 17 JUNE 2005 |
| DATE OF REASONS | : | 24 JUNE 2005 |