IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG CASE NO: J2540/08

In the matter between:

FREIGHT DYNAMICS

Applicant

and

SOUTH AFRICAN TRANSPORT & ALLIED WORKERS UNION 1st Respondent

UNITED TRANSPORT & ALLIED WORKERS UNION 2nd Respondent

UNITED WORKERS ASSOCIATION OF SA 3rd Respondent

THE PERSONS LISTED IN ANNEXURE "A" 4th Respondent

THE PERSONS LISTED IN ANNEXURE "B" 5th Respondent

JUDGMENT

FRANCIS J

1. The applicant seeks the confirmation of the rule granted by this Court on 27 November 2008. The Court had *inter alia* made the following order:

"3. A rule nisi is hereby and is herewith issued calling upon the Respondents to show cause on 8 December 2008 at 10:00 or as soon as the matter may be heard, why a final order should not be granted in the following terms:

3.1 Declaring that the strike by the Individual Respondents that commenced on 24 November 2008 is an unprotected strike as provided by, inter alia, Section 65(1) and 65(3) of the Labour Relations Act, 66 of 1995, as amended;

3.2 The Individual Respondents are interdicted and restrained from further participation in the strike;

3.3 The Individual Respondents are ordered to tender their services to the Applicant and to comply with all their contractual obligations as from the date of this order;

3.4 The Individual Respondents listed in Annexure "A" and "B" are interdicted and restrained from blockading entrances and exists to and from Applicant's premises;

3.5 The Individual Respondents listed in Annexure "A" are interdicted and restrained from approaching within a 100 metres of all Applicant's premises unless it is for purposes of tendering their services;

3.6 The Individual Respondents listed in Annexure "A" and "B" are interdicted from in any way interfering with the business operations, employees of and supplies of the Applicant at its premises".

2. When the rule was granted on 27 November 2008 the matter was unopposed. The rule was made returnable on 8 December 2008. On 5 December 2008 the fourth and fifth respondents (the respondents) filed opposing affidavits in the matter. There were several extensions of the rule and the matter was eventually heard on 29 October 2009.

3. The applicant is Makhubu Logistics (Pty) Ltd t/a Freightdynamics and Container Services with its head offices at City Deep, Johannesburg.

4. The first respondent is the South African Transport and Allied Workers Union (SATAWU), a registered trade union. The second respondent is the United Transport

and Allied Workers Union, a registered trade union. The third respondent is the United Workers Association of South Africa, a registered trade union.

5. The individual respondents are those persons listed in Annexure "A" to the application, employed by the applicant and who are party to the referral of a dispute to the bargaining council made on their behalf by Rakhudu attorneys on 30 June 2008 and who took part in the strike that commenced on 24 November 2008. The employees in Annexure "B" are all other employees employed by the applicant as drivers and who have either joined the strike or the applicant reasonably believes may soon join the strike.

6. The applicant has depots at City Deep in Johannesburg, Durban, East London, Port Elizabeth, Cape Town, Mossel Bay and Kroonstad. The applicant in total employs approximately 800 employees, of whom about 650 are drivers. The applicant provides transport and logistics services, using trucks and trailers in the fuel, general freight and container sectors. The applicant sought an order to interdict the individual respondents from continuing with their participation in an unprotected strike which had been going on since 24 November 2009. The strike was until 26 November 2008, limited to City Deep and Durban and had spread to East London.

7. The applicant purchased Freightdynamics as a going concern from Transnet Limited in October 2007. Its employees' employment contracts were transferred to the applicant in terms of the provisions of section 197 of the Labour Relations Act 66 of 1995 (the Act). One of the issues covered in the sale agreement was the transfer of the employees from the Transnet Pension Fund to new retirement funds after the transfer. Transnet Limited

and the applicant complied with the terms of the sale agreement in so far as it relates to the transfer of retirement fund benefits and membership for the employees.

8. The first to third respondent all have members employed by the applicant. These trade unions were intimately involved in the discussions around the sale of, *inter alia*, Freightdynamics to the applicant and were consulted as contemplated by section 197(2) and (6) of the Act. They were satisfied that the terms and conditions of employment which were applied by the applicant to employees of Freightdynamics were on the whole no less favourable than those which prevailed before the transfer.

9. On 13 March 2008 after the transfer of Freightdynamics and its employees to the applicant, the applicant received a letter from Rakhudu attorneys claiming to represent James Ndlela and 64 others, employees of the applicant. The letter stated that the applicant had failed to conduct road shows to explain the sale of Freightdynamics to the applicant. The letter demanded that the applicant should pay the employees on whose behalf the letter was written, their pension or provident fund moneys. The applicant had conducted road shows and there was no truth in the allegations made. This much was admitted in a letter from Rakhudu attorneys dated 18 March 2008. The applicant could not comply with the demand for the payment of pension or provident fund benefits, as employees had to authorise such payment themselves to the Transnet Retirement Fund. The applicant had encouraged employees to make their election in this regard. On 3 April 2008, the applicant responded to the letter from Rakhudu attorneys and requested the names of the employees who they were representing and also pointed out that the process followed in transferring employees had been explained to Mr Mkhize, a

candidate attorney in the employ of Rakhudu attorneys.

10. On 26 May 2008, the applicant received a referral of a dispute to the National Bargaining Council for the Road Freight Industry (the bargaining council). The referral states that the dispute being referred is about an alleged unfair labour practice. It also describes the dispute as follows:

"THE COMPANY WAS TRANSFERRED FROM FREIGHTDYNAMICS TO MAKHUBU LOGISTICS IN TERMS OF SECTION 197 OF THE LRA TERMS AND CONDITIONS WERE CHANGED CONTRADICTING THE PROVISIONS OF SECTION 197, SEE ATTACHED LETTER."

11. There was no letter attached to the referral that was served on the applicant. In the section dealing with the required outcome, it is stated that the applicant must comply with section 197 of the Act and reverse all changes. The employees who were represented by Rakhudu attorneys had not tabled for discussion any issue related to any alleged non-compliance with section 197 of the Act or any alleged changes to the terms and conditions of employment.

12. On 29 May 2008 the applicant sent a letter to Rakhudu attorneys requesting that it be provided with the details of the conditions of employment which applied before the transfer and the changes that were alleged to have been affected after the transfer. The applicant did not receive a response to the letter.

13. A conciliation meeting was scheduled for 14 August 2008 at the bargaining council. The

conciliator directed the parties to discuss the issues which the employees wished to raise as they had previously not been tabled for discussion. It was agreed that these discussions would take place outside the scope of the bargaining council. The issues raised and explained by the applicant to the employees related to a housing allowance that the employees alleged was no longer being paid to them; travel concessions that they claimed they had forfeited following the transfer of Freightdynamics to the applicant; funeral benefits and medical aid subsidy. All of these four issues raised by the employees, were according to the applicant were covered by the sale agreement and the agreement concluded with the first to third respondents at the Transnet Restructuring Benefits sub-committee. This sub-committee had been established to specifically deal with employee benefits and how they were to be addressed during the disposal of the non-core business units, including Freightdynamics.

14. The first discussion took place on 14 August 2008 after the conciliation meeting was adjourned. The applicant explained to the respondents representatives how it had complied with the terms of the sale agreement and the provisions of section 197 of the Act. The discussions were not concluded and two further meetings were scheduled for 25 and 26 August 2008. The parties met on the said days. At the end of those meetings, the employees understood the transfer and how it had been implemented, but insisted that they would still pursue the matter by way of a referral to arbitration with the bargaining council. The employees would report to the bargaining council that the matter was not resolved and apply for arbitration

15. The applicant subsequently received notification that the conciliation which had been

adjourned on 14 August 2008 would reconvene on 28 October 2008. The applicant attended the conciliation meeting and found that there was a different conciliator. It was explained to the conciliator that a certificate was to be issued. He said that he would issue a certificate indicating that the dispute was to be resolved by way of strike action. A certificate was then issued.

16. On 21 November 2008 the applicant received a letter from Rakhudu attorneys, which purported to constitute notice of a strike in terms of section 64(1)(b) of the Act. The letter stated that the strike would commence on 26 November 2008 at 16h30.

17. On Monday 24 November 2008, the respondents, mostly drivers, commenced with strike action, despite what is stated in the strike notice that the strike would only commence on 26 November 2008 at 16h30. The strike was at that stage limited to City Deep and Durban. The striking employees also blockaded the entrances and exits from applicant's premises, thus preventing non-striking employees from entering or leaving the premises. The applicant met with representatives of the striking employees at its City Deep depot on the same day and signed an agreement in terms of which the striking employees acknowledged that the strike was only due to commence on 26 November 2008, that they would resume their normal duties and that the applicant would not discipline them for striking on 24 November 2008. The striking employees then returned to work. Contrary to their undertaking and in breach of the agreement signed on 24 November 2008, the individual employees resumed their unprotected strike during the afternoon on 25 November 2008. The employees in Durban had also been on strike the previous day. At about 16h30, the applicant issued a verbal ultimatum to the Durban striking employees to

return to work by 09h00 on 26 November 2008, failing which they would be dismissed.

18. On 26 November 2008 at about 08h30, the applicant issued and distributed a written ultimatum to employees in Durban and City Deep, informing them that if they did not report for duty by 09h00, they would be dismissed. After the strike commenced on 24 November 2008, the applicant was informed by the striking employees at City Deep that amongst others, the reason for the strike was that the drivers did not want to transport goods to the Democratic Republic of Congo and wanted bonuses. These issues were not included in the referral to the bargaining council. The striking employees also became unruly. They had blocked the entrances and exist to and from the applicant's premises. Non striking drivers also reported that they had been threatened by the strikers. They were told to stop working and join the strike. The applicant feared that the threats of this nature could lead to violence and possible loss of life. On 26 November 2008 at approximately 16h00, the applicant dismissed 33 striking employees at City Deep who continued with the strike, notwithstanding the ultimatum that the applicant had distributed.

19. The applicant brought an urgent application in terms of section 68 of the Act, to interdict the individual respondents from continuing with their participation in an unprotected strike which had been going on since 24 November 2008. The applicant contended that the strike was unprotected for the following reasons:

19.1 the referral to the bargaining council did not disclose the conditions of employment which the applicant is alleged to have changed. The certificate of outcome also did not state what unilateral changes to employment conditions the

applicant is alleged to have made. The referring employees or their representative did not invoke the provisions of section 64(4) of the Act in their referral as confirmation that the dispute involves an alleged unilateral change to terms and conditions of employment. There could not be a strike in respect of an issue which had not been crystallized and which the applicant could respond to. The first to third respondents have not alleged that the applicant has changed any conditions of employment, something which they would have raised as the recognized trade unions representing the majority of applicant's employees. It followed that there was no dispute that could be resolved by way of a strike and the strike was therefore unlawful and unprotected;

19.2 in so far as the employees could rely on the issues raised at the meetings held with them on 14, 25 and 26 August 2008, these issues were not referred to the bargaining council for conciliation;

19.3 in so far as the dispute could be said to relate to non-compliance with the provisions of section 197 of the Act, such a dispute is one that the Labour Court could adjudicate over in terms of section 158(1)(b) of the Act. A strike is unprotected if it is in respect of a dispute that a party has a right to refer to the Labour Court for adjudication;

19.4 in so far as the striking employees are demanding that the applicant should change the current conditions of employment which became effective after the sale and transfer, the strike was prohibited because the new conditions of employment are regulated by a written agreement concluded by Transnet Limited and the first to third respondent;

19.5 in so far as the dispute is alleged to relate to the demand that the applicant should

pay out the retirement benefits of the striking employees, such a demand was unlawful as the applicant has no authority to make such a payment, it being a matter between individual employees and the Transnet Retirement Funds to which they belonged to make such an arrangement. The applicant, for its part, had advised and encouraged its employees to make their election and complete appropriate forms to access their pension benefits and transfer them to a new fund;

19.6 the purported notice in terms of section 64(1)(b) of the Act given by Rakhudu attorneys is invalid as these attorneys are not party to the dispute referred to the bargaining council. The notice contemplated by section 64(1)(b) of the Act must be given by a party or parties to the dispute, being the striking employees themselves.

20. The applicant submitted that it would suffer irreparable harm if the relief sought was not granted. It contended further that it did not have an alternative remedy and that this Court has the exclusive jurisdiction to order the individual respondents to cease their unprotected and prohibited strike action. It set out reasons why the application was urgent.

21. This Court granted the order referred to in paragraph 1 above on 27 November 2008.

22. An opposing affidavit was filed on behalf of the individual respondents. They stated that they are drivers of the applicant's vehicles and drive more than eight hours every day. The applicant did not pay them overtime even if they were away from home for a period exceeding five days. The applicant had a tendency to ignore labour laws in that it always

threatened them if they demanded overtime payment and ignored the fact that weekend and holidays were not normal working days so employees never received payment for weekends and holidays. The applicant was misleading the Court that the strike started on 24 November 2008. The applicant was confused of the date since the notice stated clearly that the strike was to start on 26 November 2008. The applicant locked out the respondents because of this confusion. On 24 November 2008 the respondents' attorney attended a meeting with the applicant to clear the confusion about the date of the strike. A memorandum of understanding was signed by the attorney and the applicant's representative. On 25 and 26 November 2008 all employees were committed to their work. On 26 November 2008 at 16h30 the action started according to the 48 hours notice. On 27 November 2008 the meeting started between the parties and they agreed to convene a meeting on 3 to 5 December 2008 to try to resolve the dispute amicably. The parties signed a memorandum of understanding. On 3 and 4 December 2008 the parties agreed on certain issues and the agreement was not signed. The applicant agreed to discuss those issues with the top management of the applicant. The applicant agreed to arrange another meeting before the end of January 2009 to report about issues to be discussed with top management. The strike did not continue after the court order was presented to the workers.

23. The respondents contended that the strike was legal and according to the law. The final order should not be granted since the action was unlikely to proceed and the respondents are no longer participating in an industrial action or strike.

24. As stated previously this is a return day of a rule granted by this Court on 27 November

2008. The applicant has raised several reasons why the strike action that commenced on 24 November 2006 should be declared as unprotected. It is not necessary to deal with all of those grounds. The crisp issue for determination is whether the strike action that commenced on 24 November 2008 was protected or not.

25. It is common cause that the individual respondents attorney had issued a strike notice on 21 November 2008 advising that the strike would commence on 26 November 2008 at 16h30. The applicant's case is that the employees commenced on strike action on 24 November 2008 contrary to the strike notice. The respondents denied in the opposing papers that they had embarked on strike action and said that the applicant was confused about the date. This cannot be true since the applicant met with the respondent's attorney on 24 November 2008 where a memorandum of understanding was concluded. If the employees did not embark on strike action, there would not have been a need to have met with their attorney on 24 November 2008. The memorandum of understanding states *inter alia* as follows:

"The meeting resolved for return to work with the understanding that there was a misunderstanding about the actual date for which the notification was serve to the company on 21 November 2008.

The actual notice is that the employer is served with a notice for a strike + to resume on 26 November 2009 at 16h30. (If an agreement is not reached).

All employees that have participated on the strike on 24 November 2008 are urgently informed to go back to work as soon as they get the information informing them to go to work.

Parties both made an undertaking that base on the above clarification no employee will

be subjected to a disciplinary hearing, but any employee who knowingly continued with this strike excluding 24 November 2008 will subject himself to a disciplinary action".

26. The respondents' attorney had further stated in the opposing affidavit that the strike did not continue after the Court order of 27 November 2008 was served on the individual respondents. This clearly supports the applicant's version that the employees had embarked on an unprotected strike action and that this stopped after the Court order was obtained. The respondents' denial that there was no strike and that the strike was protected is illogical.

27. The strike action that commenced was premature and did not comply with the strike notice that was issued. It is also clear from the applicant's version which is uncontested that the demands that the respondents made during the strike were not conciliated. The nature of the dispute that was referred to conciliation was characterized as an unfair labour practice dispute relating to section 197 of the Act. That dispute should have been arbitrated or adjudicated upon by this Court. The strike action embarked upon by the respondents on 24 November 2008 which continued to 26 November 2008 was therefore unprotected.

28. This Court is satisfied that a proper case was made out for the rule to be confirmed. There is no reason why in law and equity costs should not follow the result.

29. In the circumstances I make the following order:

29.1 The interim order granted on 27 November 2008 is confirmed with costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	:	ATTORNEYS E NKWANA OF MASERUMULE INC
FOR 4TH AND 5TH RESPONDENTS	:	R P KABU INSTRUCTED BY RAKHUDU ATTORNEYS
DATE OF HEARING	:	29 OCTOBER 2009
DATE OF JUDGMENT	:	4 NOVEMBER 2009