IN THE LABOUR COURT OF SOUTH AFRICA HELD IN DURBAN

CASE NO: D104/08

Reportable

In the matter between

SOUTH AFRICAN FREIGHT AND DOCK WORKERS UNION

(SAFDU) Applicant

And

SAFCOR FREIGHT (PTY) LIMITED

t/a SAFCOR PANALPINA First Respondent

PERSONS LISTED IN ANNEXURE A Second to further Respondents

Judgment

Cele J

Introduction

[1] This is an application in terms of section 158 (1) (a) of the Labour Relations Act No 66 of 1995 (the Act) for an order in the following terms:

1. Declaring the award in August 2007 by the respondent of a remuneration increase to employees who are not members of the applicant, backdated to 1 July 2007, subject to a condition that the employees who enjoy the dual benefit of the increase in remuneration and from a date earlier than was customary, may not be members of the applicant and shall forfeit such benefit if they

become members (as embodied in the letter to non union staff members and quoted in paragraphs 9 and 10 of the founding affidavit of Gokulanand Thupsee) ("the award of increased remuneration"):-

a. Constitutes discrimination against employees who have exercised their rights under section 4 of the Act to join the applicant, a registered trade union, which discrimination is proscribed by section 5(1) of the Act;

b. Constitutes conduct which imposes an incentive and thus indirectly requires those employees who are not members of the trade union not to become members of the applicant and an inducement to those members who are to give up trade union membership which is proscribed by section 5(2)(a)(ii) and (iii) of the Act;

c. Prejudices employees because of present or anticipated membership of a trade union which is proscribed by section 5(c)(i) of the Act;

d. Advantages employees in exchange for that person not exercising the right conferred by the Act to join a trade union which is proscribed by section 5 (3) of the Act and is accordingly invalid in terms of section 5(4) of the Act.

2. Declaring the award of increased remuneration to be unconstitutional as being discriminatory and an unfair labour practice and, as such, conduct inconsistent with section 9 and 23 of the Constitution of the Republic of South Africa and accordingly invalid in terms of section 2 of the Constitution.

3. Directing the respondent to remedy its unlawful and unconstitutional conduct and to this end that it be and is hereby directed to inform all the employees to whom the unilateral increases were awarded of the fact that respondent's conduct in awarding the increases was unlawful and furthermore is hereby directed within10 days of the grant this order to either recover the amounts and reverse the date of the annual increase from non union staff members to whom such increases have been paid or alternatively to grant to all employees, including those who are or may become members of the applicant, similar increases in remuneration backdated to 1 July 2007.

4. Ordering the respondent to pay the costs of this application.

[2] The first respondent has opposed this application. There has been no opposition by the second to further respondents who are employees of the first respondent and stood to be affected by the order sought by the applicant. Reference to the company involved in this matter will henceforth be to the respondent.

Background facts

[3] The facts of this matter are basically common cause between the parties.

[4] The respondent is engaged in the freight forwarding industry. It has branches at all South Africa's major ports - Cape Town, Durban, Port Elizabeth, East London and Richard's Bay - as well as Johannesburg. The respondent employs over

1100 employees in its operations. At its Durban operation, which is the subject matter of this application, the respondent employs 277 employees, 31 of whom are managerial employees. Since 1996 the applicant has been recognised as a bargaining agent for certain employees employed by the respondent in Durban. In 2006 the Union and the applicant entered into a detailed relationship agreement.

[5] In terms of this agreement, the applicant is recognised as the collective bargaining representative for its members within the bargaining unit, as defined, for so long as it maintains a membership level of 50% plus 1 of the employees employed within the Durban workplace. The bargaining unit is defined in the relationship agreement as constituting all permanent members of the company who are members of the Union, with the exception of certain administrative and managerial staff.

[6] Of the 277 employees employed in Durban, only 111 of them are members of the bargaining unit. The remaining 166 employees are non-bargaining unit employees. This means that the Union represents approximately 40% of the employees employed at the Durban operation. The respondent also recognises the South African Transport and Allied Workers Union ("SATAWU"), at its Gauteng operation. However, no other bargaining agent or union is recognised for the rest of the country. In respect of the majority of respondent's employees, who are not represented in any bargaining unit, wages and conditions of employment are determined unilaterally by the company. In setting the wages regard is had to any relevant provisions of the main agreement of the bargaining council having jurisdiction – the National Bargaining Council for the Road Freight Industry.

[7] Across the country, save for Durban, wage increases have traditionally been extended from 1 July to 30 June of each year. However, for the Durban bargaining unit, the wage year runs from 1 January to 31 December each year.

[8] On 8 August 2007, the respondent sought to change the wage cycle for the approximately 166 non-bargaining unit and non-union employees in Durban. The respondent provided a 4,5% across the board increase to non-bargaining employees, subject to them accepting a change in their wage cycle to make the wage year run from 1 July to 30 June the following year. This would mean that the non-bargaining employees in Durban would then operate on a wage cycle which was the same as the rest of the country. Only the union members, in terms of its substantive agreements with the company, operated on a wage cycle from 1 January to 31 December each year. The letter proposing the change includes conditions precedent to that change and reads:

1. "The increase in remuneration referred to above is subject to you not at any time during the period 1 July 2007 to 30 June 2008 ("the 2008 non union staff wage cycle") becoming a member of the South African freight & Dockworkers Union ("the union") and thereby becoming part of the Union Bargaining Unit established in terms of the Relationship agreement between the Company and the Union dated 25 October 2006 ("the Relationship Agreement").
2. In the event you elect to join the Union during the 2008 non-union staff wage cycle and become part of the Union Bargaining Unit you agree that:
    a. The increase in remuneration referred to in 1 above shall cease at the end of the calendar month that you elected to join the Union Bargaining Unit ("the transfer date").
    b. You will be entitled to retain all increases paid to you in terms of 1 above up to the transfer date but not thereafter.
    c. After the transfer date, you will be paid the remuneration you received immediately prior to the commencement of the 2008 non bargaining unit staff wage cycle.
    d. You will be entitled to receive after the transfer date any increase in remuneration which may be negotiated by the Union on your behalf as part of the Union Bargaining Unit, with effect from the transfer date up to and including the 31 December 2008, being the end of the Union 2008 wage cycle."

[9] The respondent therefore granted annual salary increases to non-unionised employees, six months earlier than it negotiated increases for unionised employees and that the benefit of the early increase was made conditional upon the employee concerned not joining the union, with the increase to fall away if he did. The respondent admits that it draws a distinction between bargaining and non-bargaining unit employees, but contends that this constitutes legitimate differentiation.

[10] On 28 February 2008 the applicant and the respondent entered into a substantive agreement in terms of wages and conditions of employment for bargaining unit members for the period 1 January 2008 to 31 December 2008. This provided for an increase of 7,5% in the actual basic remuneration of employees calculated at 31 December 2007. A dispute still arose between the parties on the earlier salary increase of 4,5% granted to the non unionized employees of the respondent. The applicant referred that dispute to a relevant Bargaining Council for conciliation. It was not resolved and a certificate of outcome was issued, with an endorsement that the applicant could engage in a strike. Parties deliberated on the issue for some time. When it was not resolved, the applicant referred the dispute to this court. In its answering affidavit, the respondent took issue with the efficacy of such a referral. In their heads of argument, parties did not persist with the issue, correctly so, in my view as substance should prevail over form. The respondent filed its answering affidavit out of time but did ask and was granted by the applicant an extension of the filing time. Court accordingly grants the respondent condonation.

The issue

[11] The issue in the case is whether it is legitimate, lawful and constitutional to reward non-unionised employees with an early increase in salary and impose a

condition upon payment thereof that the employee concerned does not join the union.

Submissions by parties

Applicant's submissions

[12] It is the applicant's contention that this conduct breaches sections 5(1), 5(2)(a) (i) and (ii), 5(c) (i), 5(3) and is proscribed under section 5(4) of the Act. A declaratory relief is sought in relation to this in paragraph 1 of the Notice of Motion. It is submitted that it is self evident that the applicant is correct and the reasons given by the respondent to justify its unlawful conduct cannot explain away the fact that what was done was unlawful and it follows therefore that there cannot be a valid reason for doing what is unlawful. The conduct complained about is also repugnant to the Constitution and therefore invalid under section 2 thereof. Reliance is placed specifically upon the right not to be discriminated against upon an arbitrary ground (section 9) and the right to fair labour practices (section 23). Declaratory relief is sought in this regard as well in paragraph 2 of the Notice of Motion.

[13] The remedy sought is designed to compel the respondent to recover the payment from those who received it or alternatively to pay the unionised employees similar increases from the date in question i.e. 1 July 2007 until January 2008. The parties have reached agreement in relation to the period after January 2008 and so the relief in this application relates to the declarations sought as well as consequential relief for the six months from 1 July 2007 to 1 January 2008.

Respondent's submissions

[14] It is submitted that section 5 of the Act is aimed at protecting the right of freedom of association and preventing victimisation for involvement in union activities. The prohibition against *"anti-union discrimination"* is contained in a convention of the International Labour Organisation - Convention 98 of 1949. This Convention at article 1(2) describes *"discrimination"* as:

> *"acts calculated to -*
>
> (a) *make the employment* of a *worker subject to the condition that he shall not join* a *union* or *shall relinquish trade union membership;*
>
> (b) *cause the dismissal* or *otherwise prejudice* a *worker by reason* of *union membership* or *because* of *participation in union activities outside working hours* or, *with the consent* of *the employer, within working hours."*

[15] Section 5(1) of the Act does not refer to *"unfair discrimination",* but uses the word *"discriminate",* without the pejorative adverb *"unfair".* Under section 9 of the Constitution discrimination is only actionable if it is unfair. Common to most analyses of what constitutes *"discrimination"* is that it must constitute something more than differentiation. Even prior to the advent of the Interim Constitution and the final Constitution the Industrial Court dealt with 6 cases of discrimination and stigmatised them as unfair labour practices. Discrimination was regarded as attracting legal sanction if it took place on a ground, or for a reason, that it considered impermissible. See *Siyela & Others v Sneller Enterprises (Pty) Limited (1985) 6 ILJ 3 (IC) SA Iron. Steel & Allied Industries Union v Chief Inspector. Department of Manpower (1987) 8 ILJ 303 (IC) at 307, 311 SACCWU & Others v Sentrachem (1988) 91LJ 410 (IC) at 429 Chamber of Mines v Council of Mining Unions (1990) 11 ILJ 52 (IC)*.

[16] It was pointed out in the leading commentary on the 1989 amendments to the then Labour Relations Act that the concept of *"unfair discrimination",* introduced by those amendments, identified not ordinary distinctions or differentiations in

criteria, but rather the *"unacceptable face"* of discrimination as constituting an unfair labour practice. There, the authors said:

> *"The distinction between acceptable and unacceptable forms for discrimination is premised in comparative labour law on the 'inherent requirements of the particular job'. In other words distinctions based on qualifications, occupational status, skill, training, experience (in* a *word 'merit) will not, all things being equal, constitute unfair* ***discrimination."*** Cameron et al, *The New Labour Relations Act, pp161/2.*

[17] In dealing with discrimination in terms of section 9(3) of the Constitution Act, 1996 the Labour Appeal Court considered discrimination to be unfair and actionable if the discrimination was on an impermissible ground, that is, one of the listed grounds in section 9(3) of the Constitution. Accordingly, the Labour Appeal Court stated that the approach was the following:

> *"In short: is there* a *differentiation? If so, is it discriminatory? If* so, *is it unfair either directly, on one or more of the specified grounds, or indirectly? " See* Mias v Minister of Justice & Others (2002) 23 ILJ 884 (LAC) at para 21.

[18] It is submitted that this approach to the concept of discrimination which has applied to the interpretation of the discrimination provisions in the Constitution, the Employment Equity Act and the previous unfair labour practice definition, the same approach should be brought to bear on interpreting section 5(1) of the Act. Accordingly, it is submitted that a contravention of section 5(1) comprises two elements: first, discriminatory conduct, second, that it be actuated by an illicit reason.

[19] Since different wage cycles for different employees clearly constitutes differentiation, the question then becomes one about the reasons for the

difference in order to establish whether it is discriminatory and whether it is for an illicit reason.

[20] The company has advanced a number of reasons for the change:

20.1 The non-union employees in Durban are placed on the same wage cycle as the remainder of the employees employed elsewhere in South Africa.

20.2 There are certain labour relations advantages, including -

20.2.1 There is an advantage in different wage groups receiving increases at different times. The employer may be able to avoid the disruption of industrial action if it has peace obligations with one group with which it has settled wages where it enters into a dispute with the other wage group, with whom no settlement has been reached.

20.2.2 There is an efficient use of management resources in allowing performance reviews and wage increases to be calculated at different times, rather than impose the burden of performing all of this on time.

20.2.3 It reduces the opportunity for conflict between wage negotiations and corporate budgeting.

20.3 Reviews for clients' rates occur in April or May of each year. A wage cycle which begins thereafter enables the company's management to more accurately calculate and identify the money available for wage increases.

[21] The Act permits plural or multiple representivity. Employees are free to choose their bargaining agent and to conclude agreements on terms and conditions of employment represented by that agent. If there is more than one agent or union this necessarily implies that different terms and conditions of employment may be concluded between employees who are similarly placed.

[22] In addition, the reasons for the difference are not motivated by an anti-union bias. There are operational advantages to having the wage cycles at different times of the year, and preserving this situation. It is submitted that one of the most convincing reasons relates to the employer's interest in a peace obligation with one group, while bargaining with another. There is nothing impermissible for an employer to organise its affairs so as to minimise the effects of industrial action, if this takes place.

[23] A union member, having asked to be treated differently to the non-union member in order to receive the fruits of collective bargaining, cannot now complain about differential treatment and require that the company treat him equally. If the employer does so, it runs the risk of obliterating the distinction between the bargaining units and then becoming bound to provide equal wage cycles for union and non-union members alike.

[24] It is respectfully submitted that the applicants are attempting to encourage the Labour Court to enter into the arena of collective bargaining. This arena is a dangerous one. It is in the nature of collective bargaining and the power play between employer and employees that while the one party may have the upper hand for a time, this position may quickly be reversed. Intervention by the Court on one side or the other in the contest may prove not just destructive of collective bargaining as a principle, but one of the participants in it.

[25] It is accordingly submitted that the respondent’s conduct does not constitute a breach of the provisions of section 5 of the Act, nor does it constitute a breach of section 9, nor section 23 of the Constitution.

[26] Further, discrimination on the basis of union membership does not fall within the analogous grounds which have a similar relationship and impact to injury to human dignity.

[27] Similarly, differentiation between employers which is contemplated and supported by the provisions of the Act cannot fall foul of section 23 of the Constitution. It will be noted that the applicants do not challenge the constitutionality of the Act in their application.

Evaluation

[28] In the main, this application is premised on the infringement of section 5 of the Act and section 9 of the Constitution Act, 1996. At the very outset, I need to point out that I am indebted to the parties' representatives for the submissions they made in this matter. Section 5 of the Act reads:

> "**Protection of employees and persons seeking employment**
>
> (1) No person may discriminate against an employee for exercising any right conferred by this Act.
>
> (2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following-
>
> (a) require an employee or a person seeking employment-
>
> (i) not to be a member of a trade union or workplace forum;
>
> (ii) not to become a member of a trade union or workplace forum; or
>
> (iii) to give up membership of a trade union or workplace forum;
>
> (b) prevent an employee or a person seeking employment from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or
>
> (c) prejudice an employee or a person seeking employment because of past, present or anticipated-

(i) membership of a trade union or workplace forum;

(ii) participation in forming a trade union or federation of trade unions or establishing a workplace forum;

(iii) participation in the lawful activities of a trade union, federation of trade unions or workplace forum;

(iv) failure or refusal to do something that an employer may not lawfully permit or require an employee to do;

(v) disclosure of information that the employee is lawfully entitled or required to give to another person;

(vi) exercise of any right conferred by this Act; or

(vii) participation in any proceedings in terms of this Act.

(3) No person may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute

(4) A provision in any contract, whether entered into before or after the commencement of this Act, that directly or indirectly contradicts or limits any provision of section 4, or this section, is invalid, unless the contractual provision is permitted by this Act"

[29] Sections 9 and 23 of the Constitution Act on which the applicant has also placed reliance proscribe unfair discrimination and confer a right to fair labour practices respectively and anything inconsistent with the Constitution is invalid. The sections read:

"9 **Equality**

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair"

"23 **Labour relations**

(1) Everyone has the right to fair labour practices.

(2) Every worker has the right-

(a) to form and join a trade union;

(b) to participate in the activities and programmes of a trade union; and

(c) to strike.

(3) Every employer has the right-

(a) to form and join an employers' organisation; and

(b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right-

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective

bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter the limitation must comply with section 36 (1)".

[30] I find agreement with the submission made by the respondent that section 5(1) of the Act does not refer to *"unfair discrimination",* but uses the word *"discriminate",* without the pejorative adverb *"unfair". S*ubsections 9 (2) to 9 (5) of the Constitution Act make it clear that it is unfair discrimination which is actionable. See in this respect the decision in *Harksen v Lane No & Others 1998(1) SA 300 CC* paragraph [47] where court held that:

> "Section 8 (2) contemplates two categories of discrimination. The first is differentiation on one (or more) of the 14 grounds specified in the subsection (a 'specified ground'). The second differentiation on a ground not specified in ss (2) but analogous to such ground (for convenience hereinafter called an 'unspecified' ground) which we formulated as follows in ***Prinsloo***:
>
> 'The second form is constituted by unfair discrimination on grounds which are not specified in the subsection. In regard to this second form there is no presumption in favour of unfairness. …..
>
> Given the history of this country we are of the view that "discrimination" has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them… (U)nfair discrimination, when used in this second form in s 8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.…..
>
> Where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of section 8 (2). Other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner, may well constitute a breach of section 8 (2) as well.'
>
> There will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the

> potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner."

[31] On the authority of *Mias v Minister of Justice & Others (2002) 23 ILJ 884 (LAC),* I accept the proposition advanced by the respondent that the differentiation complained of must not only be discriminatory in nature but must be unfair either directly on one or more of the specified grounds or indirectly.

[32] Further, the Act does indeed permit plural or multiple representations, meaning that employees are free to choose their bargaining agents and to conclude agreements on terms and conditions of employment as represented by those chosen agents. Where there are more unions than one in a workplace that will necessarily imply that different terms and conditions of employment may be concluded between employees of that industry. The reasons for discrimination therefore become all the more important.

[33] The first such reason given by the respondent is that the non unionized employees in Durban are placed on the same wage cycle as the remainder of the employees employed elsewhere in South Africa. This approach, by its very nature was more than likely to create tensions in the employees of the respondent who are placed in the same working environment but would be treated differently when it came to their employment conditions as different wage cycles were more likely to produce different results. No reason has been proffered why the respondent preferred this approach. It is not only in the Durban base that the respondent's employees are unionized. Satawu is another union operating in the working place of the respondent though outside of Durban. By the respondent's own admission, Satawu members' wage cycle in Gauteng is the same as of the non unionized members. A differentiation in the wage cycle in Durban does not appear to provide a valid and a reasonable explanation for the

change as the same argument will not apply in the Gauteng region of the respondent.

[34] The change was accompanied by an early salary increase for the non unionized employees in Durban to the exclusion of the members of the applicant. The conditions attendant to the salary increase are clearly a prima facie infringement of section 5, particularly section 5 (2) (a) and 5 (3) of the Act. The conditions discouraged a non union member from exercising a right protected by the Act to join a union at his or her discretion, for a specific period of time. The respondent has not really tendered an explanation for its approach in this regard. It chose to explain the inequality brought about by the plurality of its bargaining agents. Inequality brought about by the plurality of bargaining agents is one matter. It has nothing to do with dissuading an employee from exercising his right to join a union. All employees of the respondent had a right to join a union of their choice. Those employees of the respondent based in Durban were discouraged by the conditions of the salary increase from joining a union when those based outside of Durban were not. The conditions brought about an unequal treatment by the respondent of its employees without a valid and a fair reason.

[35] It was within the powers of the respondent to preserve the separate identities of its bargaining units without unilaterally collapsing the distinction between its bargaining units. In doing so, it could however not lay down conditions that violate the provisions of the Act and the Constitution Act. The unfairness in the conditions it imposed remains unexplained and these conditions have tainted the awarding of the remuneration to the non-bargaining unit employees. In my view, the application is meritorious.

[36] The following order is therefore to issue:

1. Declaring the award in August 2007 by the respondent of a remuneration increase to employees who are not members of the applicant, backdated to 1 July 2007, subject to a condition that the employees who enjoy the dual benefit of the increase in remuneration and from a date earlier than was customary, may not be members of the applicant and shall forfeit such benefit if they become members (as embodied in the letter to non union staff members and quoted in paragraphs 9 and 10 of the founding affidavit of Gokulanand Thupsee) ("the award of increased remuneration"):-

    a. Constitutes unfair discrimination against employees who have exercised their rights under section 4 of the Act to join the applicant, a registered trade union, which discrimination is proscribed by section 5(1) of the Act;

    b. Constitutes conduct which imposes an incentive and thus indirectly requires those employees who are not members of the trade union not to become members of the applicant and an inducement to those members who are to give up trade union membership which is proscribed by section 5(2)(a)(ii) and (iii) of the Act;

    c. Prejudices employees because of present or anticipated membership of a trade union which is proscribed by section 5(c)(i) of the Act;

    d. Advantages employees in exchange for that person not exercising the right conferred by the Act to join a trade union which is proscribed by section 5 (3) of the Act and is accordingly invalid in terms of section 5(4) of the Act.

2. Declaring the award of increased remuneration to be unconstitutional as being discriminatory and an unfair labour practice and, as such, conduct inconsistent with section 9 and 23 of the Constitution Act, 1996 and accordingly invalid.

3. Directing the respondent to remedy its unlawful and unconstitutional conduct and to this end that it be and is hereby directed to inform all the employees to whom the unilateral increases were awarded of the fact that respondent's conduct in awarding the increases was unlawful and furthermore is hereby directed within 21 days of the grant this order to grant to all employees, including those who are or may become members of the applicant, similar increases in remuneration backdated to 1 July 2007.

4. Ordering the respondent to pay the costs of this application.

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Cele J.

DATE OF HEARING : 25 MARCH 2010

DATE OF JUDGMENT : 01 JULY 2010

APPEARANCES

FOR APPLICANT	:	Adv M PILLEMER SC
Instructed by	:	BRETT PURDON ATTORNEYS
FOR RESPONDENT	:	Adv AS REDDING SC
Instructed by	:	DENEYS REITZ ATTORNEYS