IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO: J 1633/10

In the matter between:

UNITRANS FUEL AND CHEMICAL (PTY) LTD **APPLICANT**

and

TRANSPORT AND ALLIED WORKERS UNION OF SOUTH AFRICA **1ST RESPONDENT**

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY **2ND RESPONDENT**

RULING: APPLICATION FOR LEAVE TO APPEAL

VAN NIEKERK J

[1] This is an application for leave to appeal against an order made on 3 September 2010, in terms of which an urgent application to interdict a strike called by the first respondent was dismissed, with no order as to costs. I do not intend to repeat the material facts; these are recorded in the brief reasons that I handed down on September 2010. In essence, the first respondent (the union) issued a notice of intention to strike on issues described variously in the strike notice as “wage discrepancies”, “wage cuts”, “coupling” and a unilateral change of the administration of the provident fund. The applicant sought to interdict the strike, and brought the application which resulted in the order that is the subject of these proceedings.

[2] The application for leave to appeal was argued yesterday afternoon. The applicant was represented by new counsel and a new instructing attorney. At issue was whether what the applicant presented amounted to a new case, one not foreshadowed by the papers filed in the urgent application. Mr. Franklin SC, for the applicant, fairly submitted that the basis on which the applicant's case had been presented at the hearing of the application was unfortunate, in that its focus was a dispute about whether the union's claim in reality concerned a unilateral variation to conditions of employment, the certificate of outcome and the commissioner's conduct during the conciliation proceedings. The primary submission made by the applicant in these proceedings is simple – the intended strike should have been interdicted because it falls foul of the substantive limitations contained in s 65 (1) and (3) of the Labour Relations Act. On a proper consideration of these provisions read with the relevant collective agreements, Mr. Franklin submitted, there were good prospects that the Labour Appeal Court, having regard to the agreements, may declare the strike unprotected.

[3] The applicant disavows any reliance on new evidence. It claims that the substantive limitations contained in s 65 were referred to, albeit obliquely, in the founding affidavit, that at least the demands concerning wage discrepancies, the wage cut and an allowance for coupling. That being so, clause 50 of the bargaining council's main agreement precluded these issues from being raised at plant level. The submission proceeds on this basis: s 5 of the Civil Proceedings Evidence Act, 25 of 1965, provides that judicial notice shall be taken of any law or government notice, or of any other matter which has been published in the Government Gazette. The bargaining council's main agreement, published in the gazette on 30 April 2004 and subsequently amended and extended, is currently in force. It is not disputed the main agreement binds the parties to this dispute. The full text of the agreement, not before the court at the hearing of the matter, defines "substantive issues" to mean "…all issues involving cost and affecting the wage packets of employees." The first three demands are wage demands, and

amount to ‘substantive issues’, affecting as they do employees’ wage packets and employers’ costs. Clause 50 of the main agreement states:

> *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.*

Clause 50 (3) states:

> *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 council.*

[4] There is nothing to preclude the applicant from raising new points of law on appeal, and should the applicant wish to introduce new evidence on appeal, it has the right to persuade the Labour Appeal Court that this would be in the interests of justice. However, as I have indicated, Mr. Franklin intimated that the basis for the appeal was foreshadowed by the papers, and indeed, this application was argued on that basis. I am persuaded that there are reasonable prospects that a court on appeal may find that the first three demands amount to substantive issues as defined in the main collective agreement, and are therefore not capable of forming the subject of a protected strike, given the limitations contained in s 65 (1) (a) and (3)(a) of the LRA. It is accordingly not necessary for me to consider Mr. Franklin’s submissions on the provisions of the council’s exemption and dispute resolution collective agreement, and I say no more expect to observe that the wording of clause 50 (2) of the main agreement, which provides that in the event of a deadlock in negotiations on non-substantive conditions of employment, is not peremptory.

[5] Finally, in relation to the union's fourth demand, it seems clear to me that the dispute concerns the administration of the provident fund. Mr. Franklin submitted that the dispute concerned the interpretation and application of the provident fund collective agreement, and that in terms of that agreement, any dispute is to be dealt with in terms of the council's exemptions and dispute resolution agreement. This submission overlooks the fact that the provident fund that is the subject of the union's complaint and demand is an "in house" fund – it has nothing to do wit the industry fund or the collective agreement that establishes that fund. To the extent that the applicant submits that the union's demand is incompetent because it is addressed to a third party in the form of the fund and its administrator's it seems to me that this submission ignores the substance of the union's demand (which is that the fund be administered on a different basis) and the assertion made in the replying affidavit to the effect that the provident fund has always been under the applicant's control, and that and that a concession had been made during the meeting between the parties on 11 May 2010 when Mr. Sekano, the applicant's human resources manager, stated that he had said that he had no objection to the union writing a letter to the principal officer of the fund requesting a change to the rules of the fund. It seems to me that a demand to the effect that an employer use its influence to ensure that the administration of a retirement fund controlled by an employer more closely accords with employees' interests is a legitimate demand, and that it is not a substantive issue as defined in the collective agreement. However, in view of my finding on the first three issues giving rise to the strike, I need not pursue this matter further.

[6] Finally, whether the appeal is to be heard on an urgent basis (and any other terms that apply to the prosecution and hearing of the appeal) is not a matter for me to determine.

In the result, I make the following order:

1. Leave to appeal against the order made on 3 September 2010 is granted, costs to be costs in the appeal.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT
Date of application 14 September 2010
Date of ruling :15 September 2010