IN THE LABOUR COURT OF SOUTH AFRICA

(Held at Johannesburg)

REPORTABLE

CASE NUMBER: J01/2010

In the matter between:

COCA COLA FORTUNE (PTY) LTD Applicant

and

FOOD AND ALLIED WORKERS UNION First Respondent

THE PERSONS WHOSE NAMES

ARE LISTED IN ANNEXURE 'A'

TO THE NOTICE OF

APPLICATION Second to Further Respondents

JUDGMENT

BHOOLA J:

Introduction

[1] This is the return date of a *rule nisi* issued by this Honourable Court on 6 January 2010, *inter alia,* requiring the second to further respondents to show cause why a secondary strike due to commence at the applicant on 7 January 2010 should not be declared to be an unprotected strike as contemplated in section 68 read with 66(2) (c) of the Labour Relations Act, 66 of 1995 ("the Act").

[2] The respondents oppose confirmation of the *rule nisi.*

Material common cause facts

[3] The applicant conducts business as a producer and distributor of soft drinks. It has various bottling depots throughout South Africa which supply soft drink products to wholesale and retail customers.

[4] The applicant is a franchisee of Coca Cola Africa (Pty) Ltd ("Coca Cola Africa") and has rights to bottle and distribute Coca Cola products to certain designated regions in South Africa. It is the exclusive distributor in these regions.

[5] The first respondent's members employed at Amalgamated Beverage Industries ("ABI") are currently participating in a nationwide protected strike at ABI.

[6] ABI has a franchise agreement with Coca Cola Africa which affords it exclusive rights to bottle and distribute Coca Cola products in certain regions in South Africa other than those where the applicant distributes.

[7] The first respondent has not initiated a secondary strike at Coca Cola Africa.

[8] On 30 December 2009 the first respondent addressed a notice of commencement of a secondary strike to the applicant. The notice stated, *inter alia*, that:

> *"The secondary strike by our members at Coca Cola Fortune (Pty) Ltd is in furtherance to putting preasure (sic) on SAB Ltd to resolve the strike currently obtaining at their soft drinks division t/a ABI Coke. The primary strike concerns dispute on wages, working conditions and benefits …..The basis for such a strike is that Coca Cola Fortune is one of the South Africa's (sic) bottling companies of coca cola products".*

[9] The secondary strike at the applicant would likewise be nationwide and for an indefinite period.

The issue for determination

[10] It is common cause that the requirements of section 66(2) (a) and (b) of the Act have been met. The only issue for determination is whether the secondary strike proposed at the applicant would comply with the substantive requirements of section 66 (2)(c), which requires the nature and extent of a secondary strike to be *"reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer".*

[11] It is now settled law that proportionality is the test for determining reasonableness in this context: *SALGA v SAMWU*[1] and *Samancor Ltd & Another v NUMSA*[2]. This test requires the harm caused to the secondary employer to be proportional to its impact or likely impact on the business of the primary employer. This requires, as held by Van Niekerk AJ (as he then was) in *SALGA*[3] : "...*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".*

[12] The applicant makes the averment in its founding papers that no contractual nexus or business relationship exists between it and ABI or any of its subsidiaries, and it is therefore unable to exert any influence or pressure in respect of the primary strike. Mr Naidoo, on behalf of the respondents, submitted that the contractual nexus or relationship requirement (the "ally" or "associated employer" doctrine adopted in the United Kingdom and the United States, and which is not embraced by the Act[4]), misconstrues the test established by section 66(2)(c). Furthermore, the nexus requirement, in the words of Cheadle[5], begs the question since it is the *effect* of the

[1] [2008] 1 BLLR 66 (LC).

[2] [1999] 11 BLLR 1202 (LC).

[3] Supra, at para [16].

[4] Thompson & Benjamin, SA Labour Law, Vol 1, AA1-329.

[5] Halton Cheadle, "Strikes and Lockouts", Current Labour Law 1997, page 31.

secondary strike on the business of the primary employer that should be the subject of the enquiry. Cheadle articulates this as follows:

"The fact that one can infer a 'nexus' between the two employers once one finds that the secondary strike has an effect on the business of the primary employer does not logically mean that one has to predicate a 'relationship' or 'nexus' before one can determine whether a secondary strike has an effect 'in the way as to make the nature and extent of the secondary strike 'reasonable'". The nexus requirement has furthermore been expressly rejected by Van Niekerk AJ (as he then was) in *SALGA*[6]*.* In his oral submissions however, Mr Van As, for the applicant, conceded that the nexus requirement was not applicable. It is therefore not necessary for me to determine the issue.

[13] I turn now to consider whether the nature and extent of the secondary strike is reasonable given its proposed indirect effect. The first respondent alleges in its answering affidavit that the applicant and ABI have a contractual relationship with Coca Cola in respect of distribution of its product, and that a secondary strike would result in a significant amount of products not being distributed in the regions they are franchised to do so, resulting in a shortage of Coca Cola products in the market. These facts do not appear to be in issue. However, the first respondent then blandly asserts that: *"[t]he Coca Cola Company (presumably a reference to Coca Cola Africa**) will be able to exert influence**[7] over ABI to resolve the disputes underlying the primary strike".* This is relevant to determining the possible effect of the secondary strike. In this regard Mr Naidoo submitted that a shortage would indeed create a "*credible possibility*" that Coca Cola Africa would exert pressure on ABI to resolve the primary dispute, and hence the indirect effect requirement of section 66 (2) (c) would be satisfied. Mr Van As submitted that, on the contrary, all that the applicant would be in a position to do would be to exert pressure on Coca Cola Africa in the hope that as a consequent or "*knock on*" effect this would lead to Coca Cola Africa exerting pressure on ABI to resolve the dispute giving rise to the primary strike. I agree with the applicant that this is a remote possibility and could open the floodgates to secondary strikes with potentially limited indirect effect. However, even the potential "*knock on"* effect, Mr Van As submitted, is a remote possibility given that that the primary and secondary employers are co-franchisees and in fact competitors. This is particularly so in circumstances where there is no secondary strike at Coca Cola Africa, which would render the likelihood of a shortage of product

[6] Supra, note 1.

[7] My emphasis.

resulting in Coca Cola Africa exerting pressure on ABI to resolve the primary strike to be even more fallacious.

[14] Mr Van As made the further submission that even if the secondary strike were to have any indirect effect, this would be disproportionate to the harm occasioned by the applicant given the extent and duration of the strike. Mr Naidoo submitted that in order for there to be any possibility of an indirect effect, and for Coca Cola Africa to exert influence on ABI, the secondary strike would of necessity have to be significant and hence the proposed extent and duration were reasonable. Mr Van As submitted however that this matter was distinguishable on the facts from SALGA[8] where a one day strike was held to be justified in circumstances where its effect would have been limited and indirect. The secondary strike *in casu* would not be short and sharp, but expected to be prolonged, with little if any possible indirect effect on ABI or its subsidiaries. In such circumstances, the effect on the primary dispute would have to be more direct given the potential prejudice to the applicant. In *casu*, it was submitted, the harm caused to the applicant would be extensive and disproportionate to its limited unlikely impact on the primary strike.

[15] In my view, the absence of a secondary strike at Coca Cola Africa, for which no reasons have been furnished, would render the effect on the primary dispute a remote possibility, and would on its own justify a refusal of the relief sought by the respondents. The reliance by the respondents' on the potential indirect "*knock on"* effect of the secondary strike on the business of ABI would not in my view render the proposed nationwide and indefinite secondary strike at the applicant reasonable. Accordingly, in my view, the nature and extent of the proposed secondary strike does not appear to be reasonable in relation to its possible effect on the primary dispute. Thus the requirements of section 66(2) (c) read with section 68 have not been satisfied.

[16] In the circumstances, I make the following order:

1. The *rule nisi* is confirmed, with costs.

[8] Supra, note 1.

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Bhoola J

Date of application: 13 January 2010

Date of judgment: 28 January 2010

Appearance:

For the Applicant: Adv MJ Van As instructed by Verveen Attorneys

For the Respondents: Cheadle Thompson & Haysom Attorneys