IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO: J1245/09

In the matter between:

SOUTH AFRICAN BROADCASTING CORPORATION LIMITED	**APPLICANT**
AND	
COMMUNICATION WORKERS UNION	**1ST RESPONDENT**
MEDIA WORKERS ASSOCIATION OF SOUTH AFRICA	**2ND RESPONDENT**
THE PERSONS LISTED IN ANNEXURE "A"	**3RD RESPONDENT**
THE PERSONS LISTED IN ANNEXURE "B"	**4TH RESPONDENT**

JUDGMENT

N**YATHELA** AJ

Introduction

[1] This is an urgent application brought in terms of Rule 8 of the Rules of the Labour Court in terms of which applicant seeks a final interdict against the respondents from issuing a strike notice in terms of section 64(1)(b) and or participating in an industrial action.

[2] The application is opposed by the first and second respondents.

The parties

[3] The applicant is the South African Broadcasting Corporation Limited, a statutory corporation established in terms of the Broadcasting Act of 1999.

[4] The first respondent is the Communication Workers Union, a trade union registered in terms of the Labour Relations Act, 66 of 1995, as amended.

[5] The second respondent is the Media Workers Association of South Africa, a trade union registered in terms of the Labour Relations Act 66 of 1995, as amended.

[6] The third to further respondents listed in 'Annexure A' are employees of the applicant and members of the first respondent.

[7] The fourth to further respondents listed in 'Annexure B' are employees of the applicant and members of the second respondent.

The facts

[8] During 2008, the applicant, first and second respondent as well as BEMAWU (jointly hereinafter referred to as organised labour) which is not a party to this dispute, negotiated and concluded an Agreement on Improvement in Salaries which would be effective for a period of three years.

The clauses of the said agreement relevant to the current proceedings are as follows:

"**3. Multi-Term Salary Adjustment**

Clause 3.2 *"The annual salary adjustment on 01 April 2009 shall be based on the 12 month average CPI-X as at 31 March 2009 plus 1% for the period 1 April 2009 to 31 March 2010 for the financial 2009/10".*

Clause 3.5 *"Should the average CPI-X drop below 4% or rises to 9% or more, any party to this agreement has the right to re-open salary negotiations".*

[9] On 25 February 2009, applicant convened a meeting with organised labour which was termed a Strategic Planning Meeting. At the said meeting applicant discussed various operational issues such as cost cutting and its budget.

[10] A similar meeting was held on 23 March 2009. At the said meeting, applicant advised organised labour that:

10.1 "*discussions on wage negotiations needed to be entered into...*

10.2 looking at the SABC's financial status it was very difficult not for the SABC to request a renegotiation on salary increases...".

In response to an enquiry by organised labour on what the percentage increase, the applicant was proposing, applicant stated that: "*...the SABC had nothing as yet as they were still following the necessary protocols".* At the end of the said meeting, the parties resolved that:

10.3 Applicant will present the 2009 budget to organised labour.

10.4 Applicant will get mandate from the Board on percentage to be renegotiated for salary increases.

10.5 Applicant will convene a feedback session on mandate on salary negotiations after 30 March 2009.

[11] On 20 April 2009, applicant again convened a meeting with organised labour to deal with the SABC's business situation. Applicant made a presentation and shared information with organised labour on its financial standing. Applicant did not disclose the percentage increase it was proposing for the wage negotiations as they were still awaiting a mandate from the Board to reopen negotiations. When organised labour insisted that applicant should make its position clear on whether it was reopening the wage negotiations or not, applicant undertook to forward a communication to organised labour before close of business on 24 April 2009 on its stance regarding the reopening of wage negotiations.

[12] On 21 April 2009, applicant forwarded a letter to organised labour pursuant to the above undertaking in which it stated amongst others as follows:

"Based on the CPI-X averaging at approximately 11.27% as at February 2009, management of the SABC wishes to advise the union of its intention to re-open salary negotiations for the period 2009/10, owing to the fact that the average CPI-X percentage rose above 9%. Applicant proceeded to provide time lines for the intended negotiations which it envisaged it will be concluded by 29 May 2009.

[13] On 21 May 2009, Malan Incorporated Attorneys sent a letter to applicant in which it stated that it was acting on behalf of organised labour. In the letter, the attorneys accused applicant of being in breach of the multi year wage agreement and demanded that applicant should adhere to the terms of the agreement and implement the salary increases for the 2009/10 period as stipulated in the agreement.

[14] On 22 May 2009, first respondent referred a dispute to the CCMA against applicant for conciliation. In the referral form, first respondent described the dispute as follows: "*CWU & SABC entered into Multi-Term Substantive Agreement which is valid for 2008-2011. SABC failed to implement the percentage increase of 01 April 2009 without a valid reason(s)".* First respondent stated the outcome it required from conciliation to be that "*Commissioner should order the SABC to implement salary increase of 12.85% as provided by the agreement".*

[15] On 28 May 2009, applicant held a meeting with organised labour. At the meeting, applicant presented an offer for wage increase for 2009/10 of a guaranteed 7% to be implemented during June 2009, and a further 1.5 % wage increase at the end of July 2009. Applicant also undertook to find additional funds to implement a further wage increase of 1.5% after September 2009. The total offer made by applicant was 10%. An agreement was however not concluded as organised labour still needed to obtain a mandate from its members.

[16] The parties held another meeting on 2 June 2009. Organised labour rejected the applicant's proposed salary increase. First respondent demanded a 12.85% increase for its members while second respondent demanded 12.2% increase. The parties did not reach any agreement on the increase.

[17] Although there are no minutes for the meetings of 28 May and 2 June 2009, the applicant did not dispute the fact that the meetings were held and the contents of respondents' answering affidavit regarding the discussions in the meetings.

[18] On 3 June 2009, second respondent referred a dispute to the CCMA for conciliation. In the referral form, second respondent classified the dispute as a mutual interest dispute. It further summarised the dispute as follows: "*Parties have deadlocked over wage dispute". S*econd respondent stated that it required the implementation of 12.5% increase with immediate effect as the outcome of the conciliation.

[19] On 08 June 2009, BEMAWU also referred a dispute to the CCMA for conciliation against applicant. However BEMAWU classified the dispute as one concerning the interpretation and application of a collective agreement.

[20] The CCMA consolidated the referral by first and second respondents including the one lodged by BEMAWU and set down a conciliation hearing for the 15th June 2009.

[21] At the hearing of the consolidated dispute, applicant raised a point in limine that the CCMA lacked jurisdiction to conciliate the dispute as the dispute according to applicant is about the interpretation and application of a collective agreement.

The commissioner however advised the parties that he will make a ruling on the jurisdictional point raised at a later stage.

[22] On 18 June 2009, the CCMA Commissioner issued a ruling on the jurisdictional point raised at conciliation and found that the CCMA had jurisdiction to conciliate the dispute as the dispute is one of mutual interest. The commissioner proceeded and issued two conciliation outcome certificates.

[23] The certificate issued to BEMAWU classified the dispute as a dispute about the interpretation and application of a collective agreement which can be arbitrated while the certificate issued to both first and second respondents classified the dispute as a dispute of mutual interest which can be resolved by way of a strike or lock out.

[24] On 18 June 2009, second respondent served applicant with a notice to embark on industrial action. On the same date applicant filed an urgent application in which it amongst others sought an order declaring that any strike by the respondents pursuant to the conciliation outcome certificate issued on 18 June 2009 under case number GAJB 16109-09 to be unprotected. Further applicant sought to interdict respondents from issuing notices in terms of section 64(1)(b) of the Labour Relations Act on the basis of the certificate referred to above.

[25] Applicant sought the above order as an interim order pending its application to review the conciliation outcome certificate.

[26] On the 19th June 2009, the parties reached an agreement which was made an order of court. In terms of the said agreement, second respondent withdrew the

notice to strike dated 18 June 2009. The respondents further agreed not to issue further strike notices until after the application has been heard and order or judgement handed down following the hearing scheduled for 25 June 2009.

[27] On 25 June 2009, both parties appeared and advised the court that they will not persue the issue of the validity of the CCMA conciliation outcome certificate. Applicant further informed the court that it now sought a final order.

Issues

[28] The parties agreed during the proceedings that despite the papers initially filed, the issues which the court should determine are the following:

(a) Whether there is a dispute between the parties?

(b) If so, the court should determine the nature of the said dispute.

Analysis

[29] In order to determine whether a dispute exists between the parties or not, the court should consider the provisions of the Labour Relations Act, case law and the circumstances pertaining to this case.

Is there a dispute between the parties?

[30] Section 213 of the Labour Relations Act 66 of 1995 defines a dispute as follows: "*A dispute includes an alleged dispute".* The section further states that "*Issue in dispute", in relation to a strike or lock-out, means the demand, the grievance, or the dispute that forms the subject matter of the strike or lock out"*.

[31] In SACCAWU v Edgars Stores Ltd & Another (1997) 10 BLLR 1342 (LC) at para G, Zondo AJ (as he then was) quoted with approval the following definition of a dispute: "*I think it is unnecessary – and it certainly would be unwise - to attempt a comprehensive definition of the word dispute as used in section 35(1) of the Industrial Conciliation Act. But whatever other notions the word may comprehend, it seems to me that it must, as a minimum, so to speak, postulate the notion of the expression by the parties, opposing each other in controversy, of conflicting views, claims or contentions".*

[32] In Leoni Wiring Systems (East London) (Pty) Ltd v National Union of Metal Workers of SA & Others (2007) 28 ILJ 642 (LC) at para C - D. "*The fact that a party is unhappy cannot be allowed to form the basis of that party later on alleging that it was, as a matter of fact, in dispute with the other side. I am of the view that a dispute only arises when the parties in fact express their differing views and assume different positions in relation to a specific factual complex. The mere fact that one party maybe unhappy about a particular state of affairs does not give rise to a dispute".*

[33] In City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union & Others (2008) 29 ILJ 650 (LC) at para 18. "*I am of the view that, although it is not a prerequisite that one of the disputing parties must formally or even expressly declare a dispute (as was the case under the previous Labour Relations Act), at the very least the issue referred to conciliation must be an issue over which the parties have reached a 'stalemate' in the sense that the employer has had the opportunity to reject or accept a demand put forward by*

the employees or their representatives. To hold otherwise may, in my view, give rise to a situation where employees may refer any issue to conciliation without first having afforded the employer an opportunity to formulate a negative response or to reject a demand or grievance put forward by the employees or their representatives. At the very list the employer should know what the dispute is about and what is required to resolve the demand or dispute.

I am of the view that this is in accordance with the purpose of the LRA which is to promote orderly collective bargaining and is in accordance with the spirit of the LRA which is to promote the effective resolution of disputes. Once the employer has rejected or indicated through its conduct that it is not willing, for whatever reasons, to accede to the demand, then the parties will have reached a stalemate to the extent that it may be concluded that there is now 'an issue in dispute' between the parties which is capable of being conciliated and, if unsuccessful, be the subject matter of strike action".

[34] The above case law confirm that for a dispute to be said to be existing, the parties must be holding different positions on an issue and have reached a stage where none of the parties would like to change its stance.

[35] In this matter, applicant held meetings with organized labour on 25 February, 23 March, 20 April, 28 May and 02 June 2009. In all the meetings, applicant made it clear that its financial position was such that it could not implement the salary increase as stipulated in Clause 3.2 of the Multi Term Salary Adjustment. Although in the meetings of 25 February, 23 March and 20 April 2009, applicant

did not table its proposed increase, applicant does not dispute that in the meetings held on 28 May 2009 it proposed a 10% salary increase instead of implementing the increase as per clause 3.2 of the agreement. Applicant further does not dispute that in the meeting held on the 2nd June 2009, organised labour, after having sought a mandate from its members, rejected applicant's offer and instead demanded the salary increase of 12.85% (CWU) and 12,2% (MWASA) respectively.

[36] There is nothing in the papers filed by both parties and the submissions made that any of the parties requested that the meeting be adjourned so that it could reconsider its position regarding the salary increase. I am therefore satisfied that the parties had reached a deadlock on the salary negotiations on 02 June 2009 and thus a dispute existed between the parties as at that date.

[37] In view of the above finding, I agree with the applicant that the referral of a dispute by CWU to the CCMA on 22 May 2009 was premature as there was no dispute at that stage.

What is the nature of the dispute?

[38] In this case, applicant contends that the dispute at issue is about the interpretation and application of a collective agreement. According to applicant, the respondents dispute that applicant has a right to re-open wage negotiations after 01 April 2009 and thus this dispute involves an interpretation and/ or application of Clause 3.2 of the Multi Term Salary Adjustment.

[39] The respondents and in particular, second respondent contends that applicant had re-opened wage negotiations for 2009/10 and the parties had reached a deadlock during the said negotiations. Thus according to respondents' the dispute is one of mutual interest.

[40] In Lesedi Local Municipality v SAMWU & others (2008) 29 ILJ 2780 (LC) at para 19 "*This court is therefore not precluded from determining whether or not the strike is protected because of the entry made by the commissioner that the dispute be referred to arbitration. The court has the power to determine what the true nature of the dispute is, despite the classification or categorisation of the dispute by the commissioner in the certificate*".

[41] In SATAWU v Coin Reaction (2005) 26 ILJ 1507 (LC) at page 1512 para D, the court held that the real or true dispute should be determined with reference to all the relevant facts "*...including the referral form to conciliation, the correspondence immediately before and after conciliation, the negotiations and discussions which took place at the conciliation and the content of the advisory award and affidavits filed with this court".*

[42] In this matter, the key issue is whether applicant had re-opened wage negotiations for the period 2009/10.

[43] The sequence of events show that applicant clearly did not want to implement the agreed wage increase for 2009/10 as stipulated in the Multi year wage agreement due to its financial position as well as the fact that the CPI-X was more than 9%.

[44] In the meeting of 23 March 2009, applicant emphasised the need to re-open negotiations and undertook to provide organized labour with its budget and financial information. It further agreed to obtain a mandate from its Board so that it can table its proposed increase to organised labour.

[45] In the meeting of 20 April 2009, applicant provided organised labour with a budget and financial information but once again did not table its proposed increase. What is crucial is that when organised labour insisted that applicant should make it clear whether it was reopening negotiations or not, applicant undertook to give its position by not later than 24 April 2009. As a follow up, to its undertaking, applicant addressed a letter to organised labour on 21 April 2009. The contents of this letter should be interpreted in the light of the undertaking which applicant had made to organized labour to make its position clear on whether it was reopening negotiations or nor. .

[46] What is crucial from the letter is that applicant gave a justification that entitles it to reopen negotiations, viz: the CPI-X was more that 9%. It further proceeded to give a time frame for the negotiations which will be concluded on 29 May 2009. Applicant does not dispute that after it had given the time frames referred to above, it proceeded to meet with organised labour on 28 May 2009 at which meeting it tabled a proposed increase of 10%. Although applicant argues that the meeting of 28 May and 2 June 2009 were not wage negotiation meetings, applicants does not state what the purpose of the said meetings were. It also does not dispute that salary increase for 2009/10 was discussed in the said meetings.

[47] Applicant further does not dispute that organized labour rejected applicant's proposed increase of 10% in the meeting held on 2 June 2009 and instead tabled a counter-proposal of 12.2 % and 12.85% for different employees respectively. It is further not in dispute that the parties did not reach any agreement in the meeting of 2 June 2009 and neither party had requested to be given more time to reconsider its position.

[48] In the circumstances, I am of the opinion that the circumstances and sequence of events outline above show that applicant had re-opened the wage negotiations for 2009/10. The parties did not reach agreement on the proposed and the dispute declared by second respondent on the 03rd June 2009 is a matter of mutual interest.

[49] I must state further that the minutes of the meetings referred to above, show that organised labour participated in all the meetings and has been insisting that applicant should make up its mind on reopening negotiations and table its proposed increase in the meeting. Organised labour also participated in the meetings of 28 May in which applicant tabled its proposed increase. I agree with respondents' contention that the fact that organised labour's counter proposal is similar to the increase contemplated in the Multi Term Wage Agreement does not make the dispute one of interpretation and application of a collective agreement since there is nothing which precludes a party from tabling any proposal it deems appropriate during wage negotiations.

[50] Applicant's argument that organised labour disputes its right to re-open negotiation and thus the dispute should be regarded as one of interpretation of a collective agreement cannot stand in view of the active participation of organised labour in the negotiations on wages in all the meetings referred to above.

Order

[51] In the premises I make the following order:

(i) A dispute existed between applicant and second respondent on 02 June 2009.

(ii) The dispute between the parties involves a salary increase for the period 2009/10 and is a matter of mutual interest.

(iii) Applicant's application for a final interdict is hereby dismissed with costs.

(iv) The rule nisi is hereby discharged.

Nyathela AJ

Date of Hearing : 25 June 2009

Date of Judgment : 29 June 2009

Appearances

For the Applicant : Mr. P. Maserumule

Maserumule Incorporated

For the Respondent: Cheadle, Thompson & Haysom