IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No: PA10/07

In the matter between:

GILLET EXHAUST TECHNOLOGY (PTY) LTD t/a TENNACO	Appellant
and	
NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA obo MEMBERS EMPLOYED BY THE APPELLANT	1st Respondent
MOTOR INDUSTRY BARGAINING COUNCIL	2nd Respondent

JUDGMENT

WAGLAY JA

Introduction

[1] This is an appeal, with leave of the Labour Court, against its judgement in terms of which it dismissed the appellant's unopposed application directed at securing a Declaratory Order against its employees, who are members of the National Union

of Metal Workers of South Africa, the first respondent (the "respondent"), in the following terms:

"(a)Declaring that the second respondent lacked the necessary jurisdiction to issue a certificate of non-resolution dated 20 September 2006 under Case No.MICT 2094 in respect of a dispute which formed the subject matter of the respondent union's referral to conciliation, and which related to the payment of a transport subsidy/allowance to applicant's employees falling within the bargaining unit represented by the respondent union, alternatively, and in any event,

(b) Declaring that the first respondent's members are not entitled to embark upon a protected strike action in respect of the dispute which formed the subject matter of the respondent union's referral to conciliation under case no. MICT 2094."

Background

[2] The matter continues on an unopposed basis in this Court. The facts as set out in the appellant's papers are therefore not in dispute. These are that:

2.1 the appellant and respondent concluded a number of collective agreements regulating their relationship with each other. One of the issues addressed in these collective agreements was the issue of *"wages and conditions of employment"* which provided that there would be *"no consultations negotiations or other discussions and debates regarding wages"* during the period for which the agreements were in force.

2.2 notwithstanding the agreements, in July 2006 the respondent demanded payment of a "*75% transport allowance*" for all of its members employed by the appellant. The appellant refused to entertain this demand. The respondent subsequently referred a dispute to the Motor Industry Bargaining Council ("MIBC") and described the dispute in its referral form as being one relating to "*transport subsidy/allowance*". It recorded in the said form that the outcome it desired was: "*Company to concede to demand of 75% subsidy/allowance*"

2.3 the MIBC failed to conciliate the dispute within 30 days of the matter being referred to it as prescribed by s135(2) of the Labour Relations Act 65 of 1995 ("the Act") and, because there was no agreement between the parties to extend the 30 day period within which the MIBC could conciliate the dispute, in terms of s135(5) of the Act, the MIBC issued a certificate of non-resolution of the dispute. The certificate was issued on 20 September 2006 under case no MICT 2094.

2.4 the appellant objected to the certificate on the grounds that: (i) it was not afforded an opportunity to object to the jurisdiction of the MIBC to entertain the dispute; and (ii) that the dispute related to a demand which the respondent was precluded from pursuing because of the binding collective agreements between it and the respondent. There was no response to the appellant's objection either by the MIBC or the respondent.

2.5 in March 2007, 6 months after the certificate of non-resolution of the dispute was issued, the respondent by letter to the appellant "*reminded*" the appellant that the issue of "*transport subsidization for all our members …*" remained unresolved. A month later, in April 2007, the respondent advised

the appellant that its members at the appellant's workplace intended to embark on a strike in support of their demand for "*transport subsidy/allowance".*

2.6 the appellant reacted by stating that, because the respondent had not acted on the certificate of non-resolution issued by the MIBC for a period in excess of 7 months and it took no steps to set aside the said certificate, it believed that the respondent *"had waived and/or abandoned [its] right to rely on the certificate."* The appellant then called upon the respondent to provide an undertaking that it would not rely on the certificate of non-resolution to pursue a strike in respect of its demand for a "*transport subsidy/ allowance."*

2.7 the respondent neglected to provide such an undertaking and the appellant approached the Labour Court for an Order as set out earlier in this judgement.

[3] According to the appellant, because the demand for a *"transport subsidy/allowance"* was a demand made across the board in respect of all the employees within the bargaining unit including, employees who might not rely on public transport or any transport to get to work, it was a demand for an increase in the employee's weekly remuneration and as such it is impermissible given the collective agreements which were in force at the time.

[4] In the light of the above facts and averments the appellant contended that the respondent was prohibited in terms of s65(1)(a) read with the relevant provisions of the collective agreements concluded between the respondent and the appellant from embarking upon a strike action.

Collective Agreements

[5] The respondent and appellant concluded a number of agreements to regulate their relationship with each other which were binding at the time. Two of these agreements were the "Collective Agreement" and the "Remuneration Agreement". These agreements were signed at the same time and remain in force and binding on the parties. The "Collective Agreement" which is the recognition agreement, and I shall refer to it as the "Recognition Agreement", provides that:

> *"18.2 The parties recognise and agree that no industrial action may be resorted to:*
>
> *8.2.1 concerning any issue which is the subject matter of a substantive agreement during the period of such agreement unless either the company or the union, union officials or members act in material breach of the agreement; or…"* (emphasis added).

[6] This agreement defines a *"substantive agreement"* as an agreement concluded between the parties relating to "*wages and conditions of employment".*

[7] The "Remuneration Agreement" limited the rights of the parties to enter into negotiations in respect of wages and related matters. The relevant clause provides the following:

> "*13. Whole agreement*
>
> *13.1 This Agreement supercedes any previous agreements regulating wage rates, specifically individual agreements concluded between*

employees and the company, regulating their wages or increases and, generally, of all other employees.

13.2 This Agreement shall determine all wage rates, increases and adjustments for the duration of the Agreement and will not apply to industry negotiated increases.

13.3 The parties agree that there will be no further consultations, negotiations or other discussions and debates regarding wages.

13.4 The parties specifically agree to be bound by all terms and conditions of employment historically implemented and which exist at the time of signing of this Agreement."

[8] In addition, the "Main Agreement" issued under the auspices of the MIBC, which was binding between the parties, incorporated a 'peace clause' which provided that:

> *"The parties agree not to embark on and/or participate in any form of industrial action as a result of any dispute on any wage and/or salary adjustments and other conditions of employment relating to any sector or chapter in this Agreement: Provided that an employer has implemented the wage and/or salary adjustments and other agreed conditions of employment matter on or before promulgation. Participation in any form of industrial action after promulgation of wage and/or salary adjustments and agreed conditions of employment shall be unprotected."*

[9] Furthermore "Division C" of the "Main Agreement" deals *inter alia* with the actual wages that are payable by the appellant to the respondent's members. This was binding on the parties at the time and the appellant complied with its obligations in terms thereof.

The Labour Court

[10] The Labour Court dismissed the application on the basis that the demand for *"transport subsidy/allowance"* was not a demand prohibited by the collective agreements that were then binding between the parties because the demand made by the respondent did not amount to a wage increase but was a demand that was *"…more of a benefit than remuneration…"*.

[11] The Labour Court also took the view that it was inappropriate in the circumstances for the appellant to seek a declarator and said that the appellant should have initiated review proceedings to set-aside the certificate issued by the MIBC under s158 (1) (g) of the Act.

The Appeal

[12] The appellant argues that in the absence of any evidence being presented by the respondent, the Labour Court should have accepted the facts as set out by it and should have concluded that the *"transport subsidy/allowance"* demanded by the respondent for and on behalf of its members amounted to nothing more than a demand for an increase in wages. The appellant submits that the *"transport subsidy/allowance"* is a wage related issue and the collective agreements between it and the respondent prohibit strike action in respect of wage related matters. Accordingly, the appellant continued, the Labour Court should have granted the order declaring the contemplated strike action unlawful and in breach of s65 (1) (c) of the Act, thus prohibiting the respondent's members from embarking on a strike.

[13] Section 65(1)(a) of the Act is clear: if there is a collective agreement between the parties that specifically provides that neither of the parties may participate in a strike or lock-out or any conduct in contemplation or furtherance thereof in respect of a specified issue in dispute, then there can be no strike or lock out about that issue.

[14] Clause 18.2 of the "Recognition Agreement" concluded between the appellant and the respondent specifically provides that the respondent will not call for, nor will its members participate in, an industrial action *"concerning any issue which is the subject matter of a substantive agreement"*. A *"substantive agreement"* as recorded earlier is defined as an agreement on wages and conditions of employment between the parties. At the time of this dispute the parties were also bound by the "Remuneration Agreement" and the "Main Agreement" which regulated their wages and conditions of employment.

[15] The "Recognition Agreement", "Main Agreement" and the "Remuneration Agreement" concluded and binding between the appellant and respondent thus regulated and set-out the wages and conditions of employment at the time and prohibited the respondent from calling on its members to strike in respect of a dispute relating to or connected with wages and conditions of employment. In light thereof, if the demand made by the respondent related to *"wages and conditions of employment"* then the respondent was prohibited from embarking on a strike action to pursue such demand as its action would constitute a breach of s65(1)(c) of the Act.

[16] The appellant and the court *a quo* simply dealt with whether or not the demand for *"transport subsidy/allowance"* constitutes remuneration whereas the issue is whether or not the demand fell within the boundaries of the *substantive*

agreement that was in place at the time. In my view there can be no doubt that "*transport subsidy/allowance"* falls within the parameters of the term: *"wages and conditions of service"* and as such the respondent was not permitted to call on its members who were employed by the appellant to embark on a strike in relation to that demand.

[17] Finally, while the appellant is entitled to an order declaring that the respondent's members are not entitled to embark upon a strike in respect of their demand for "*transport subsidy/allowance",* the appellant's prayer for the setting aside of the certificate of non-resolution of the dispute is misconceived. I say this because whether the certificate of non-resolution is valid or not, in this case this did not affect the legality of the strike the employees may have been planning to embark upon. This is so because in terms of s64(1) (a) (i) and (ii) of the Act a strike will be a protected strike even if there is no certificate of non-resolution of the dispute provided that a period of 30 days from the date of the referral of the dispute to conciliation has lapsed and all the other requirements of s64 of the Act have been complied with.

Conclusion

[18] In the circumstances the Court *a quo* erred in refusing to grant an order declaring that the first respondent's members were not entitled to embark upon a strike in respect of their demand for *"transport subsidy/ allowance."*

[19] With regard to costs as the matter was unopposed there shall be no order as to costs.

[20] In the result the appeal succeeds and the order of the Court *a quo* is set aside and replaced with the following order:

> *Declaring that the first respondent's members are not entitled to embark upon a strike in respect of the dispute which formed the subject matter of the respondent union's referral to conciliation under case no. MICT 2094."*

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WAGLAY JA

I agree

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ZONDO JP

I agree

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KRUGER AJA

APPEARANCES

For the appellant	**: ADV R WADE**
Instructed by	**: CHRIS BAKER AND ASSOCIATES**
For the respondent	**: UNOPPOSED**
Date of judgment	: 28 August 2009