**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case no: JA 44/2013

In the matter between:

**TRANSPORT AND ALLIED WORKERS UNION**

**OF SOUTH AFRICA (TAWUSA)** **First Appellant**

**W NGENDLE AND 302 OTHERS** **Second and further Appellant**

and

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

**Heard:** **12 May 2015**

**Delivered:** **24 June 2015**

**Summary: – employees embarking on strike in support of certain demands which were subject of an appeal judgment – judgment holding that wage discrepancies among employees falling outside bargaining council's jurisdiction and that employee entitled to strike – employer contending that employees' interpretation of the judgment to extend wage discrepancies to all employees not consonant with the judgment. Employees' demands affecting wages and costs of employer and are subject to collective bargaining - employees demand falling within issues negotiated at the bargaining council and excluded from strike – Labour Court's judgment upheld - appeal dismissed.**

**Coram: Davis, Ndlovu *et* Landman JJA**

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**JUDGMENT**

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DAVIS JA

Introduction

[1] This is an appeal against the judgment of the court *a quo* (Bhoola J) which was delivered on 13 December 2012.

[2] First appellant had sued on behalf of some 93 employees who were dismissed by respondent for participating in a six day strike from 28 October 2010 to 2 November 2010. Appellants contended that the dismissal of the employees was automatically unfair; alternatively procedurally and substantively unfair. The Labour Court dismissed the appellants' claims with costs. It is against this decision that the appellants have approached this Court on appeal. Before dealing with the merits of the appeal, I am required to determine an application for condonation.

Condonation

[3] Leave to appeal was granted on 20 March 2013. Appellant filed a notice of appeal on 22 April 2013. In terms of Rule 5(8) of the Rules of the Labour Appeal Court, appellant had 60 days in which to deliver the record of appeal from the date of the order granting leave to appeal; that is 20 March 2013. The record of appeal should have been filed by 19 June 2013.

[4] The appellants served an incomplete record of appeal on 4 July 2014, more than a year later. It appears that the appellants then withdrew this record on 4 July

2014 and served another record on 8 August 2014 which was also withdrawn. On 12 August 2014, appellants served yet another record of appeal.

[5] On 17 July 2014, an application for condonation and reinstatement of the appeal was filed. To the extent that it is relevant the contents of this application read thus:

> ‘1. The appellants requests that condonation be granted for the late filing of the appeal record.
>
> 2. The late filing of the record was due to the delay in the obtaining of the transcript of the proceedings in the Labour Court under Case No. JS 359/11 from I-Africa Transcriptions (Pty) Ltd as same was made ready for collection on or about 08 April 2014, as more fully appears from the copy of the tax invoice attached hereto as Annexure “A”.
>
> 3. In the circumstances, the appellants request that condonation be granted for the late filing of the record as there are great prospects of success of the appeal on merits thereof, as shall be indicated in the paragraphs below.
>
> RE-INSTATEMENT OF THE APPEAL
>
> 1. The appellants are desirous in the prosecution of the appeal as there is a great prospects of success of the appeal as no evidence has been produced by the respondents that the appellants had embarked on an unprotected strike based on different demands than the demands that had been allowed by the Labour Appeal Court under Case No. JA 55/10.’

[6] Respondent strenuously objects to this application for condonation. Mr Gordge, the General Manager of respondent, avers in his opposing affidavit that the appellants had been remiss in prosecuting their appeal. If the court reinstated the appeal, it would “have the effect of condoning their lax attitude in the prosecution of this matter and denying the respondent their right to the expeditious and final

resolution of this matter. Particularly in these circumstances where the Appellants had very poor prospects of success."

[7] Mr Wilke, on behalf of the appellants, understandably could offer no explanation as to why so skeletal an affidavit in support of the appellants' condonation application had been filed. The affidavit contains no explanation for the delay of more than a year in ensuring that the appeal could be heard by this Court.

[8] In an application of this kind, a court must take into account the degree of the delay in complying with the Rules, the reasons for the delay, the merits of the appeal and whether it is in the interests of justice to reinstate this appeal. See in particular, *Brummer v Gorfil Brothers Investments (Pty) Ltd and others* [2000] 5 BLLR 465 (CC) at para 33. See also *Fidelity Security Services v Sibobi and Another* (Case No: PA 3/2012: judgment of the LAC of 12 December 2014).

[9] Strictly, this Court should dismiss the applications for condonation and the reinstatement of the appeal. However, it was decided at the hearing to determine whether there were any merits in the appeal which might weigh in favour of the appellants. In addition, Mr Redding, who appeared on behalf of the respondent, submitted that, in the circumstances, his client would prefer if the case was disposed of to finality.

<u>The merits</u>

[10] It is common cause that the first appellant and certain employees embarked upon a strike in pursuit of two demands. Those two demands were central to the determination of whether the strike was protected or whether it contravened the provisions of s65 of the Labour Relations Act 1995 (LRA).

[11] When the employees initially gave notice of the strike, they relied on four grounds being:

1. a wage cut;

2. wage discrepancies;

3. a coupling allowance of R 500 per week; and

4. a demand in relation to the transfer of the Provident fund.

[12] Respondent attempted to interdict the strike on the basis that all four demands were unlawful. Respondent was unsuccessful in the Labour Court but, on appeal, it maintained that the first three demands fell foul of the provisions of clauses 50(1) and (3) of the Main Agreement of the National Bargaining Council for the Road Freight Industry which had jurisdiction over the parties. Clause 50(1) of the Main Agreement provided that the forum for negotiation and conclusion of substantive agreements and wages benefits and other conditions of employment was the Bargaining Council. Clause 50 (3) provided that no trade union or employers' organisation could compel its negotiating partner by way of a strike or lock-out to negotiate issues at any level other than the council.

[13] In its judgment, the Labour Appeal Court[1] accepted that the demand for the coupling allowance of R 500 per week was a demand for an increase in wages, an increase in the cost to the company and thus fell foul of clauses 50(1) and 50(3) of the Main Agreement. However, the demand in relation to the wage cut was not a demand for wages but a demand that respondent restores the terms and conditions of employment in respect of seven employees to that which existed prior to the termination of a particular contract to which I shall presently make reference.

[14] The wage cut demand thus concerned a dispute about the unilateral change to terms and conditions of employment. Further, the Court held that the dispute relating to the wage discrepancies did not fall foul of clause 50(1) of the Main Agreement. The Court reasoned that the claim for wage parity was not a demand

[1] The judgment is reported as *Unitrans Fuel and Chemical (Pty) Ltd v Transport and Allied Workers Union of South Africa* and Another [2011] 2 BLLR 153 (LAC).

for an amount of money and therefore did not constitute the conclusion of substantive agreement in wages, benefits and other conditions of employment.

[15] Subsequent to that judgment, the parties met on 21 and 25 August 2010. On both occasions, respondent sought answers from first appellant as to precisely the demands which it had made. In respect of the wage cut, the first appellant indicated that it sought that all employees, whose wages had changed since February 2009, should have their wages restored, regardless of whether there had been a unilateral change to their conditions of employment. In respect of the wage discrepancy, the first appellant stated that it demanded that the wages of those on the lower salary level be increased to the wages of those on the highest level.

[16] A further dispute now ensued in that the respondent considered that these demands were now different from those made previously and hence were demands that went beyond the scope of the judgment of the Labour Appeal Court. A second urgent application was brought by respondent. The Labour Court issued an order interdicting the strike based on the demands as articulated on 25 October.

[17] On 29 October 2010, the same issues were then again discussed. In the course of this meeting, first appellant's general secretary, Mr Zach Mankge arrived and was briefed by the shop stewards. According to the minutes of this meeting, appellants representatives then made the following statements:

> '1. It is illegal that the company reduce employees' rates without any reasons;
>
> 2. In essence, there should not be any reduction on rates;
>
> 3. In wage discrepancies, e.g 20-40 [everyone should be paid equally].'

[18] It appears that respondent's attorneys wrote to first appellant, warning that, on the basis of these demands, a strike would be illegal. Nonetheless, the strike began on the afternoon on 28 October 2010.

[19] The crisp question for determination was whether, in terms of the Labour Appeal Court's judgment to which I have made reference, appellants had been prohibited from striking in respect of those demands relating to wage discrepancies. This issue thus requires a careful engagement with the judgment of the Labour Appeal Court.

The Labour Appeal Court

[20] In his judgment, on behalf of a unanimous court, Waglay DJP (as he then was) referred to clauses 50(1) and 50(3) of the Main Agreement, to which I have already made reference. The learned judge then said the following, and its importance necessitates that it be reproduced in full:

> 'It is clear that in terms of this clause all and any negotiations in relation to wages and substantive issues must be negotiated at the Bargaining Council and that neither party may resort to industrial action (strike or a lock-out) concerning these issues. The Main Collective Agreement also goes on to define "*substantive issues*" as "*all issues involving costs and affecting the wage packets of employees.*'
>
> According to the appellant the first three demands of the first respondent, described as "*wage discrepancies*"; "*wage reduction*" and "*Coupling R 500 pw*" are all related to and connected with wages and are substantive issues and as such the first respondent is prohibited in terms of clause 50 (1) and (3) read with s 65 (1) (a) and (3) (a) (i) from calling upon its members to strike in order to secure these demands. I accept that where a demand is made for an increase in remuneration or for remuneration to be paid in relation to a particular aspect of employment such demands related to wages and are substantive issues. If the demands as we have them here are about wages and substantive issues then,

as appellant has properly argued, the first respondent is prohibited from calling on its members to embark on a strike in respect of those issues.

I am however not persuaded that the first two demands made by the first respondent are demands which relate to an increase in wages. Seen in the context of what has transpired at the appellant's work place it is clear that the aforementioned demands relate to the fact that the appellant unilaterally decided to reduce the wages of those if its employees who previously serviced the Shell contract for the appellant. When appellants contract with Shell came to an end it did not seek to reach an agreement (at least not with the 7 employees referred to earlier) with those employees who decided to remain in the appellant's employ but reduced their wages. The 7 employees were simply paid a lesser salary. This reinforces the first respondent's averment that the appellant unilaterally reduced the wages of its employees. Appellant's response is that the Shell contract was of a greater value than the present contracts on which these ex-Shell drivers were now placed. This may be so, but this does not mean that the appellant is entitled to unilaterally enforce a reduction in salary without concluding an agreement with the employees. The employees are entitled to demand that the appellant not apply wage discrepancies and wage reduction unilaterally and such demand is not a demand that seeks to increase their wages but to undo the appellant's unilateral implementation of a change in wage rates and reduction in wages.

As counsel for the first respondent argued the demand for wage parity is not a demand for an amount of money but requires of the appellant to adjust wages so as to arrive at a uniform level of remuneration for employees performing the same work albeit on different contracts.

The demands of "*wage discrepancy*" and "*wage cut*" are thus not demands that fall within the purview of clause 50 (1) and/or (3) of the Main Collective Agreement and are therefore not issues in respect of which the first respondent is prohibited from calling upon its members to strike.'[2]

[21] Waglay DJP then concluded as follows:

[2] At paras 17-21.

> 'In the circumstances I am of the view that the first respondent's demands that the appellant implement a system of wage parity for the drivers irrespective of which contract they service and that there be no reduction in salary without there being an agreement to that effect are demands which fall outside the ambit of clauses 50 (1) and (3) of the main Collective Agreement and as such the first respondent is not prohibited in terms of s 65 (1) (a) and (3) (a) (i) of the LRA from calling upon its members to strike in respect of these demands.'[3]

[22] This judgment was founded on a central proposition, namely that all negotiations in relation to wages and substantive issues are required to be conducted at the Bargaining Council. Neither party may resort to industrial action concerning these defined issues. Substantive issues are regarded as "all issues involving costs and affecting the wage packets of employees".

[23] It was for this reason that Waglay DJP came to the conclusion that the first demand fell outside the scope of the bargaining agreement and accordingly was one which could be the subject of industrial action.

[24] This demand must be viewed within the following factual context: Respondent runs a haulage business and conveys goods such as petroleum products and oxygen in bulk. It had a contract with Shell Petroleum Company to convey its products for a period of five years. This contract terminated in February 2009. 110 drivers in respondent's employ were affected by the termination of this contract. All but 31 obtained employment elsewhere. Respondent incorporated 31 drivers in its business; that is to perform other haulage contracts. However, the salaries of these drivers were reduced. Respondent sought to ensure that these drivers signed contracts to the employment which indicated their acceptance of the reduced salary. Seven of the 31 drivers (the Shell-7) refused to sign these contracts but continued to work for respondent. Notwithstanding this refusal, respondent implemented the reduction and continued to pay them accordingly.

[3] At para 25.

[25] This description of the initial dispute reveals clearly why Waglay DJP concluded that this wage demand constituted unilateral action on the part of the respondent and fell outside the bargaining agreement and thus could be the subject of industrial action. It is for this reason that Waglay DJP noted "the employees are entitled to demand that the appellant not apply wage discrepancies and wage reduction unilaterally and that such demand is not a demand that seeks to increase their wages but to undo the appellant's unilateral implementation of a change in wage rates and reduction in wages."[4]

[26] The first appellant issued a strike notice on 27 October 2010. To the extent that it is relevant, it read thus:

> '2. We confirm that our members will proceed with the strike on the basis of the very same demands, as were during Labour Appeal Court judgment, and as contained in annexure "C" to the founding affidavit of your urgent application (today) being as follows:
>
> (I) Wage discrepancies – there must been wage discrepancy between employees who perform work but on different contracts.
>
> (II) Wage cut – Former Shell contract employees must earn what they used to earn under Shell contract plus annual increases.'

Appellants' case

[27] Mr Wilke contended that the "wage discrepancy" and "wage cut" are not two facets of the same dispute. They were separate and distinct disputes. The primary purpose of the wage discrepancy demand was, in his view, to achieve wage parity for the same work across different haulage contracts between the employer and its customers. Mr Wilke conceded that the salary adjustment to procure wage parity would, of necessity, require an agreement at plant level, the conclusion of which would have involved further costs for the respondent and affected the wage packages of employees. However, in his view, the Labour

[4] At para 19.

Appeal Court had not confined the meaning of word "adjust" to a reduction in wages but left it to be determined by way of the forces of an industrial power play. Accordingly, the appellants were entitled, on the basis of the judgment of the Labour Appeal Court, to have taken strike action to remedy a wage disparity in respect of all of the respondent's employees, provided that the primary purpose of the demand was to procure wage parity across the haulage contracts.

[28] In a further note filed after the hearing, Mr Wilke referred to the papers filed in the application brought by respondent before the Labour Court, which papers then formed the basis of the appeal before the Labour Appeal Court.

[29] In his view, paragraph 21 of the founding affidavit in the urgent application suggested that, from respondent's perspective, the "wage discrepancies/cut" issue was confined to the Shell-7. However, in the answering affidavit, appellants clearly explained that the wage discrepancy demand pertained to all employees across respondent's various haulage contracts. Mr Wilke submitted that respondent's reply to the contents of these paragraphs of the answering affidavit in its replying affidavit indicated that respondent understood that the wage discrepancies demand was not confined to the Shell-7.

Evaluation

[30] During cross-examination, Mr Badenhorst, who gave evidence on behalf of respondent, said that at a meeting between the parties on 1 November 2010, a demand had been made for all drivers to be paid at R 38.00 per hour. Mr Badenhorst conceded that this proposal "rings a bell" but then noted that it was a proposal for an increase that would have meant a significant increase in costs for the respondent because of the effect on wages. This demand could only have been made at the Bargaining Council.

[31] The only witness for the appellants, Mr Wellington Ngedele, agreed that the demand was for a minimum of R 38.00 per hour. He conceded under cross-examination that this would have involved an increase in costs for the respondent

but testified that, since respondent had created the inequality in the first place, it was required to bear the costs of the remedy.

[32] This evidence, read within the factual context of the dispute with which the Labour Appeal Court had been confronted and which gave rise to the judgment of Waglay DJP, confirms that the Court could not have had in mind that the demand for wage discrepancy was one which would affect respondent's entire workforce. The demand it considered to be the legitimate subject matter of a strike was a demand which was linked to the earlier demand with regard to wage cuts, triggered by the termination of the Shell contract. Were any other finding to be made, it would make nonsense of the central finding of Waglay DJP, namely that neither party may resort to industrial action concerning wages and substantive issues; that is, issues involving costs and affecting the wage brackets of employees. It was because the Labour Appeal Court had been cognisant of this foundational proposition, that it was at pains to emphasise "the employees were entitled to demand that the appellant not apply wage discrepancies and wage reductions unilaterally and such a demand is not a demand that seeks to increase their wages but to undue the appellants unilateral implementation of the change in wage rate and reduction of wages".[5]

[33] The interpretation given to the judgment by Mr Wilke notwithstanding, it is evident as to what was intended by the judgment, which intention was correctly determined by Bhoola J in the court *a quo,* who held:

> 'The LAC clearly understood both the wage discrepancy and wage cut demand to related to the restoration of the position of wages of the Shell-7 prior to the unilateral alteration… The strike in relation to these two demands, therefore seen as demands relating to implementing the system of wage parity and no further unilateral reductions in salary, was therefore permissible.'

That there were disputes on the papers filed before the Labour Court in the first application is hardly surprising. As I have indicated, there was a dispute relating

[5] At para 25.

to the demands made by the appellants. However, the Labour Appeal Court clearly held that substantive issues affecting wages and thus costs of the respondent were subject to collective bargaining. Manifestly, the way Mr Wilke described the appellants' demand in respect of a wage discrepancy fell within this categorisation; that is it stood outside the confines of the area of a protected strike as defined by the Labour Appeal Court.

[34] To summarise: this case stands to be dismissed on two bases, namely that, given the non-existent explanation for the delay of a year before the appeal could be prosecuted, the application for condonation stands to be dismissed. This is particularly so because, on the basis of the finding to which I have arrived, there are no prospects of success on appeal. However, given that the matter was exhaustedly canvassed before this Court in oral argument, and given the finding to which I have arrived, the appeal stands to be dismissed on its merits.

[35] Accordingly, the appeal is dismissed with costs.

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Davis JA

Ndlovu and Landman JJA concurred

APPEARANCES:

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|---|---|
| FOR THE APPELLANTS: | Adv F J Wilke |
| | Instructed by Masango Attorneys |
| FOR THE RESPONDENT: | A Redding SC |
| | Instructed by Cliffe Dekker Hofmeyr Inc |