IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA63/2016

IMPERIAL CARGO SOLUTIONS	**Appellant**
and	
SATAWU	**First Respondent**
INDIVIDUAL RESPONDENTS LISTED IN ANNEXURE	
“A” TO THE NOTICE OF MOTION	**Second Respondent**
Road Freight Association	**Amicus Curiae**

Heard: **03 May 2017**

Delivered: **01 August 2017**

Summary: Cancellation of a collective agreement in terms of which employees were required to perform certain ancillary duties in addition to their main functions – whether those ancillary duties survived the cancellation so as to be incorporated into the employees’ contract of employment.

Held that in the absence of any other agreement creating an obligation on the employees to perform the ancillary duties, the obligation fell away upon cancellation of the collective agreement. Similarly, the obligation of the employer to pay the employees in lieu of ancillary functions in terms of the collective

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agreement fell away. Labour Court's judgment upheld – appeal dismissed with costs.

Coram: Tlaletsi AJP, Davis JA and Kathree-Setiloane AJA

JUDGMENT

TLALETSI AJP

[1] This is an appeal against the judgment of the Labour Court (Prinsloo J) which discharged the interim interdictory relief granted in favour of the appellant, interdicting the first and second respondents against a threat to withdraw from performing certain ancillary duties as truck drivers. The issue that had to be considered is whether the second and further respondents listed in Annexure A to the Notice of Motion (the employees) were obliged to perform the aforesaid ancillary duties and if that be the case whether their refusal to perform such ancillary duties would constitute unprotected strike action. The appeal is with leave of the Labour Court.

Background facts

[2] The appellant, Imperial Cargo, is a logistic company with a large fleet of trucks. It transports freight cargo, consumable goods and other goods on behalf of various clients throughout the country. Appellant's business in so far as it relates to the respondents, falls within the jurisdiction of the National Bargaining Council for the Road Freight and Logistics Industry (the bargaining council). Drivers' wages are regulated by way of a collective agreement concluded in the bargaining council and extended across the road freight industry (the main collective agreement). The main collective agreement comprehensively regulates all aspects of driver's remuneration.

[3] The appellant employs the employees as drivers. These employees are all members of the first respondent, South African Transport and Allied Workers Union (SATAWU), a trade union registered in terms of the Labour Relations Act

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(the LRA).[1] The transport of freight cargo by truck necessitates safety measures to prevent goods falling off the truck. Tarpaulins, straps and ropes depending on the goods transported are used to secure the safety of the cargo. In the past, the appellant employed drivers' assistants whose duties were to assist the driver to load and offload the cargo, and also to perform the "tarping" duties. These duties shall be collectively referred to as "ancillary" duties or functions. It is common cause that in 2007, the appellant abolished the position of drivers' assistants.

[4] The consequence of doing away with the drivers' assistants' posts was that a decision had to be taken as to who would thereon perform the duties previously done by the drivers' assistants. To this effect, the appellant and the first respondent concluded a collective agreement in 2007 known as the "Guard Fee Agreement" (the collective agreement). In terms of this collective agreement, it was left to the drivers to either perform the ancillary duties themselves or appoint assistants to undertake those ancillary duties. An agreed amount of money was in addition to their normal salaries paid in lieu of the ancillary duties. The drivers could keep the money for themselves if they personally performed the ancillary duties or pay assistants they employed specifically for such duties. The agreed amount was subject to an annual increase.

[5] In 2015, SATAWU wanted to negotiate an increased guard fee above the agreed annual increase rate. When the appellant refused to meet the demand, SATAWU informed it that it was cancelling the collective agreement on a one month's notice. SATAWU also informed the appellant that as from 01 February 2015, the drivers would no longer perform the ancillary duties as provided in the collective agreement. The appellant was then advised to make the necessary arrangements to ensure that the ancillary duties be carried out by persons other than the drivers.

[6] The appellant viewed the cancellation of the collective agreement and refusal to perform ancillary duties as unprotected strike action. To this effect, the appellant

[1] Labour Relations Act 66 of 1995.

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filed and obtained an urgent interim relief directing the drivers to perform all ancillary duties on the basis that their refusal to do the work amounted to unprotected strike action.

The Labour Court Judgment

[7] The dispute before the court *a quo* was whether the drivers' refusal to perform the ancillary function amounted to a strike action. In order to determine this issue, the court *a quo* considered the nature of the duties that the drivers refused to perform. In its view, the duties the drivers refused to perform derived from the collective agreement. It reasoned that because the collective agreement which constituted the source of the obligation to perform the duties was cancelled, the drivers could not be said to have withheld their services. This is so because the collective agreement from where those duties originated ceased to exist. As a result, the court *a quo* rejected the appellant's contention that the performance of the ancillary duties was part of the drivers' contract of employment. In rejecting this argument, the court *a quo* held that these duties were not part of the contract of employment because they were performed in terms of the collective agreement which had been cancelled and not the main agreement. Had the case been as contended, the court *a quo* reasoned, there would not have been any need for the collective agreement to be concluded because the employees would have been contractually obliged to perform the ancillary duties.

[8] The court *a quo* concluded that refusal to perform the ancillary duties would not constitute strike action as the collective agreement in terms of which it was performed was cancelled and that the duty to perform those duties fell away. Further, that there was no general refusal to work but only a refusal to work in accordance with the terms of the cancelled collective agreement.

[9] The Labour Court went further to consider, in the event that it is wrong in the view it took in respect of the duty to perform ancillary duties, the contention that the real issue was a wage dispute, and that the respondents' conduct was deliberate, concerted and directed at obtaining an increase in the guard fee. The

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Labour Court held that although the respondents had in 2015 demanded an increase of the guard fee, they had since abandoned the said demand by cancelling the collective agreement, thereby rendering the wage demand dispute moot.

[10] In the result the Labour Court discharged the *rule nisi* earlier granted to the appellant and made no order as to costs. On application by the appellant, the Labour Court issued an interim order preserving the rule nisi, thereby preserving the status quo pending the appeal.

The appeal

[11] The appellant's main ground of appeal is mainly directed at the court *a quo*'s finding that the ancillary duties terminated at the cancellation of the collective agreement. Relying on the judgment of the Labour Court in *SA Municipal Workers Union v City of Tshwane and Another*[2] (SAMWU), Mr Redding SC, who appeared on behalf of the appellant contended that the ancillary duties the drivers performed prior to the cancellation of the collection agreement remained in force. He submitted that the ratio of *SAMWU*, which according to him was not brought to the attention of the court *a quo*, is that the terms of the collective agreement are incorporated into the contract of employment and unless the collective agreement provided, either expressly or by implication, that its terms that had been incorporated into the individual employment contract lapsed on termination of the collective agreement, remain applicable and binding.

[12] Mr Redding referred to the main collective agreement's definition of the word "Drive" as including: all periods of driving, all periods during which a driver is obliged to remain at his or her post in readiness to drive, and any time spent by the driver in connection with the vehicle or its load. He submitted that duties in connection with the load necessarily include ensuring that the load is secure and safe to transport, before setting off on a trip, for example, tarping. Counsel submitted further that "Driver" is defined as an employee who is engaged in

[2] (2014) 35 ILJ 241 (LC).

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driving a motor vehicle which should be read in conjunction with the broad definition of the verb "drive". He further submitted that the duties of "general worker" are cast extremely widely, and often overlap with the duties of other, more specialised workers.

[13] Mr Redding finally submitted that on a proper interpretation of the main agreement, tarping functions are not reserved exclusively for general workers, and are not excluded from the scope of a driver's duties. He further referred to what he regarded as an admission by the respondents at paragraph 17 of the Answering Affidavit that "*tarping and untarping were never additional duties for drivers*."[3]

[14] The Road Freight Association (RFA) is an employer's organisation duly registered in accordance with the LRA. The RFA was not a party to the litigation in the court *a quo*. It applied and was granted leave to intervene as *Amicus Curiae* in the proceedings in this Court. Its leave to intervene is limited to the question relating to the interpretation of the main collective agreement. It challenges the court *a quo*'s finding that since the main collective agreement mentioned that tarping duties were one of the functions conducted by general workers, the implication was that these duties fell outside of the scope of a driver's responsibilities. RFA is concerned that this finding of the court *a quo* does not reflect the realities of how the main collective agreement is applied in the industry and has the potential of causing widespread confusion in the industry, and may lead to strike action during the currency of the wage agreement.

[15] Mr Redding appeared on behalf of the RFA as well. In addition to the submissions he made on behalf of the appellant, he submitted that unless

[3] The full text reads: 'AD PARAGRAPH 29.
The contents of this paragraph are denied. The tarping and untarping was never an additional duty for drivers, and the conclusion of the Agreement was never to include tarping and untarping as an additional. Instead, the agreement provided for liberty by the driver to perform the duties himself, or to acquire the services of an assistant. The agreement is not specific as far as the tarping and untarping as an additional duty to drivers. It is in this that the drivers find the strength not to continue with the tarping duties'.

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otherwise agreed to in individual employment contracts or by way of plant level collective agreements, the practice in the industry, as regulated by the main collective agreement, is that all functions relating to the safe operation of the vehicle and the safe transport of its load, fall within the scope of the driver's normal functions, including tarping duties.

[16] Ms Makgamatha, an official of the first respondent, appeared on behalf of all the respondents. She submitted, in the main that the court *a quo* was correct in its findings and that the appeal should be dismissed.

Analysis.

[17] In light of the view I take of this matter, it shall not be necessary to deal with all the contentions made on behalf of the appellant and the *Amicus*. To recap, the appellant claims that the individual employees had a contractual obligation to perform ancillary duties from when the assistants were done away with. It contended that the guard fee agreement only served to provide them with money to keep if they did the work themselves or to pay the assistants they hired. The appellant further relies on the *SAMWU* judgment that the collective agreement which dealt with the ancillary duties formed part of the employees' contracts of employment and remained applicable as it did not provide, expressly or by implication, that upon cancellation the obligation will fall away. The appellant further relies on paragraph 17 of the Answering Affidavit that the respondents conceded that the ancillary duties were not an addition to their normal duties.

[18] The respondents deny all the allegations by the appellant. The appellant bore the *onus* to prove its case on a balance of probabilities. The contention that the respondents conceded that the ancillary duties were not additional but part of their normal duties is without merit. The text and context clearly show that the respondents deny that ancillary functions were part of their normal duties as drivers. The statement is intended to mean that the functions referred to were not added to be part of their normal or day to day duties as drivers, hence they were remunerated separately for performing them.

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[19] It is clear from the papers that there was no written or verbal contract of employment that set out that the employees were obliged to perform ancillary duties as their normal duties. The only agreement providing for the performance of the ancillary duties is the collective agreement which gave the employees the option to either perform the functions themselves or employ assistants to perform the said duties. In both instances, the appellant was obliged to pay for whoever performed these ancillary functions.

[20] In the absence of any other agreement creating an obligation on the employees to perform the ancillary duties, and since they were entitled to cancel the collective agreement on notice, the obligation fell away upon cancellation of the agreement. Similarly, the obligation of the employer to pay the employees in lieu of ancillary functions in terms of the collective agreement also fell away. It would make no sense to contend that the appellant's obligation to pay for the ancillary functions fell away upon cancellation of the agreement by the respondents but that the obligation to perform the ancillary functions survived the cancellation. Without deciding on the correctness or otherwise of the ratio in the *SAMWU* matter, its facts and circumstances are clearly distinguishable from this case.

[21] The obligation relating to ancillary duties was based solely on the collective agreement and not on the main collective agreement. It is therefore not necessary to determine whether the main collective agreement obliged the respondents to perform the ancillary duties. It has never been the practice at the respondent's workplace that the employees performed the ancillary functions in terms of the main collective agreement. Such an inquiry is not relevant to the issue to be decided in this appeal and my conclusion is limited to the dispute between the parties in this appeal.

[22] For the above reasons, I am satisfied that the Labour Court did not misdirect itself in finding that the employees were not obliged to perform the ancillary functions and was correct in discharging the *rule nisi*. The appeal falls to be dismissed with costs.

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[23] In the result, the following order is made:

The appeal is dismissed with costs.

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Tlaletsi AJP

Davis JA and Kathree-Setiloane AJA concur in the judgment of Tlaletsi AJP.

<u>APPEARANCES</u>:

FOR THE APPELLANT AND AMICUS: Adv AIS Redding SC and Adv GA Fourie

Instructed by: Cliffe Decker Inc

FOR THE RESPONDENTS: Ms Tlou Makgamatha

Union official: SATAWU

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