REPUBLIC OF SOUTH AFRICA

Of interest to Other Judges

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: J1135/14

In the matter between:

IMVULA QUALITY PROTECTION (AFRICA) (PTY) LTD	**First Applicant**
IMVULA SECURIPARK (PTY) LTD	**Second Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER NADIA SITHOLE *N.O.*	**Second Respondent**
SECURITY OFFICERS CIVIL RIGHTS AND ALLIED WORKERSS UNION	**Third Respondent**
THOSE INDIVIDUALS AS LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION	**Fourth and Further Respondents**

Heard: 16 May 2014

Delivered: 17 May 2014

Summary: (Urgent – Strike interdict – non-compliance with dispute resolution procedure in collective agreement - compliance with LRA dispute resolution procedures).

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an urgent application to interdict strike action due to commence on matters of mutual interest on 19 May 2014. My brief reasons for the decision set out below.

Salient facts

[2] For the purposes of this application, it appears that both the union and employer parties accept that the recognition agreement concluded between a company whose business was absorbed by the applicants is binding on them. That agreement contains dispute procedure. In terms of the dispute procedure, it is stipulated that:

> *"15.2 The party declaring the dispute shall do so in presenting a written notice, shall set out the nature of the dispute and the parties proposed settlement.*
>
> *15.3 Party receiving the notice shall convince a meeting with the other, within 5 days of receipt of the notice referred to above for the purpose of endeavouring to settle the dispute.*
>
> *15.4 At any stage following a meeting referred to in clause 15.3 above, a party declaring the dispute shall be entitled to refer the dispute in terms of the act, provided the dispute remains unresolved.*

15.5 Notwithstanding that the dispute may have been in terms of the act, parties may continue to meet and attempt to resolve the dispute will agree to any other dispute resolving procedure.

15.6 If either party declares dispute in terms of clause 15.2 above, the labour practice in employment relationship prevailing immediately prior to the change which gave rise to the dispute shall be restored until the dispute resolving procedure has been exhausted."

(sic)

[3] In essence, the procedure requires that before either party may resort to the dispute resolution procedures of the Labour Relations Act, 66 of 1995 ('the LRA'), a written description of the dispute and how it should be resolved must be sent to the other party and a meeting must be convened within five days of the latter party receiving it.

[4] In this case, the respondents concede that they did not comply with clause 15.2 literally, but did comply with it substantially. In support of this contention they point out that the issues over which the union has called for the strike as set out in its list of demands are ones that have been discussed in a number of meetings with the applicants. It is true that one of the items had been on the agenda of a meeting between the parties as far back as October 2012. However, the closest the union came to meeting the requirements of clause 15.2 was in a letter of 27 February requesting a meeting with the company on 5 March 2014. The letter contained an agenda of items, most of which made it onto the list of final demands set out in the union's strike notice of 2 May 2014.

[5] In relation to the issue of proposals to resolve the dispute, the union contended that these were canvassed in the meetings which took place between the parties even if they had not been reduced to writing in the notice.

[6] The day after the first meeting between the parties on 5 March 2014, which was the first one held following the union's letter of 27 February, the union referred a mutual interest dispute to the CCMA. Before the matter

was due for conciliation of the CCMA on 30 April 2014, the union proposed further meetings between the parties to discuss their members' demands. The applicants indicated their willingness to hold such a meeting, but insisted that the referral should be withdrawn pending the outcome of such meetings. Although the applicants' letter to this effect does not make explicit reference to the provisions of clause 15, it is apparent from the union's response to the letter that it was fully aware of the need to comply with that provision.

[7] For present purposes, it is sufficient to note that the union did not withdraw the CCMA referral, and on 2 May 2014 issued a strike notice. It must be mentioned that the strike notice contained two additional demands relating to shop stewards, which had been part and parcel of the demands referred to the CCMA, but which had not been included in the list of items identified for discussion by the union in its proposed agenda for the meeting on 5 March 2014.

[8] Following the strike notice the employer indicated its continuing willingness to meet with the union on 9 May 2014, as the union had proposed. The meeting took place but no agreement on the demands could be reached. There is a dispute about whether the union undertook to revert to the company about holding another meeting on 12 May 2014 to discuss the demands further, and I must accept the union's version that no such undertaking was given. In any event, it was on 12 May 2014 that the union notified the company that the CCMA had issued a certificate of non-resolution. The applicants responded immediately setting out the view on why the intended strike action would amount to unprotected strike action and warning amongst other things of the prospect of bringing an interdict to a halt it.

[9] This application was launched two days later on 14 May 2014.

Urgency

[10] Considering the sequence of events leading up to the launching of the application, while it might be said that there were no reasons why the application could not have been launched after 2 May 2014, it was

possible that the meeting of 9 May might have yielded a resolution of the matter and the applicant's effectively gave notice of the prospect of an interdict been launched seven days before the strike was due to commence. In the circumstances, I believe that the union had sufficient notice that the application would be brought so it cannot be said that it only arose at the last minute.

Prima facie right

[11] The heart of the dispute on whether the applicants are entitled to the interdict is twofold. Firstly, in circumstances where a union has complied with the provisions of the LRA in referring a dispute to conciliation and, following the unsuccessful resolution thereof, issued a strike notice more than 48 hours before the commencement of the strike, can it be prevented from striking because it did not comply with the dispute resolution provisions of a collective agreement? If the answer to that question is yes, then the second question is whether or not the union complied with the dispute resolution provisions of the collective agreement in this instance.

[12] It seems that since the ratio of the majority in the LAC decision in ***BMW South Africa (Pty) Ltd v NUMSA obo Members*** it is no longer the case that compliance with the LRA is sufficient. Waglay DJP, as he then was, writing for the majority, stated:

> *"[8] It is not for me to interpret the above clause. It is common cause between parties that the clause sets out the procedure which the parties need to follow in dealing with the demand. The appellant however argued that the procedure set out in clause A.8.3 was the only way that the respondent was entitled to proceed in addressing its demand. I agree. Parties by way of a collective agreement set out certain procedural steps which they will follow in dealing with their demands, grievances, concerns, etc. In this respect appellant is correct to submit that the respondent was obliged to follow clause 8.3 in having its demand addressed.*

[9] The respondent on the other hand argues that it is not obliged to comply with the procedure set out in clause A.8.3 because its demand is one of mutual interest and it is entitled to embark on a strike in support of its demand as long as it does so in compliance with the provisions of the Labour Relations Act 66 of 1995 (as amended) (the Act). I disagree. Where parties have concluded an agreement which does not deny any of the parties to the agreement the rights and obligations provided in the Act, I see no reason why that agreement cannot be enforced. In fact the Act seeks to promote collective bargaining, particularly at the sectoral level and gives primacy to collective agreements.

[10] A collective agreement concluded between the parties is binding between them. It is a contract that sets the agreed terms between them and as long as what is agreed upon is not in conflict with the applicable legislation or contra bones mores it is binding and enforceable between them."[1]

[13] Consequently, the contrary approach adopted in ***County Fair Foods (Pty) Ltd v Food & Allied Workers Union & others*** **(2001) 22 ILJ 1103 (LAC)** no longer appears to hold good. In the circumstances, I must agree with the applicants that they were entitled to require the union to comply with the provisions of the dispute resolution process in the recognition agreement, even though they had complied with the dispute resolution provisions in the LRA.

[14] This brings me to the second question. As mentioned above, the union has argued that even if it did not comply with the letter of the dispute resolution process in the collective agreement, there had been substantial compliance therewith. It is true that the agenda notice contained in the union's letter of 27 February 2014 contained most of the items over which it subsequently declared a strike. What was missing from the letter as required by clause 15.2 of the recognition agreement were the proposals for settling the dispute. The union contested that these were essentially

[1] (2012) 33 ILJ 140 (LAC) at 150-151

addressed in the discussions which followed. I have two difficulties with this approach. Firstly, the declaration of dispute is a signal to the respondent party that matters have come to a head on certain issues between them. Like the orange warning light on a traffic light, it signifies that however matters have been proceeding to date, things are about to change. Secondly, the clear identification of demands and the proposed resolution provides clarity for the way forward. The union's letter of 27 February 2014 did not meet these requirements. The difficulty with relying on the un-minuted discussions of what took place in meetings after that agenda notice as a basis for arguing that there was substantial compliance, is that, it lacks the very clarity which a dispute notice, like a strike notice provides. I am not satisfied on the available evidence that there was substantial compliance with the provisions of the agreement

[15] Accordingly, I am satisfied that the applicants have established a *prima facie* right to the relief sought, which does not require the union to abandon any intended strike action altogether but is only prevented from doing so before it has completed the dispute process set out in clause 15 of the recognition agreement.

Irreparable harm and balance of convenience

[16] Had the union withdrawn the referral to the CCMA and simultaneously complied with clause 15.2 of the agreement, it would have been in a position to initiate the dispute procedures of the LRA within a week assuming that the parties did not resolve the dispute at a meeting provided for in clause 15.3 of the agreement. I do not think that this is unduly onerous for the union to comply with, especially given that the dispute has had a relatively long gestation period. On the other hand, it is unlikely that the applicants would be able to recover any economic loss resulting from unprotected strike action, if they were ultimately successful in obtaining a final interdict.

Costs

[17] Although the applicants have been successful I do not believe that the union's opposition to the application was in bad faith given that it raised

genuine issues of dispute relevant to whether or not the applicants were entitled to the interdict. Consequently, a costs order would be inappropriate in my view.

Order

[18] Consequently, an order is granted as follows:

18.1 Dispensing with the provisions of the Rules of the above Honourable Court relating to time and manner of service referred to therein and enrolling the matter as one of urgency in terms of Rule 8 of the Rules of Conduct of Proceedings in the Labour Court.

18.2 Condoning the non-compliance with section 68(2) in so far as it is found to be applicable.

18.3 Declaring the intended strike action by the Third Respondent and the Fourth to Further Respondents planned for 19 May 2014 commencing at 06h00 at the Applicant's head office situated at 5 - 8 Wolseley Street, Woodmead East, Sandton, Johannesburg, and at all branches within the Republic of South Africa to be unlawful.

18.4 Interdicting the Third and Fourth to Further Respondents from participating in the planned strike of 19 May 2014 until such time that they have complied with the dispute resolution provisions set out in the recognition agreement which binds them.

18.5 Declaring the participation of the Fourth to Further Respondents planned strike of 19 May 2014 to constitute a breach by them of their contracts of employment with the Applicants.

18.6 Declaring that the Third Respondent's dispute referral to the First Respondent and the certificate of non-resolution issued by the Second Respondent under case number GAEK 1949-14 is premature in that the Third Respondent failed to comply with the dispute resolution provisions set out in the recognition agreement which binds them.

18.7 That the orders prayed at paragraphs 3, 4, 5 and 6 in this Notice of Motion operate immediately as a *rule nisi* pending the return date of the *rule nisi* on 8 August 2014.

18.8 Directing that an order granted in terms of this motion be served upon the Third Respondent by transmitting it by way of a telefax to its head office and at fax number 011 331 5998.

18.9 Directing that service upon the Fourth to Further Respondents to be done by persons nominated by any one of the Applicants by reading a copy of the order to so many of the Fourth to Further Respondents who may be gathered at its head office situated at 5 and 8 Wolseley Street, Woodmead East, Sandton, Johannesburg and at its branches within the Republic of South Africa.

18.10 Directing further that service on the Fourth to Further Respondents to be done by affixing a copy of an order of this Court on so many of the Applicants' notice boards as are accessible to them.

18.11 Each party must pay its own costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS: F Bhoda instructed by Norton Rose Inc

FIRST RESPONDENT: K Mkhize of Bowman Gillfillan Inc