REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: J 2903-13

In the matter between:

IMPERIAL GROUP (PTY) LTD T/A IMPERIAL CARGO SOLUTIONS	**Applicant**
and	
SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION	**First Respondent**
PERSONS LISTED IN ANNEXURE "A"	**Second Respondent**

Heard: 15 May 2014

Delivered: 02 June 2014

Summary: (Provisions of s 64(4) of the LRA akin to a strike notice and must meet the same standards of clarity – protected strike pursuant to a s 64(4) referral is only protected for the duration of the relevant time period in s 64(1)(a) of the LRA)

JUDGMENT

LAGRANGE, J

Order

[1] This Matter Concerns a Strike Interdict, in which the Applicant Seeks confirmation of a *Rule Nisi* Originally issued on 17 December 2014. The original return day was 27 February 2014, but by agreement the parties agreed to extend the rule until 15 May 2014. The court further extended the rule in interim orders on 20 May 2014 and 30 May 2014.

Brief chronology

[2] On 17 December 2013, the union issued a notice to the applicant which read:

> *"**UNILATERAL CHANGE TO TERMS AND CONDITIONS OF EMPLOYMENT***
>
> *Dear Sir*
>
> *Kindly take notice that members have reported that the company has unilaterally changed the previous condition of paying shunting money to drivers at Distel contract, and that you have tempered with the prior practice a manner which assistance allowance should be utilised.*
>
> *We therefore serve to yourself a referral form as a 48 hours notice to restore or not to implement an intended change of any previous condition, 48 hours will be calculated as from today 17 December 2013, and should you fail to comply with a notice your total operation will embark to legal industrial action starting from 20 4H00 in midnight of Thursday, 19 December 2013.*
>
> *Trusting the above is in order"*

(*sic*)

[3] On the same day that the notice was issued, the applicant referred a dispute to the National Bargaining Council for the Road Freight and Logistics Industry (' the bargaining Council'). The applicant was clearly seeking to invoke the provisions of section 64 (4) of the Labour Relations

Act 66 of 1995 ('the LRA') in terms of which a union which refers a dispute about a unilateral change to terms and conditions of employment to the relevant bargaining Council may require the employer not to implement the change until the ordinary periods for conciliating a dispute in terms of section 64 (1) (a) have expired. If the employer fails to heed the union's demand within 48 hours of receiving it, the employees may embark on a protected strike.

[4] In the original founding affidavit, the applicant simply sought to challenge the strike notice on the basis that no certificate of outcome had been issued by the bargaining Council. This was clearly a misconception of the effect of section 64 (4) read with section 64 (3) (e) of the LRA. In a supplementary affidavit filed later on 19 December 2014, the applicant advanced other grounds why the strike was unprotected. These were:

4.1 The applicant was ignorant of what the term "shunting money" referred to and therefore had no idea how it could give an undertaking to revert to the status quo on that claim.

4.2 The applicant did not alter the practice or manner in which a so-called assistance allowance was utilised, but had reiterated an existing rule that drivers were not allowed to have passengers in the vehicle cabin.

[5] The applicant did mention that there was a Guard Fee collective agreement between it and the union in terms of which certain drivers in a particular division of the firm were entitled to a weekly guard fee. In terms of clause 7 of that agreement, drivers who were entitled to the allowance received it "...in lieu of no assistant being on the vehicle and for performing her duties such as tarping and untarping (including strapping) which might be performed by the driver or paid for by the driver".

[6] The applicant also contended that the strike had been initiated maliciously by the union official issuing the strike notice, who it claimed had ‘an axe to grind’ with the applicant following his dismissal in 2011 by the applicant, which formerly employed him.

[7] With the filing of answering and replying affidavits some of the factual obscurity in the original application was clarified.

[8] As regards the convoluted reference in the strike notice to the assistance allowance, the union claims that the applicant tampered with the practice in terms of which the assistance allowance was utilised by making it a rule that "The Driver Is the Only person allowed in cab. No Assistants (except where permanently employed as an assistant)". The union was of the view that the prohibition on temporary/ad hoc truck assistants being in the vehicle was a clear contravention of the Guard Fee Agreement.

[9] The Guard Fee agreement itself makes no reference to the issue of transporting assistance in the vehicle. It would seem that the union was trying to suggest that there was some relationship between the entitlement to the Guard Fee and the necessity of allowing temporary truck assistants to ride in the truck cab. However even though the union had an opportunity to make the connection clear, the answering affidavit unfortunately it did not do so.

[10] Secondly, the so-called "shunting money" took on a more concrete form. According to the respondents, long-distance truck drivers working on the Distell contract are paid "shunting money" whenever they are required to do local distance trips while they were waiting for the processing of their long-distance trips by the applicant and for the loading of their long-distance vehicles. On the drivers pay slips these monies were recorded as "trip fees".

[11] The union claims that in November 2013 the employer had told the drivers that it intended to change their conditions of employment by withdrawing the payment of shunting money. As evidence thereof the applicant provided payslips of a driver, one of which showed that he had received a payment for trip fees, whereas the other had no trip fee payment. It also provided copies of “Daily Shunting” slips bearing the applicant’s corporate logo and containing a written entries and payment calculations which correspond trip fee payments on a payslip. On this basis, the respondents question how, Mr L Hollander, the deponent to the founding affidavit could have claimed complete ignorance of shunting moneys.

[12] In reply, Hollander continued to profess his ignorance of the term and provided no explanation why the company produced daily shunting slips

which were clearly used as the basis for calculating trip fees. Instead, he continued to argue that in the absence of conciliation, the applicant could not be sure what the reference to shunting money referred to and expresses the view that the term was used deliberately rather than the well-known term' trip fees', which appeared on payslips.

[13] The applicant also refer to an enforcement award of 25 October 2013 which appears to have concerned the employer's previous non-compliance with the bargaining Council collective agreement governing overtime. The enforcement award issued by the arbitrator ordered the applicant to comply with clause 35 of the bargaining Council agreement by ensuring that "...all of its employees are remunerated ordinarily (*sic)* and overtime is implemented from one December 2013."

[14] Further, the dispute which the union had referred to the bargaining Council in terms of section 64 (4) of the LRA had been conciliated on 4 February 2014. According to the arbitrator's ruling of 13 February 2014 (case number GPRFBC 28516), the union had alleged that the unilateral change concerned stopping the incentive payment of "shunting" and stopping drivers from transporting casual employees on the company's truck. The applicant raised a preliminary points arguing that the dispute could not be entertained by the arbitrator because of the earlier enforcement award of October 2013.

[15] According to the arbitrator's summary of the applicant's submissions, it appeared that it had justified the withdrawal of the trip fees because all incentive payments had to fall away once it had been ordered to remunerate employees 'ordinarily' and pay them overtime in terms of the bargaining Council agreement. As regards the second issue of the transportation of casual workers, the applicant had submitted that it was practice amongst drivers which stopped because of the risk of third-party liability in the event of an accident. The respondent had further argued that even though casual labour could be used, casual labourers could not be transported in the applicant's vehicles. It further submitted that ceasing the practice could not be interpreted as a change of terms and conditions of employment.

[16] In reply the union and submitted that the enforcement award did not apply to drivers when they were doing local trips and according to the new Council did have the jurisdiction to entertain the dispute about the removal of the shunting allowance. The union agreed on the practice regarding casual workers being transported on the vehicle.

[17] In arriving at her ruling that the bargaining Council did not have jurisdiction to entertain the dispute, the arbitrator reasoned as follows:

17.1 On the issue of the trip allowance, the union had not presented any evidence to support its argument that the enforcement award only applied to drivers when they were doing long-distance trips whereas the award itself stated that the order was applicable to 'all' employees, which tended to support the employer's argument that the order impacted across the board on all drivers. The arbitrator suggested that the union's real problem lay with the enforcement award.

17.2 On the question of the transportation of casual workers, the arbitrator was satisfied that it was common cause that it was the practice of drivers to transport casual workers on the company vehicle and consequently the issue had incorrectly been categorised as a change of conditions of employment.

[18] Effectively, the arbitrator concluded that the driver's entitlement to 'trip fees' was an issue that had been determined by the October enforcement award, and that the issue concerning the transport of casual workers did not concern a change to conditions of employment.

[19] SATAWU also attacked the employer for not complying with of the LRA which requires the applicant to give written notice of its intention of bringing the application and criticises the application as being hopelessly premature because it was made without responding to the union's request not to implement the unilateral variation of terms and conditions it accused the applicant of. As such, it had no clear right to the interdict. Moreover, it argued that all the applicant had to do was to reverse the changes it had made to avoid the strike so it was facing no imminent harm.

[20] In reply, the employer raised a further objection to the union being permitted to strike pursuant to the strike notice issued on 17 December 2013, because the period during which it would have been permitted to strike in terms of section 64 (4), namely the ordinary conciliation period provided for in section 64 (1) (a) has expired. This is considered below as it arises as an issue even if it had not been raised by the applicant.

Evaluation

[21] The first point which must be made is that the applicant disingenuously raised the two bargaining Council awards only in its replying affidavits, when clearly it should have placed these matters before the court in a supplementary affidavit before the applicant filed an answering affidavit. The union's answering affidavit pertinently draws the court's attention to the fact that the applicant was given leave to supplement its founding papers on 19 December 2013 but had not done so. In its replying affidavit, the applicant simply ignores this issue and fails to explain why it did not supplement its founding papers further, but then proceeds to raise entirely new issues in reply. In keeping with the well-known principles set out in ***Plascon-Evans Paints v Van Riebeeck Paints*** **1984 (3) SA 623 (A)**, which apply to the determination of matters of fact where final relief is sought, I should disregard the fresh allegations about the awards which the applicant ought to have included in a supplementary affidavit.

[22] The cardinal issue which remains for the purposes of making a final order is whether the union had satisfied the requirements of section 64 (4) when it referred a dispute over unilateral change to terms and conditions to the bargaining Council and simultaneously demanded the reinstatement of the status quo regarding the issues in question. At this stage, I am no longer concerned with the issue whether or not interim relief ought to have been granted initially. The issue is whether on the contents of the affidavits, which can be properly admitted as evidence, a final order can be granted.

[23] The strike notice issued by the union under section 64 (4) was not a model of clarity. I am inclined to agree that it is improbable the applicant did not know what the term shunting money referred to. It provides no satisfactory explanation for its own forms which used the term and which were used to

calculate what was perhaps more accurately called the “trip fees”. The union for its part explains the connection between the daily shunting slip and the trip fees but does not explain why it did not refer to the withdrawal of trip fees, which is the way the payment is actually reflected on driver’s pay slips. It must also be mentioned that neither party provided any indication that there were any discussions preceding the issuing of the strike notice, in terms of which the content of the notice might have been more readily understood.

[24] Leaving aside the somewhat obscure reference to "shunting money", the union’s other reference to what was in fact an issue concerning the transportation of casual employees was extremely poorly expressed. The way it is expressed makes it appear as if it is referring to the payment of an allowance for assistance. In my view, this would explain why the applicant made reference to the Guard Fee Agreement in its original supplementary affidavit. That agreement seems to provide a payment to drivers in circumstances where they might use a third party's services to perform the duties for which they receive the Guard Fee. In this regard, I cannot attribute any deliberate misinterpretation on the part of the applicant of the second demand.

[25] Drawing on the principles governing strike notices set out in the LAC judgment in ***Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union (2)*****(1997) 18 ILJ 671 (LAC)**, which interpreted the purpose of the warning as affording the employer an opportunity to deliberate on the implications of strike action and on whether or not to accede to the employees' demands, Van Niekerk J has expressed the view that:

> *“[27] The same purposive approach adopted by the Labour Appeal Court requires that a strike notice should sufficiently clearly articulate a union's demands so as to place the employer in a position where it can take an informed decision to resist or accede to those demands. In other words, the employer must be in a position to know with some degree of precision which*

demands a union and its members intend pursuing through strike action, and what is required of it to meet those demands."[1]

[26] I agree with this approach. It is clear that the letter claiming the unilateral alteration of terms and conditions was drafted with little concern about creating clarity. In respect of the second issue it was not even clear what the union was referring to, let alone what the employer had to do to avoid a strike in connection with that matter. In this instance where the demand under s 64(4)(a) to restore the *status quo* fulfils the same role as a strike notice and where it is issued prior to any conciliation process taking place in which the precise nature of the issues in dispute can be clarified, the request to restore the *status quo* should be drafted with even more care for the avoidance of doubt about what measures the employer must reverse or not implement. For this reason I am satisfied that neither the referral form nor the covering letter of the union of 17 December 2013, which serve a similar purpose to a strike notice because the union is supposed to identify the terms and conditions it claims have been unilaterally altered, met the requirements of section 64 (4) by identifying the terms and conditions in question clearly enough to avoid ambiguity.

[27] By reason of non-compliance with s 64(4)(b) the applicant was entitled to interdict the strike and a strike pursuant to that referral would be unprotected at least in so far as the issue relating to casual assistants being able to be transported on company vehicles is concerned.

[28] On the first issue, I believe that the applicant probably did know what the "shunting moneys" referred to and the union was entitled to embark on strike action on that issue, based on the admissible evidence before me at least prior to the arbitrator's ruling of 13 February 2013. Ignoring for present purposes any future consequences of that award, after the finalisation of the conciliation phase the opportunity to strike in terms of the request to restore the status quo under s 64(4) would have passed and a fresh strike notice would have to be issued. Thus, even though the union

[1] ***SA Airways (Pty) Ltd v SA Transport & Allied Workers Union* (2010) 31 *ILJ* 1219 (LC)** at 1228.

might have embarked on a protected strike in respect of the trip fees that strike would only have been protected until the expiry of the relevant period of the conciliation phase described in s 64(1)(a) and my finding in this regard only has a bearing on that period.

[29] I must point out in passing that whether strike action in respect of the issues which formed the subject matter of the referral of 17 December 2014, might be the subject matter of protected strike action after 13 February 2014, is not a matter within the ambit of this judgment, which is confined to the protected status of strike action within the time period circumscribed by s 64(4) and s 61(1) of the LRA.

Costs

[30] Since the parties are both partially successful, it would not be just and equitable in my view to make an adverse cost award against either of them.

Order

[31] I find that the first respondent's request to the applicant not to implement unilaterally a change to terms and conditions in respect of the issue of permitting part-time/ ad hoc casual workers to ride in company trucks ('the first issue') did not comply with s 64(4)(a) of the LRA, but the equivalent request in respect of the request to restore the trip fee payments ('the second issue') did comply therewith.

[32] Accordingly, the rule interdicting the respondents from participating in strike action in terms of s 64(4) in relation to the first issue is confirmed for the period from 19 December 2013 until 13 February 2014 and the rule interdicting the respondents from participating in strike action in terms of s 64(4) of the LRA in relation to the second issue for the same period is discharged.

[33] No order is made as to costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: C Roodt instructed by AM Spies Attorneys

For the Respondents: MM Baloyi of MM Baloyi Attorneys