REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Reportable

Case no: J 2883/13

In the matter between:

AIR CHEFS (PTY) LTD **Applicant**

and

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION **First Respondent**

THE INDVIDUAL RESPONDENTS WHOSE NAMES APPEAR ON ANNEXURE "A" TO THE NOTICE OF MOTION **Second to further Respondents**

Heard: **16 May 2014**

Delivered: **09 June 2014**

Summary: (Urgent – strike – proposals on wage adjustments in consequence of job grading not a demand for a general wage increase even thought wages would increase if the demand was accepted – Clauses in main agreement dealing with general increases not regulating implementation of in-house grading exercise – strike not prohibited on this account – Clause requiring all terms and conditions to be negotiated at bargaining council nonetheless applicable – strike unprotected for that reason – rule confirmed - Costs)

JUDGMENT

LAGRANGE, J

Introduction

[1] This matter concerns an application for a final interdict to prevent strike action which the respondents' union and its members had intended embarking on in December last year. In October 2013, the union referred a dispute over job grading to the Bargaining Council Restaurant Catering and Allied Trades (' the bargaining council'). The dispute was unsuccessfully conciliated on 4 December 2013 and on 12 December the union gave the applicant 48 hours and 2 minutes notice of its intention to strike with effect from 16H00 on Saturday 14 December. The applicant provides catering services to the airline industry both domestically and internationally, 24 hours a day and 365 days a year.

[2] The strike was scheduled for a critical weekend as it was the weekend of national mourning during which the former State president Nelson Mandela was being buried. A shutdown of the applicant's catering service to the national airline carrier, South African Airways ('SAA'), which was the official air carrier for mourners to the funeral, could have caused significant embarrassment and adverse publicity for the airline apart from the other normal consequences of strike action. The applicant is a subsidiary SAA.

[3] The applicant obtained an interim order preventing the strike action on the basis that it had made out a *prima facie* case that the strike action was unprotected. The matter was set down for hearing 28 February 2014, being the return date. However the parties agreed to extend the interim order to 16 May 2014 to allow the applicant to file its replying affidavit. The respondents had only filed their answering affidavit two days prior to the return date.

The nature of the dispute giving rise to the strike

[4] The central question for the termination is whether the issue giving rise to the strike is one that the respondents are entitled to embark on protected

strike action over. The determination of this question rests fundamentally on whether or not the matter is one falling within the scope of the existing main collective agreement of the bargaining council. The Minister of Labour declared the main agreement binding on all employers and employees falling within the scope of the bargaining council with effect from 17 October 2011 until 31 August 2014.

[5] In the answering affidavit it was alleged by the union that in fact the applicant and its employees did not fall within the scope of the bargaining council and consequently did not fall within the scope of the main agreement. However, the submission was abandoned at the hearing of the application and arguments proceeded on the basis that the respondents did fall within the scope of the bargaining council and therefore the main agreement was applicable to, and binding on, them.

[6] Clause 3 of the main agreement deals with industrial action. It reads:

> *"(1) No person bound by the provisions of this Agreement entered into by the parties shall engage in or participate in a strike or lockout or any conduct in furtherance of a strike or lockout in respect of any matter regulated by this Agreement for its duration.*
>
> *(2) The forum for negotiation and conclusion of substantive agreements on wages, benefits and other conditions of employment between employer and employer's organisations on the one hand and employees and trade unions on the other hand, shall be the Bargaining Council and not at shopfloor level.*
>
> *(3) No trade union or employer's organisation may attempt to induce or compel or to be or be induced or compelled by any natural or juristic person or other organisation, by any form of strike or lockout, to negotiate the issues referred to in paragraph 1 above, at any level other than this Bargaining Council."*

[7] Further, section 25 (7) (i) provides:

> *"(7)* ***Peace obligation****: Neither an employer or a trade union or its members shall cause, sanction or participate in any strike or lockout directed against the other party:*

(i) concerning any issue which is the subject matter of a substantive agreement during the period of such agreement and, in particular, where the issue has been negotiated at the council and the collective agreement has been concluded in this regard;"

[8] The applicant contends that the strike called by the respondents is in breach of the provisions of sub-clauses 3(1) and (2) and 25 (7) (i) above and accordingly is contrary to the provisions of section 65 (1) (a) of the Labour Relations Act, 66 of 1995 (' of the LRA') which states:

"(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if-

(a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute."

[9] The applicant contends that the respondents' demand for implementation of the job grading amounts to a demand for a wage increase and nothing more. As such it amounts to a demand concerning something regulated in the main agreement and cannot be the subject matter of protected strike action. In effect, the applicant argues that any demand which has the consequence of revising wages upwards falls within the ambit of the main agreement and therefore cannot be negotiated at company level.

[10] The respondents retort that the main agreement does not deal with job grading systems and that even if it did, it would be of little assistance because the job categories in the main agreement do not correspond with the job categories of the applicant's business, which is part of the reason the applicant engaged the expertise of independent consultants to grade jobs. In reply, the applicant baldly denies this and claims that the job grading exercise was undertaken to remedy disparities created by the job grading which took place in 2009. The allegations of both parties on this issue are broadly stated and for the purposes of this judgement it remains indeterminate what correspondence there is, if any, between the job categories and commensurate salaries in the main agreement and the job grading undertaken by the applicant. Notably, there is only one reference to the term 'grade' in the main agreement, namely clause 5 (5) which

states: *"...nothing in this agreement shall be so construed as to preclude an employer from requiring his employee to perform work of another grade."* However, there is no other reference to job grades in the wage schedule of the main agreement to suggest the jobs and associated minimum wages described there had actually been graded, rather than simply being the result of negotiations. It is apparent also that not all jobs at the applicant's workplace are described in the main agreement, but the extent of this lack of correspondence is not clear.

[11] The portion devoted by both parties in their respective pleadings to the actual issue in dispute does not provide much elucidation and at the hearing of the matter I was unable to obtain any greater clarity from either of the parties representatives about the details of the implementation of the job grading system, which the applicant claims to have done, or of the respective demands or proposals of the parties relating to the issue of implementation. The pertinent aspects of what can be gleaned from the limited information made available in the founding, answering and replying affidavits is summarised below.

A job grading exercise had been conducted in 2012 and the parties have been engaged with each other on implementing it. This is also not the first job grading exercise conducted by the applicant as there was a previous one done in 2009. The parties are at odds about the reason for the 2009 exercise, save that they agree it was intended to remedy 'disparities' which existed. The applicant also does not dispute that the flaws in the 2009 grading exercise led to its Human Resources General Manager approaching the union shop stewards and advising them that he had done a payroll audit which led him to conclude that another job grading exercise was required and the services of PE Corporate Services were engaged for this. On the applicant's version, which I must accept in terms of the rule in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** [1], the report was presented to the union and the outcome of the grading exercise was discussed. Although the union does not admit having seen the report, in the answering affidavit it is stated:

[1] **1984 (3) SA 623 (A)**

"What SATAWU has gathered in discussing with Air Chefs is that the outcome of the grading exercise is that the workers are in low, average and higher wage bands. Air Chefs must bring all the workers to the average band."

[12] It appears to be common cause that the report recommended certain salary bands be adopted which would result in upward wage adjustments. The applicant maintains that it is not bound by the recommendations of the report and that even though it has adopted the job grading during 2013, it has not implemented any wage increases. Although, the applicant does not explain how it was able to implement the new job grades without adjusting any salaries or amending existing salary bands, it maintains that implementing the job grading system and adopting certain salary bands in relation to the job grades are two "mutually exclusive processes", and the implementation of wage increases is something within its own discretion. According to the applicant, recommendations in the report for salary increases did not create an entitlement to those recommended increases. The union, for its part, accuses the applicant of walking away from the job grading process because of the recommendations that upward adjustments had to be made for some employees. The applicant argues that the union's demand is no different from relying on the consumer price index to demand an increase in salaries.

[13] The applicant does admit approaching the union to discuss salary increases but claims it only did so as a desperate effort to avoid the strike action. This was something it did not reveal in its original application and only deals with in its reply because the union attached the applicant's proposed settlement of the dispute. The material content of the applicant's last minute proposal to avert the impending strike reads:

"2.1 The company will increase the salaries of employees below the average salary for the grade over the next years in order to address the salary anomalies related [to] the previous job grading system as follows:

2.1.1 The salaries of employees who are below the average salary for the grade will receive the salary increase affected to the

bargaining council from April 2014 +70% of that increase over the next year as until the employee salaries equal to the average of the grade.

2.2 The salaries of employees were above the average salary for the grade will receive a salary increase affected to the bargaining council from April 2014minus 70% of that increase over the next years until the employee salaries equal to the average of the grade."

[14] No explanation is provided by the applicant why it failed to mention this in its founding papers, which it ought to have in circumstances where the interim application was determined solely on its version. In any event, the union says it rejected this proposal because it would mean it would take eight years to complete the upward adjustment. In respect of those employees earning above the average, the union maintains that they should at least receive inflation related increases and where possible be accommodated into positions paying the remuneration that they already earn, for which they are competent or could become competent in with minimal training.

Evaluation

[15] The provisions of clause 5 (1) of the main agreement determine minimum wages payable to certain categories of employees identified by job titles. Clause 5 (9) of the main agreement also provides for minimum percentage increases payable to all employees other than certain classes of waiter. These are the only provisions in the main agreement, which was attached to the founding papers,that deal with wage increases.

[16] The applicant has adopted its own grading system for its employee's jobs. It maintains that any adjustment of salaries or salary bands arising from the job grading system is an entirely separate exercise and within its sole discretion to determine. On the one hand it contends that it lies within its power to determine the associated salary bands and adjustments, if any, which could include upward adjustments. On the other hand, it maintains that when upward adjustments are proposed by the union in relation to the

graded jobs such proposals simply amounts to a proposal for wage increases, which is a matter that has been, and can only be, determined at the bargaining council. Thus, it seeks to reserve to itself an exclusive right to implement whatever salary adjustments it deems necessary without reference to the bargaining council negotiations, but insists that if the union wants to resort to industrial action over its counterproposals, it may not do so because wage increases are a matter dealt with in that forum. The first point that must be made in this regard that, apart from the apparent duality in the employer's stance, the mere fact that an employer regards a matter as falling within its discretion, does not mean that the subject over which it seeks to exercise that discretion cannot, as a matter of principle, also be a matter of mutual interest susceptible to negotiations.

[17] In any event, the employer's main contention is that the demand is simply a disguised demand for a wage increase. It is true that, the union's proposal would have the effect of increasing the wages of those employees earning below the average salary for a grade. It also patently clear that the main agreement does not deal with increases relating to the adjustment of salaries of employees to align them with their job grades as determined in a company level job grading exercise. It is telling that, the applicant's own proposal, albeit made as a desperate measure to avoid a strike, implicitly recognises that the general increases determined at the level of the bargaining council negotiations will not address the adjustment process relating to the job grading exercise. The 70% premium on the bargaining council increase, which it proposed, plainly recognises that the minimum annual increases determined at the council do not have a direct bearing on any realignment of salary bands and actual salaries intended to iron out disparities, which the job grading exercise was intended to address.

[18] I agree there may be instances when, for instance, a demand is made for the establishment of a previously non-existent allowance where the payment of such an allowance is without any pre-conditions being met which make it indistinguishable from a demand for a general wage

increase.[2] In cases like that, couching the demand as an allowance, does not disguise the true import of the demand. However, it is overly simplistic to argue that simply because the effect of a demand would be to increase the wages of some employees, that the demand is simply a disguised attempt to achieve a general wage increase of the kind that is negotiated at the bargaining council. In this instance, I am satisfied that the nature of the demand is one that is directly related to an in-house grading exercise and the adjustment process to eliminate disparities identified in that exercise, is not a matter which is currently regulated by the main agreement. The wage increases dealt with in the main agreement are general annual increases which are not related to the adjustment process arising from an in-house grading exercise. Consequently, I am satisfied that the union's demand does not relate to a matter regulated by the main agreement in terms of clause 3(1) thereof.

[19] However, clause 3 (2) of the main agreement goes further and dictates that the only forum for the negotiation of substantive conditions of employment is the bargaining council. Even though the union proposal does not amount to a disguised attempt to negotiate a general increase, the effect of any adjustments or realignment of salaries with new job gradings is obviously a matter affecting wages and conditions of service of those employees. As such, the main agreement prescribes that such a matter should be negotiated at the bargaining council, and clause 3 (3) prohibits strike action for the purpose of compelling negotiation at any other level other than the bargaining council. This provision presents a bar to the union pursuing its demands in relation to the implementation of the grading system at company level. How workable this is given that neither the union nor the applicant are parties to the bargaining council is another matter but as the agreement stands it is binding on both parties and in the absence of an exemption to allow the negotiations to proceed, the union is

[2] See, for example, the consideration of a potentially disguised demand in ***BMW SA (Pty) Ltd v National Union of Metalworkers of SA on behalf of Members*** **(2012) 33 *ILJ* 140 (LAC)** at 146-147, paras [24] – [27], though in that instance the demand for a transport allowance was found not to be a disguised demand for a wage increase.

bound by this provision and accordingly cannot embark on strike action in pursuit of its proposals on the job grading implementation in so far as it affects salaries. The wisdom of the prohibition in clause 3(3) of the main agreement when applied to a case like this which pre-eminently concerns a matter pertaining to only one employer and its employees may appear doubtful, but collective agreements are a consequence of negotiations and will not always provide solutions for all situations. Anomalies can only be addressed through the exemption process.

[20] In the circumstances, the rule must be confirmed.

Costs

[21] The prohibition of the respondents' right to strike over the wage adjustment process pursuant to the job grading exercise was plainly not a simple matter to determine as the applicant suggests it was and in the result it cannot be said that the union's opposition was frivolous or that it was pursuing a demand that concerned a matter regulated by the main agreement. The union can be criticised for its late filing of its answering affidavit two days before the return date of the matter, but equally the applicant's conduct in failing to disclose its own proposal to deal with the dispute was improper in circumstances where the interim application was determined on its papers alone. Consequently, I think there is good reason in this instance that the parties must bear their own costs.

Order

[22] Accordingly, it is ordered that:

22.1 the intended strike of the Second to Further respondents in respect of the dispute, which was referred to the bargaining council on or about 10 October 2013, is unprotected and unlawful;

22.2 the Second to Further Respondents are interdicted and restrained from participating in the said strike at the applicant's premises;

22.3 the Second to Further Respondents are interdicted and restrained from participating in any conduct in pursuance of the said strike;

22.4 the Second to Further Respondents are interdicted and restrained from encouraging, participating in, or promoting the said strike;

22.5 the First Respondent is to publicly call upon the Second to Further Respondents not to participate in the said strike or any conduct in furtherance of such strike.

[23] Further, the parties are to pay their own costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: J Botesof Cliff Dekker Hofmeyr Inc.

FIRST RESPONDENT: S Mabaso of Mabaso Attorneys