REPUBLIC OF SOUTH AFRICA

Reportable
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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 1662/14

In the matter between:

IMPERIAL GROUP (PTY) LTD

T/A IMPERIAL CARGO SOLUTIONS Applicant

and

SATAWU First respondent

The persons listed in Annexure "A" Second and further respondents

Heard: **24 July 2014**

Delivered: **1 August 2014**

Summary: Strike – unilateral change in conditions of employment – LRA ss 64(4) and 65(1)(c) – whether union can embark on protected strike over issue in dispute after 30 days to restore status quo had elapsed.

JUDGMENT

STEENKAMP J

Introduction

[1] The respondent trade union, SATAWU (the South African Transport and Allied Workers Union), acquired the right to strike in terms of s 64(4) of the Labour Relations Act[1] when it referred a dispute about alleged unilateral changes to their members' terms and conditions of employment by the applicant, Imperial, to the National Bargaining Council for the Road Freight Industry. Imperial did not, as is required by s 64(4), restore the previous conditions within 48 hours. Instead, it obtained an interim order declaring that threatened strike unprotected. The rule *nisi* was eventually discharged. Can the union now call its members out on strike based on the same referral to the Bargaining Council and the fact that 30 days had elapsed?

Background facts

[2] Imperial had a long-standing practice to pay its drivers "trip fees" or "shunting money"[2], ostensibly instead of overtime. The agreement is not embodied in writing. SATAWU acknowledges that the practice existed, but does not accept that it or its members accepted that this payment was in lieu of overtime.

[3] On 30 March 2010 SATAWU complained to the Bargaining Council that Imperial did not pay overtime and was in breach of the collective agreement that was binding on the parties (the Main Agreement). The Council issued a compliance order on 20 October 2010 ordering Imperial to pay overtime in compliance with the Main Agreement. After some further skirmishes, a Council arbitrator, Prince Kekana, issued an enforcement arbitration award on 25 October 2013, effective 1 December 2013. That award compels Imperial to pay overtime but does not mention trip fees.

[1] Act 66 of 1995 (the LRA).

[2] Although Mr Louis Hollander, Imperial's human resources director, initially denied any knowledge of the term "shunting money", he acknowledged that it is used interchangeably with the term "trip fees" after it was pointed out to him that the term appears on the company's own documentation.

[4] From 1 December 2013 Imperial did pay overtime in compliance with the Main Agreement, but at the same time it stopped paying its drivers trip fees. The result was that the drivers earned less than before.

[5] On 17 December 2013 SATAWU referred a dispute to the Council in terms of s 64(4) of the LRA. It stated that: "The company has unilaterally changed the previous practice of paying drivers shunting money at Distell contract and assistant allowance." The union stated that the result it desired was for the "company to restore previous conditions or not to implement assistance allowance practice". The referring union official signed the clause concerning disputes about unilateral changes to terms and conditions of employment in terms of s 64(4) that reads:

> "I/we require that the employer party not implement unilaterally the proposed changes that led to this dispute for 30 days, or that it restore the terms and conditions of employment that applied before the change."

[6] On the same day, the union gave Imperial 48 hours' notice of a strike, should it not restore the *status quo* with regard to the payment of trip fees. Imperial did not restore the *status quo*; instead, it obtained an interim order in this court interdicting the strike. The rule was extended to 15 May and then to 30 May 2014. On 2 June 2014 Lagrange J handed down a judgment in which he discharged the rule *nisi* interdicting the union from calling a strike in relation to the trip fees for the period 19 December 2013 to 13 February 2014.

[7] The relevance of 13 February is that, on that day, the Bargaining Council decided that it did not have jurisdiction to deal with the "trip fees" dispute. The arbitrator, Ms Lorraine Johnston, found that the compliance order was applicable to all employees. That issue had been determined by the enforcement order of October 2013.

[8] The effect of the order granted by Lagrange J on 2 June 2014 is that the union could have embarked on a protected strike in respect of the trip fees until the expiry of the conciliation phase in section 64 (1)(a) of the LRA. That period expired on 16 January 2014. Imperial has appealed against the judgement; but what is important for present purposes, is not the

period during which the *status quo* strike would have been protected, but the question whether the union can go on strike now.

[9] After the rule *nisi* had been discharged, the union issued a fresh strike notice. That strike was due to commence on 5 July. Again, Imperial applied for an urgent interim interdict. Again, Lagrange J granted an interim order on 7 July 2014. That order – as varied on 16 July – reads as follows:

> 1. "The rules relating to the forms and men of service are dispensed with and this matter is dealt with as one of urgency.
> 2. A rule nisi is issued calling on the respondents to show cause on Thursday 30th October 2014 at 10h00 why an order should not be granted in the following terms:
>
> 2.1 Declaring the [union's] notice dated 30th of June 2014 invalid; and
>
> 2.2 declaring in a strike action pursuant to the strike notice dated 30 June 2014 unprotected and unlawful and interdicting, prohibiting and restraining the second two further respondents from participating in any refusal to work or strike action pursuant to the [union's] notice dated 30 June 2014.
>
> 3. The provisions of paragraphs 2.1 and 2.2 shall operate as an interim interdict against the first and the second two further respondents pending the return date.
> 4. The respondents may anticipate the return date on 48 hours' notice to the applicant in terms of the rules of this court.
> 5. The applicant is granted leave to supplement its founding papers if necessary.
> 6. Costs are reserved for determination on the return date."

[10] The union did anticipate the return date as envisaged in paragraph 5 of the court order and rule 8(10). It did so on 11 July 2014, giving Imperial sufficient time to file a replying affidavit, which it did on 24 July (the day of the hearing). The union also supplemented its answering affidavit, although Imperial chose to deliver a replying affidavit rather than supplementing its founding affidavit as provided for in the order of Lagrange J.

[11] Objections were raised about the late filing of these further affidavits. I requested both parties to deliver written heads of argument after the oral hearing of this matter. They did so. Both parties have had the opportunity to consider the further affidavits filed by the other site. Although it is unusual and not to be encouraged, I consider it to be in the interests of justice to take both the further answering affidavit and replying affidavit into account, although they were both filed late.

[12] Imperial asked for the rule *nisi* to be confirmed. It argues that the strike would be unprotected. In addition, it objects to the union anticipating the return date.

Anticipation of the return day

[13] Imperial complained about the fact that the union anticipated the return day. But that right is expressly provided for in rule 8(10) unless expressly ordered otherwise. And in any event, when Lagrange J varied the order at Imperial's request to specifically provide for it to supplement its founding papers, he also included an express order that the union could anticipate the return day on 48 hours' notice.

[14] Not much more need to be said about this complaint. Imperial bases its objection on the High Court rule that is not the same as that of this court. Although this court is of the same status as the High Court, it has its own set of rules. The High Court rules only apply if the Labour Court rules do not specifically provide for a situation. The Labour Court rules do specifically give a party in an urgent application the right to anticipate the return day on 48 hours' notice.

[15] High Court rule 6(12)(c) provides that only a party who was not present in court may anticipate. That is not the case in the Labour Court. Labour Court rule 8 is specifically designed to deal with urgent relief. And what is more, it was designed to deal with urgent relief in a strike context. For example, rule 8(2)(c) provides that the deponent in an affidavit in support of an urgent application must, if it brings an application in a shorter period than that provided for in terms of section 68(2) of the LRA, provide reasons why a shorter period of notice should be permitted. And section

68 (2) provides that the Labour Court may not grant an order interdicting a strike unless 48 hours' notice of the application has been given to the respondent. It is in that context – where a respondent such as SATAWU may not have had sufficient time to deliver comprehensive answering papers – that rule 8(10) provides for it to anticipate the return date.

The legislative framework

[16] Imperial argues that the union's planned strike will be unprotected because its right to a "*status quo* strike" expired on 14 February 2014.

[17] It is necessary to distinguish between two types of strike here. The union initially referred a dispute to the Bargaining Council in terms of section 64(4) read with section 64(3)(e) of the LRA. Section 64(4) provides that:

> "Any employee who or any trade union that refers a dispute about unilateral change to terms and conditions of employment to a council or the Commission in terms of subsection (1)(a) may, in the referral, and for the period referred to in subsection (1)(a) –
>
> (a) require the employer not to implement unilaterally the change to terms and conditions of employment; or
>
> (b) if the employer has already implemented the changes laterally, require the employer to restore the terms and conditions of employment that applied before the change."

[18] The period referred to in subsection (1)(a) is the conciliation period of 30 days, or the period until a certificate stating that the dispute remains unresolved has been issued. In short, if the union refers a dispute concerning the alleged unilateral change to terms and conditions of employment in terms of section 64(4) – as SATAWU did in this case – it can embark on a protected strike after 48 hours if the employer does not comply with the requirement to restore the *status quo ante*. It need not wait until a certificate of outcome is issued or until 30 days have expired.

[19] As the learned authors explain in *Labour Relations Law: A Comprehensive Guide*[3]:

[3] Du Toit et al, *Labour Relations Law: A Comprehensive Guide* (5 ed, LexisNexis 2006) at 304.

"The exemption in section 64(3) does not arise automatically when an employer introduces a unilateral change to terms and conditions of employment; it is triggered only when a party 'requires' the employer in the referral document not to implement the change or to restore the previous conditions of employment. Nor does section 64 (4) apply to changes that may be referred to arbitration or adjudication in terms of the Act; for example, unilateral changes to a collective agreement or changes to 'benefits' that may be stigmatised as unfair labour practices. The reason is that such disputes are excluded altogether from the ambit of protected industrial action [s 65(1)(c)]. Unilateral changes to contracts of employment, in contrast, do fall within the compass of section 64 (4) because they are not arbitrable or justiciable in terms of the Act."

[20] Clive Thompson[4] describes the aim of this status quo remedy thus:

"The object of the provision is two-fold. Its primary purpose is to reduce reflex industrial action by providing a quick administrative counter to a common strike trigger, namely unilateral change to terms and conditions of employment. A secondary purpose is to encourage employers to engage the employees and their representatives in dialogue over workplace change. If an employer bent on quick change knows it is liable to have its plans put on hold or reversed until the issues in dispute have been conciliated under the auspices of an external agency, it may be more inclined to involve those affected directly at the outset."

[21] Grogan[5] also provides a useful summary:

"Section 64(4) and (5) are an attempt to preserve the 'status quo' orders the industrial court was empowered to make under the 1956 Act. The aim of those interim orders was to enable the court to correct unfair labour practices pending their determination by final arbitration. The main difference between the old 'status quo' orders and the present provisions is that the latter are aimed only at a limited range of practices – unilateral changes to terms and conditions of employment – and operate not *pendent lite*, but for a fixed period, that is, until a certificate of outcome is issued, or for 30 days, whichever period is the shorter. Once that period has lapsed, the employer is free to implement the change. *The employee's only remedy is then to strike in support of a demand that the employer restore the status quo ante.*"

[4] Clive Thompson, "Labour-management relations" in Thompson and Benjamin, *South African Labour Law* (Juta, service 41, 2000) AA1-116.

[5] John Grogan, *Collective Labour Law* (Juta 2010) at 173 (emphasis added in the last sentence).

[22] Section 65(1), on the other hand, deals with limitations on the right to strike. No person may strike if –

(a) that person is bound by a collective agreement that prohibits a strike in respect of the issue in dispute;

(b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;

(c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of the LRA; or

(d) that person is engaged in an essential service or a maintenance service.

Evaluation

[23] This court has already held [per Lagrange J on 2 June 2014] that SATAWU did have the right to embark on a protected strike in terms of section 64 (4) in December 2013. I agree. The union followed the correct procedure in terms of that subsection and it alleged that Imperial had unilaterally changed the terms and conditions of service of its members.

[24] The question that arises in this application, though, is whether the union's members can now embark on a strike, long after the time periods envisaged in section 64(1)(a) have expired.

The purpose of s 64(4) and the question of further strike action

[25] I have discussed the purpose of section 64(4) above. In short, it is aimed in restoring the *status quo ante* until statutory conciliation has run its course. If an employer ignores the *status quo* call, as Imperial did in this case, the right to strike may be exercised immediately.

[26] The question is whether the union may now, six months later, strike on the same issue in dispute.

[27] Imperial argues that the issue in dispute – i.e. the failure to pay trip fees – was resolved by the Bargaining Council award of 13 February 2014. The Council found that it had no jurisdiction because the payment of overtime was in compliance with its enforcement order of 25 October 2013.

Therefore, Imperial argues, the issue in dispute has been resolved through arbitration.

[28] But that argument is a *non sequitur.* The Bargaining Council did not resolve the issue over which the union seeks to strike, i.e. whether its members are entitled to trip fees. The Council found that it did not have jurisdiction. It is common cause that the parties are bound by the compliance order compelling Imperial to pay overtime. In oral argument, the court challenged Mr *Roodt* to refer it to any evidence in the 300-odd pages before the court where it was stated that the payment of trip fees and payment of overtime was mutually exclusive. He could not. The fact that Imperial is compelled to pay overtime in compliance with the collective agreement that is binding upon the parties, does not deprive the union of the right to strike over a matter of mutual interest, that is the payment of trip fees.

[29] The conciliation period referred to in s 64(1)(a) has passed. Provided it gives Imperial 48 hours' notice in terms of s 64(1)(c), the union can embark on a protected strike over the issue in dispute, i.e. the payment of trip fees.

[30] The strike is also not prohibited by any of the exceptions in s 65(1). The union is not bound by a collective agreement that prohibits a strike in respect of the issue in dispute. There is no agreement that requires it to be referred to arbitration. And the issue in dispute is not one that the union has a right to refer to arbitration or to this Court in terms of the LRA.

Illegitimate demand?

[31] Imperial argues that the payment of trip fees has been "outlawed" by the Bargaining Council. It cites no authority for the proposition. All that the Council did, was to decide that it had no jurisdiction and to conclude that the October enforcement award compelled Imperial to pay overtime to all its employees. It did not rule that the employees are not entitled to trip fees; even less so that such payments had been "outlawed".

[32] There is no basis for Imperial's argument that it had been "prohibited" from paying trip fees by the Bargaining Council. It has laid no basis for it

argument that the union's demand requires it to act "in breach of the law". The union's demand is not "illegitimate".

Not a unilateral change?

[33] Imperial further argues that the non-payment of trip fees is not a change in terms and conditions of employment because it is "compelled" by a decision of the Council to cease payment of trip fees. Quite simply, there is no such decision.

[34] Imperial's blithe assertion that it paid trip fees "in lieu of overtime" is not borne out by any independent evidence before the court. And the union expressly denies it: its official, Amos Mnyakeni, says in his answering affidavit:

> "The payment of shunting moneys or trip fees to be made in terms of the parties' agreed shunting arrangement is in addition to and not a substitute for, any other amount of overtime pay, night shift allowance, guard fee, etc. to which the individual respondents are entitled in terms of any law, collective agreement or contract of employment."

Demand prohibited by s 65(3)(a)(i)?

[35] The union says that its members are entitled to the payment of trip fees as well as overtime. Imperial says that this amounts to a demand for an increase in wages; that wages are resolved by collective bargaining at national level and not a plant level; and that is strike pursuant to this demand is prohibited by the provisions of sections 65(3)(a)(i) and 65(1)(a) of the LRA.

[36] But that is not the union's position. It does not claim an increase in wages. It says, quite simply, that its drivers are entitled to overtime in compliance with the main agreement; and that there are also entitled to the payment of trip fees in accordance with the practice between Imperial and its drivers. The payment of trip fees is not an issue that is regulated by "any arbitration award or collective agreement that regulates the issue in dispute" in terms of s 65(a)(i). The main agreement – i.e. the collective agreement that binds Imperial and SATAWU – does not regulate the

payment of trip fees. That agreement was reached between Imperial and its drivers at plant level. Section 65(a)(i) is irrelevant to that agreement.

[37] Similarly, the union is not prohibited from striking in terms of section 65(1)(a). The issue in dispute – that is, the payment of trip fees – does not form part of any collective agreement that prohibits a strike.

Conclusion

[38] The union is entitled to strike in support of its demand that Imperial restore the payment of trip fees.

Costs

[39] There is an ongoing relationship between the parties, fraught as it may be. One hopes that they may be able to come to an agreement in the course of collective bargaining rather than resorting to power play. An adverse cost order at this stage may have a chilling effect on those efforts. In law and fairness, I do not consider a cost order to be appropriate.

Order

The rule *nisi* issued on 2 June 2014 is discharged.

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A J Steenkamp

Judge

APPEARANCES

APPLICANT:	A Redding SC and C Roodt Instructed by A M Spies attorneys.
RESPONDENTS:	M M Baloyi (attorney).