REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 779/15

In the matter between:

ANGLO OPERATIONS LTD (KLEINKOPJE COLLIERY) **Applicant**

and

NATIONAL UNION OF MINEWORKERS **First Respondent**

THE PERSONS WHOSE NAMES APPEAR IN ANNEXURE 'A1' **Second and further respondents**

Heard: **14 May 2015**
Delivered: **21 May 2015**

Summary: Strike interdict – urgent application – six demands met – strike unprotected.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant conducts mining operations at Kleinkopje colliery. Its employees who are members of NUM (the first respondent) are on strike. The union has followed the prescribed procedure to go on a protected strike in terms of section 64 of the Labour Relations Act.[1] But the applicant seeks to have the strike declared unprotected because, it says, none of the six demands that form the subject matter of the strike can in law form the subject matter of a protected strike; either because the demands have been met or because they are covered by a collective agreement and therefore fall outside the scope of a protected strike in terms of section 65(3)(a)(i) of the LRA.

[2] The court granted a rule nisi on 21 April 2015. The matter came before me on the return day on 14 May 2015. There is no dispute that it is urgent.

Background facts

[3] NUM has referred two disputes to the CCMA. The first relates to matters of mutual interest, and the second relates to a reconfiguration exercise that the NUM contends amounts to a unilateral change to its members' terms and conditions of employment.

[4] A number of the disputes leading to the strike arise from the appointment of a new general manager, Mr Dirk Miller, in October 2014. The NUM contends that he changed a number of practices introduced by the previous GM, Mr Leslie Martin; and that he unilaterally changed the number of redundancies that would be declared pursuant to the reconfiguration exercise.

[5] The union articulated its demands in its answering affidavit. I will deal with each of those demands in considering the application.

Evaluation / Analysis

[6] As I have noted, the union has followed the process in section 64 of the LRA to call its members out on a protected strike. It referred the relevant

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

disputes to the CCMA; conciliation took place; the matters remained unresolved; and the union gave 48 hours' notice of the commencement of the strike, in writing.

[7] The employer argues, though, that once the issues in dispute which gave rise to the strike have been met, the respondents cannot strike in pursuance of those issues. In *Ceramic Industries Ltd v NCBAWU*[2] the court noted that in terms of section 213 the purpose of the strike must be "remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee". It follows, said the court, that "as soon as the issue in dispute which gave rise to the strike has been settled, any strike which continues beyond this point cannot have such purpose because the whole reason for using such economic muscle falls away". As Clive Thompson[3] has remarked: "The justification for strong-arm tactics having fallen away, the action forfeits its protected status." Each demand therefore has to be considered.

[8] It is also important to point out that, at the hearing of the matter, the company made a formal tender in respect of five of the six demands.

First demand: abandon restructuring

[9] The first demand appears to be that the company must abandon its restructuring exercise at the colliery. That is because the applicant initially communicated to NUM that 62 redundancies would be declared; but upon Miller's arrival, according to the union, he changed this number to 103 positions. This unilateral reconfiguration, it says, affected employees and their shift system. It amounts to a unilateral change to the terms and conditions of employment. The parties have not agreed on the number of positions that would be affected arising from the reconfiguration process.

[10] The applicant has undertaken in a formal tender to discontinue its restructuring exercise. It undertakes to engage the union in a proper

[2] (1997) 18 *ILJ* 550 (LC); [1997] 5 BLLR 547 (LC) at 552. See also *Pikitup (SOC) Ltd v SAMWU (2)* [2013] 11 BLLR 1118 (LC); (2014) 35 *ILJ* 201 (LC).

[3] Thompson & Benjamin, *South African Labour Law* AA1-308.

consultation process as contemplated by sections 189 and 189A of the LRA before embarking on any retrenchment exercise.

[11] Given this tender, the substratum of the issue in dispute has fallen away. The strike has lost its purpose – and therefore its protected status – in respect of this demand.

Second demand: reconfiguration

[12] The second demand relates to the alleged unilateral change to terms and conditions of employment arising from the reconfiguration exercise, and more especially the move from a "4x4 shift" and the resultant loss of a shift allowance.

[13] The employer has tendered to discontinue its reconfiguration exercise with immediate effect. Those employees who no longer work 4x4 shifts as a result of having accepted a transfer to an alternative position will continue receiving a 4x4 shift allowance for a period governed by a collective agreement titled 'the 4x4 shift roster at Kleinkopje Colliery".

[14] The company has also undertaken to engage the union in an appropriate process of consultation should the need exist to examine further reconfiguration.

[15] It seems clear that the company has acceded to this demand as well and the strike loses its protected status in respect of this demand.

Third demand: pre-interview panel

[16] The union says that there was a practice, orally agreed to with the former GM, Martin, that the union would be allowed to have an observer at the "pre-interview panel" preceding recruitment interviews. The company denies such an oral agreement, but has in any event tedered to allow an observer appointed by the NUM to attend the pre-interview panel meeting and interviews for prospective job applicants and applicants for vacant positions.

[17] In so far as the NUM demands the right to also cast a vote as a panellist, the employer has pointed out that such a demand is contrary to the

recruitment policy annexed to the union's answering affidavit. And in any event, both parties accept that the appointment and promotion of personal are not matters of mutual interest.

[18] The union is not entitled to call out its members on a protected strike on this issue.

Fourth demand: health and safety representatives.

[19] The union relies on yet another verbal "prior arrangement" with Martin that two health and safety representatives would be moved as follows:

19.1 one employee to be appointed as a full-time health and safety representative; and

19.2 the second employee to be moved to the VOHE department.

[20] The union says that Miller reneged on this agreement and directed the two employees involved to return to their previous positions.

[21] The employer has pointed out that the redeployment of SHE representatives who have not been re-elected is governed by a collective agreement. Therefore the respondents are prohibited from striking in pursuance of this demand in terms of section 65(3)(a)(i) of the LRA.

Fifth demand: appointment of a second full-time health and safety representative

[22] The company has undertaken in the tender to appoint a second full-time SHE representative by 31 May 2015. This representative will be elected in accordance with the provisions of the Full-Time Health and Safety Representative Collective Agreement. The substratum of this issue in dispute has been settled and the respondents are not entitled to strike in pursuance of this demand.

Sixth demand: bonuses

[23] The union says that it reached an agreement with Martin in 2013 to change the bonus system for foremen and officials from one calculated at a "30%/70% rate" to a 100% monthly bonus system.

[24] The company has undertaken to pay a full monthly production bonus to foremen and officials with effect from 30 June 2015 provided that the parties have reached an agreement as to the calculation of those bonuses.

[25] The union concedes that the parties have not yet reached an agreement as to the formula to be used for calculating the monthly bonus. The part of the demand that remains, therefore, is an inchoate demand that cannot form the subject matter of a protected strike.

Conclusion

[26] The union has lost the right to strike in pursuit of the demands that have been met by the applicant's tender; and in respect of the demands governed by a collective agreement, it is not entitled to embark on a protected strike.

[27] It follows that the interim order granted on 21 April 2015 must be confirmed.

Costs

[28] Mr *van As* argued that the union should be ordered to pay the company's costs, as the company has exceeded to the union's demand and has tried to avoid both the strike and further litigation.

[29] Taking into account the requirements of both law and fairness, I do not agree. There is an ongoing relationship between the parties. That relationship may well have been placed on a better footing following the company's efforts to exceed to the union's demands. But more work is to be done to build that relationship. I fear that an adverse cost order at this stage may have a chilling effect on those efforts.

Order

I therefore make the following order:

29.1 The rule nisi issued on 21 April 2015 is confirmed.

29.2 There is no order as to costs.

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Steenkamp J

APPEARANCES

APPLICANT:	M J van As Instructed by Cliffe Dekker Hofmeyr.
RESPONDENTS:	L Pillay Instructed by Molebaloa attorneys.