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Road Accident Fund v South African Transport and Allied Workers Union (SATAWU) obo Members and Others [2010] ZALC 54

Judgement: Molahlehi J

Introduction

The applicant seeks an interim order declaring as unprotected and unprocedural the strike which the first respondent and its members intend to embarking on.

The requirements for an interim interdict are:

a clear right or a right prima facie though open to some doubt,

a well grounded apprehension of irreparable harm if the interim relieve is not granted and ultimately relieve is granted,

the balance of convenience in favour of granting the interim relieve, and

the access of any other alternative remedy.

Background facts

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The applicant is the Road Accident Fund (“RAF”) The first respondent South African Transport & Allied Workers Union (SATAWU), is a trade union. The second and the third respondents are commissioners appointed in terms of section 117 of the LRA to perform the dispute resolution function under the auspices of the CCMA.

The issue that gave rise to the dispute between the parties arose from the planned introduction of a New Operating Model (“NOM”) by the applicant. The NOM is a system used for processing payment of claims of victims of road accidents. The need to introduce the NOM system according to the applicant arose because of the changes which had been introduced by the Act. In contemplating the impact of the introduction of the NOM the applicant issued a notice in terms of section 189 of the LRA to the first respondent. The notice was however withdrawn because it was not contemplated that the introduction of the NOM would lead to job losses and to the changes to the terms and conditions of employment. The notice was in fact withdrawn on the advice of the CCMA.

The parties agreed to continue with the consultation process despite the withdrawal of the section 189 notice. The consultation in the present instant concerned issues related to transformation. In this respect the parties agreed to approach the CCMA for



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assistance with the intervention in terms of section 150 of the LRA. Section 150 intervention may be utilised even when there is no referral of the dispute to the CCMA.

It would appear that the respondent was not satisfied with the progress made in the section 150 facilitation and thus referred a dispute to the CCMA.

Subsequent to the referral of the dispute the CCMA issued a notice of set down which indicated that the dispute would be conciliated by commissioner Fadal and the dispute was therein described as “a section 64 (1) Matters of Mutual Interest dispute.”

The parties held a meeting the following day after the issuance of the notice of the set down of the conciliation hearing. The meeting was facilitated by commissioner Mello. The parties agreed in that meeting that the consultation process from which the respondent withdrew during December 2009 would resume and a task team would be constituted to look at the issues. The further conciliation proceedings which had been scheduled was then cancelled and the task team held its first meeting on that day.



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The employer then raised certain points in respect of the conciliation. After raising the above points which as indicated are the bases for challenging the legality of the strike, the commissioner issued a verbal ruling to the effect that the conciliation would proceed.

On the 31st March 2010, commissioner Mello issued a certificate of outcome which indicated that the dispute remained unresolved as at the 29th March 2010. The applicant contended that the certificate was null and void because it was in respect of a dispute that had been suspended.

On the same day that the certificate of outcome was issued, the 31st March 2010, the respondent issued a 48 hours notice to the applicant indicating its intention to go on strike. The employer then sought an interim interdict against the strike.

Evaluation

Section 64(1)

Was there compliance with the requirements of section 64 (1) (a) (i) of the LRA?

The court held that It is important in answering this question to look at the purpose of section 64 (1) of the LRA. The court in SA Transport & Allied Workers Union



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&Others v Equity Aviation Services (Pty) Ltd (2006) 27 ILJ 2411 (LC)

held that:

“The provisions of s64 (1) (b) need to be interpreted and applied in a manner which gives best effect to the primary objects of the Act and its own specific purpose. That needs to be done within the constraints of the language used in the section. One of the primary objects of the Act is to promote orderly collective bargaining.

Section 64 (1) (b) gives expression to this object by requiring written notice of the commencement of the proposed strike. The section’s specific purpose is to give an employer advance warning of the proposed strike so that an employer may prepare for the power-play that will follow. That specific purpose is defeated if the employer is not informed in the written notice in exact terms when the proposed strike will commence.”

In Early Bird Farm (Pty) Ltd v Food & Allied Workers Union & Others (2004)25 ILJ 2135 (LAC), the court dealt with right to strike and observed in this respect as follows:



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“Section 23 (1) (c) of the Constitution provides that ‘[e]very worker has a right to strike.’ Like all fundamental rights contained in the Bill of Rights in our Constitution, the right to strike can be limited by a law of general application provided that the requirements of s36 of the Constitution are met. The Act is an Act of general application.

[30] Section 64 (1) of the Act is an Act confers on very employee ‘the right to strike if certain conditions prescribed therein have been met. It is sufficient to say that the first condition is that the issue in dispute – that is the demand or grievance over which the strike is called – must have been referred either to a council with jurisdiction or the CCMA, as the case may be, for conciliation and either a certificate must have been issued to the effect that the dispute remains unresolved or a period of 30 days must have elapsed from the date of the referral of the dispute for conciliation.”

In terms of section 64 (1) (a) of the LRA:

“(1) every employee has the right to strike and every employer has recourse to lock-out if –



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the issue in dispute has been referred to a council or to the Commissioner as required by this Act and –

a certificate stating that the dispute remains unresolved has been issued; or

a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commissioner; and after that”

The Labour Appeal Court in dealing with a comparable issue that arose in terms section 64 (4) of the LRA in *Eskom v NUMSA & Others* (2002)12 BLLR 1153 (LAC) the court at paragraph [11] held as follows:

“There are two periods referred to in section 64 (1) (a). Each one commences when the dispute is referred to a council or to the CCMA. The one ends when a certificate is issued in terms of section 64 (1) (a) (i). The other ends 30 days after the referral of the dispute (section 64 (1) (a) (ii)). The question is whether it is the purpose of section 64 (4) to refer to only the one described in terms of a number of days. Section 64 (4) pre-supposes that section 64 (1) (a) in turn refers to only one period. It is unclear on such a reading to which of the two periods section 64 (4) refers. The two periods in section 64 (1) (a) are mutually exclusive in the sense that if the one applies, the other cannot. Therefore, a reference in section 64 (4) to “the periods” would have been nonsensical. The singular “period” is used in



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section 64 (4) because the purpose is to refer to the period which is applied in the circumstances of each case.”

Irregularity: Appointment of Commissioner

The court held that it is common cause that the first respondent had in-compliance with the provisions of section 64 (1) (a) of the LRA referred the dispute to the CCMA.

The issue raised by the applicant is that the first respondent has not acquired the right to strike because there was no proper compliance with the provisions section 64 (1) (a) (i) of the LRA, in that there was an irregularity in relation to the appointment of the commissioner who purported to conciliate the dispute. The complaint is based on the ground that the commissioner who conciliated the dispute is not the one mentioned in the notice of set down by the CCMA.

The court held that in terms of section 135 (5) of the LRA the CCMA must appoint a commissioner to resolve the dispute through conciliation. The appointed commissioner must attempt to resolve the dispute through conciliation within 30 days of the date it received the referral, unless the parties agree to extend the 30 day period.



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In the courts view section 135 (5) of the LRA must be read with section 117 of the LRA which provides that the governing body of the CCMA must appoint, “as commissioners as many competent persons as it considers necessary to perform the functions of commissioners by or in terms of this Act or any other law.”

The court held that there is nothing in section 135 (5) of the LRA that the conciliating commissioner must be the one whose name appears in the notice of set down. If this was the case or such interpretation was to be given to the provisions of section 135 (5) of the LRA it would make the function of the CCMA impracticable if not impossible.

Conflict of powers

There is some suggestion in the founding affidavit of the applicant that the commissioner who issued the certificate of outcome was conflicted because he was intimately involved in the facilitation conducted in terms of section 150 of the LRA. There is no merit in this submission particularly if regard is had to the fact that the same commissioner who performs conciliation function in a given matter can also perform the arbitration function which is largely adjudicative in nature.

Unilateral set-down



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It was further the applicants' contention that "unilateral set down" of the dispute was irregular because the dispute had been "placed on ice". The court was of the view that the concept of "placing the dispute on ice", meant that the dispute had been suspended and not withdrawn.

Accepting that the dispute was suspended and not withdrawn it then means that the first respondent as the referring party could resuscitate the suspended dispute. The dispute having been resuscitated it was for the CCMA to decide as to the date to which it was to be scheduled for a hearing. In the courts view when the dispute was resuscitated there was no need for the CCMA to obtain the consent of any of the parties to set the matter down for a hearing.

Compliance with section 64(1)(a)(ii)

Is there compliance with the provisions of section 64 (1) (a) (ii) of the LRA?

If for whatever reason the requirements of section 64 (1) (a) (i) of the LRA is not satisfied within the period of 30 days, the right to strike which the union may have acquired from firstly declaring a mutual interest dispute and thereafter referring it to the CCMA, does not fall away. The fact that the CCMA may have not handled the conciliation process properly or that the commissioner who conducted the conciliation



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process was for whatever reason disqualified to do so, is immaterial and has no barring in as far as the lapse of 30 days in section 64 (1) (a) (ii) of the LRA is concerned.

The 30 days period arises as an event independent of any other processes or procedural step that may have happened prior to its occurrence. The occurrence of 30 days elapse is an event that removes the procedural limitation imposed in evoking the right to strike by a union. In other words the union acquires permission in law to exercise that right to strike which it acquired from the time a proper referral of the dispute was made, including all other procedural aspects related there.

The above view has its support in the case of INGO Strautmann v Silver Meadows Trading 1999 (Pty) Ltd Trading as Mark and Ben Sun Cost and others unreported case number D412/07, Bombardier Transportation (Proprietary) Limited v Lungile Mtiya N.O & Others unreported case number JR 644/09 (LC) and Goldfields Mining South Africa (Kloof Mine) v National Union of Mine Workers & Others (2009) 12 BLLR 1214 (LC) including authorities referred therein.



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The application was dismissed.

