



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J 2582/15

In the matter between:

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

Applicant

And

**SOUTH AFRICAN MUNICIPAL
WORKERS UNION**

First Respondent

**PERSONS MENTIONED
IN ANNEXURE A**

Second to Further Respondents

Heard: 22 December 2015

Delivered: 28 December 2015

Summary: Urgent Interdict. Strike Action. Separating permissible from impermissible demand. Employees interdicted from striking on impermissible demand and allowed to strike on the permissible demand.

JUDGMENT

Molahlehi, J

Introduction

- [1] This is an urgent applicant in terms of which the applicant seeks an order interdicting the respondents from embarking on a strike action a day before Christmas day, 24 December 2015. The applicant seeks an interim relief pending the referral of a dispute concerning interpretation and application of the collective agreement in terms of s 24 of the Labour Relations Act 66 of 1995 (LRA). It also seeks to have the planned strike interdicted pending the referral of the dispute to arbitration in terms of s 74 of the LRA.
- [2] The parties have placed all the relevant affidavits for consideration of this matter before the court. At the commencement of the hearing I enquired from Mr Buiski's, for the applicant as to why in light of this a final rather than an interim relief should not be considered.
- [3] The essence of Mr Buiski's argument was that an interim order be given to afford the applicant the opportunity to refer the matter to arbitration for a dispute concerning interpretation and application of the provisions of collective agreement. This in my view is not necessary because if found that the issue in dispute concerns interpretation and application of the collective bargaining agreement then that would mean that the respondents are not entitled to embark on a strike action. This would mean that the strike action is not the proper forum for addressing the dispute but rather that the proper forum would be arbitration. After putting this proposition to him he accepted that the matter should be considered on the basis of a final determination.

Background facts

- [4] During the course of the hearing Mr Buiski brought an application to file a further affidavit to supplement the applicant's papers. The application was refused and the reasons thereof were made ex tempore.

- [5] The relationship between the parties as members of the SALGBC is governed by the Main Collective Bargaining Agreement (the main agreement). The scope of the main agreement covers all local government undertakings across South Africa.
- [6] The main agreement provides for two levels of bargaining in relation to certain of the local authorities and that would take place at the divisional level. "Division of the council," is defined to including amongst others Johannesburg Metropolitan.¹
- [7] The list of the subject matters for collective-bargaining at national level are set out at clause 10.2 of the main agreement and includes the following: Wages and Salaries; Medical aid; Retrenchment policy and severance pay; Retirement funds; Home owners allowance; Annual leave; Maternity leave; Sick leave; Hours of work; and Family responsibility leave.
- [8] Clause 10.3 deals with subject matters that shall be negotiated at divisional level and they are: Special leave; Acting allowance; Night work allowance; Standby allowance; Shift allowance; Long service bonus; Emergency work; Legal Indemnification; Additional paid sick leave Administrative measures for the taking of sick leave; and Measures to manage the taking and accrual of sick leave.'
- [9] The main agreement also provides for Minimum Services for the designated essential services which has to be determined by a collective agreement in terms of s 72 of the LRA.
- [10] The current Main Collective Agreement between IMATU, SAMWU and SALGA, was concluded on 9 September 2015. This agreement replaced the 2007/2012 agreement.²

¹ Other divisions of the council includes; Cape Metropolitan, Eastern Cape, eThekweni Metropolitan, Free State, Gauteng, KwaZulu-Natal Limpopo, Mpumalanga, Northern Cape, North West, Tshwane Metropolitan and Western Cape.

² See clause 22.1 of the Main Collective Agreement which provides; "This Agreement together with its annexures replaces the Main Collective Agreement dated 18 June 2007.

- [11] It is common cause that the applicable collective agreement in relation to the Essential Services is that which was concluded in 2003 which has since not been updated nor amended. The agreement was ratified by the Essential Services Committee in 2005. For the purposes of this judgement clause 8 of the Minimum Service Level Agreement (the service level agreement) deals with matters related to Municipal Police Services which in the present matter relates to the Johannesburg Municipal Police Department (the JMPD).
- [12] At the time the service level agreement came into effect the total number of the JMPD staff was 2684 and the agreed minimum service level consisted of 470 members. The agreement further states in a note that "the JMPD is committed to providing the minimum of 474 which is an increase of 71 employees of that of the original agreement of 403."
- [13] It is common cause that the number of staff members in the JMPD has since increased significantly with the estimated number being 4000 staff members.
- [14] Turning to the background facts related to the current dispute, it is common cause that it arose from the disagreement between the parties as to whether the demand for the reintroduction of the pay progression is a matter for bargaining at national or divisional level of the bargaining council. The other demand raised by the respondents, concerns payment of allowances to staff members in the JMPD.
- [15] The issue concerning the pay progression between the parties has been going on since 2012. It is apparent that the issue arose three years after the pay progression was abolished in 1999.
- [16] In the course of the engagement between the parties and with the view to seeking clarity on the approach to be adopted in dealing with the matter, Mr Fowler, the City Manager addressed the letter to the CEO of SALGA on 17 September 2012, the essence of which was a request that the Exco of SALBC be approached and be requested permission

for the Johannesburg City to engage with the unions with the view to finding interim measures to address the pay progression issue.

[17] It is evidently clear from the letter that the stand taken by the Johannesburg City was that the issue of pay progression is a matter that falls under the national and not the divisional part of the bargaining council.

[18] The CEO of SALGA responded in the letter dated 1 October 2012, the salient features of which was that SALGA was surprised by the attitude of SAMWU and IMMATWU. It was however pointed out in that letter that the request would be presented to SALBC for guidance.

[19] On 12 September 2012 the matter served before the Exco of the SALGBC which then resolved as follows:

‘6.10.1 The Executive Committee of the Central Council hereby grants delegated authority to the Johannesburg Metropolitan Council and its Local Labour Forum to engage in negotiations with IMATU and SAMWU to negotiate a collective agreement on re-introduction of a salary notch system.

6.10.2 The delegation is for the purposes of enabling the conducting of negotiations and the conclusion of a Collective Agreement on salary notches. Any Collective Agreement concluded in the LLF on this issue is subject to its ratification by the Executive Committee of the Central Council of the SALGBC.

6.10.3 The delegation in 6.10.1 above is limited to the Johannesburg Metropolitan Council only and shall not be applied to any other municipality.

6.10.4 The General Secretary will inform the parties to the Johannesburg Division of the above resolution.’

[20] The parties were unable to reach any agreement at the divisional level of the bargaining council and accordingly the status quo in relation to pay progression remained. In other words once the negotiations failed the issue of pay progression remained an issue to be bargained for at national level according to the applicant.

- [21] On 20 April 2015, the respondents referred a dispute to the regional bargaining council concerning, “(1) Progression and (2) Allowances.” It is indicated in the referral form that the outcome of the conciliation which the respondents were looking for was “Implementation of Progression Plan and Allowances.”
- [22] The demand for the payment of allowances involves the payment of acting in a higher position to the one occupied by the acting person, nightshift allowance, Sunday bonus and standby allowance at home.
- [23] Subsequent to the referral of the dispute to the region of the bargaining council the respondent issued the applicant with the, “Notice of Strike action by Non-Essential JMPD Employees.” There was some suggestion in the applicant’s papers that the notice of the strike was defective. This point was not pursued in the heads of argument nor in the submission during the hearing.
- [24] The applicant responded to the above notice with a letter through their attorney dated 18 December 2015 wherein amongst others it is stated that:
- 4.1.1. ‘The issue in dispute is regulated by a collective agreement and/or is one that a party has the right to refer to arbitration or to the Labour Court as contemplated by section 65 of the LRA, and no reliance by SMWU on a SALGBC certificate of outcome to the effect that the matter is one of mutual interest detracts from these facts;
 - 4.2. Insofar as your members include members of the JMPD, the person who intend to strike are essential service employees as contemplated by section 65(1) (d) of the LRA.
 - 4.3. Albeit that the strike notice purports to be in respect of non-essential service employees, having regard to recent press statements by SAWMU’s Archie Ntaba and Jack Mokalapa, that “...the new strike certificate included uniformed JMPD officers would not be taking part in festive season road blocks... we hope management will go and get uniforms themselves and set up road block as [police officers] will be on strike..”, it is clear that the

intended strike shall include both essential and non-essential service employees; and

- 4.4. Your strike notice is furthermore defective and in breach of section 64(1)(d) of the LRA for want of, inter alia, its failure to indicate precisely who will participate therein.'

The Applicant's case

- [25] The applicant contends that the strike action by the respondents is unprotected because the issue in dispute being the demand for salary progression is governed by a collective bargaining council agreement operative at the national level. A strike action based on this demand according to the applicant would be in contravention of the provisions of section 65 (3) (a) of the LRA.³ The proper forum for addressing this issue is the CCMA by arbitrating a dispute concerning interpretation and application of the provisions of the collective bargaining agreement in terms of s24 of the LRA.
- [26] The other issue raised by the applicant is that the demand of the respondents is regulated by the arbitration award issued during June 2010.
- [27] In terms of s 65 (3) (a) (i) of the LRA a strike action is prohibited if there is collective agreement or binding arbitration award dealing with the issue in dispute.
- [28] The arbitration award in question concerned the interpretation of the 2007/2012 collective agreement. As stated earlier that agreement was replaced by the current agreement of 2015 and therefore the arbitration award is of no application to the present matter. There was also no submission from the applicant that the provisions of the 2007 agreement were incorporated into the 2015 agreement.

The Respondent's case

³ Section 64 (3) (a) (i) of the LRA reads as follows: "(1) No person may part take in a strike or any conduct in furtherance of strike . . . if- (a) that person is bound by a collective agreement that prohibits a strike . . . in respect of the issue in dispute."

- [29] The respondent contends that the demand for pay progression has no bearing on the terms and conditions of the salary and wages concluded in the 2015 collective agreement and therefore they are entitled to make such a demand on the applicant. According to them the pay progression has to do with movement from one notch to the other which occurs automatically by lapse of time.
- [30] In relation to the allowance demand the respondents argues that the only allowance regulated by the collective agreement is the home owner's allowance. They also argued that the issue of allowances is not a matter dealt with at the nation level but rather is a matter for the division of the bargaining council

The legal requirements for an urgent interdict

- [31] As indicated above it was agreed that the matter should be determined on the bases of a final relief and therefore in order to succeed it has to satisfy the following requirements:
- (a) a clear right
 - (b) an injury which was actually committed or one which is apprehended
 - (c) that there is no other satisfactory remedy to protect its interest.
- [32] The other requirement which the applicant has to satisfy concerns the provisions of rule 8 of the Rules of the Court which includes the applicant having to show the reason for urgency and why urgent relief is necessary and why the requirements of the rules were not complied with.
- [33] I am satisfied that the application complies with the above requirements and accordingly non-compliance with the rules is condoned.
- [34] In terms of s 72 of the LRA the agreed minimum services are regarded as essential services in which case the provisions of 74 do not apply.

- [35] As indicated earlier it is trite that employees would not be entitled to strike where there is a collective agreement or an arbitration regulating an issue in dispute.

Evaluation/Analysis

- [36] The key question to answer in relation to the demand for pay progression is whether that demand is a matter to be bargained for at the national or divisional level of the bargaining council. It is common cause that pay progression does not appear in the list of matters for bargaining at the both levels of the bargaining council
- [37] The applicant contends firstly that the respondents are prohibited from embarking on a strike action because of the arbitration award made in 2010 in terms of the provisions of the 2007 collective bargaining agreement is binding on the parties. The other point made by the applicant is that the pay progression demand must be interpreted as an aspect of the salary and wages agreement.
- [38] The respondent's argument on the other hand, and as I understand it is that a pay progression is a system whose purpose is only to deal with the salary movement of employees within the salary band. It does not have any impact on the wages and salaries agreed to in terms of the collective agreement.
- [39] It is common cause that the 2015 main agreement, is a three-year term agreement. Whilst pay progression has to do with the ranges within the salary band, its relationship and impact on the wage and salary increase agreement which is based on a three year period is a matter that lends itself to the interpretation and application arbitration in terms of section 24 of the LRA. This means the issue of pay progression is an issue regulated by the provisions of section 65 (1) (b) of the LRA.
- [40] It follows based on the above that it is impermissible for the respondent to embark on a strike action based on the pay progression demand.
- [41] The next issue to consider is whether the respondents have a right to strike based on the demand for payment of the various allowances

referred to above. The respondents have abandoned the issue of the risk allowance.

- [42] The applicant has not disputed that except for the housing allowance all other allowances are subject matters for bargaining at the divisional level and that the demanded payment of allowances by the respondents are not regulated by the main agreement neither is there evidence that they are regulated by a collective agreement at the divisional level.
- [43] It follows from the above analysis that the respondents' demand for the payment of allowances is permissible and therefore would be entitled to embark on a strike action in that regard.
- [44] The question that then follows from the above is whether the respondents are entitled to embark on a strike action when one of their demands is impermissible.
- [45] The issue of whether a union has a right to strike when its dispute is based a combination of permissible and impermissible demands received attention in *Samancor Ltd & another v National Union of Metalworkers of SA*,⁴ where Landman J considered the same question and held that if it is possible to distinguish between the permissible and impermissible demands, once the impermissible demands have been abandoned, the strike is protected.
- [46] In the unreported case of *Digistics (Pty) Ltd v South African Transport and Allied Workers Union and Others*⁵, Van Niekerk J in following the decision in *Samacor* granted an order interdicting the union from embarking on the strike in relation to those demands which were impermissible and granted them the right to strike in relation to those that were permissible.
- [47] The Labour Appeal Court in the unpublished case of *CSS Tactical (Pty) Ltd v Security Officers Civil Rights and Allied Workers Union (SOCRAWU)*⁶, held that:

⁴ (1999) 20 ILJ 2941 (LC).

⁵ (J1316/10) [2010] ZALCJHB 352 (04 July 2010).

⁶ (2015)26 ILJ 2764 (LAC) SALCJHB352.

“[15] The import of this concession is twofold. First the demands were permissible demands and so a strike relating solely to those demands would be protected.”

[48] In conclusion I find that the impermissible demand of pay progression and the demand for payment of the various allowances are separable and accordingly the respondents are to be interdicted from embarking on a strike in as far as the impermissible demand is concerned. They however have the right to strike as concerning the permissible demand.

[49] For the purposes of this judgment and the right to strike of the respondents in terms of the permissible demand, the following as agreed to between the parties shall constitute minimum service:

| Roles/Occupations | Total Employees | % ratio as per MSA 2001 | SAMWU Minimum Service Employees who will be on duty during this strike as per % of total number of employees in a category (number are rounded) |
|--|------------------------|--------------------------------|--|
| Directors | 7 | 40 | 3 |
| Deputy Director | 14 | 25 | 4 |
| Chief Superintendents/Heads | 16 | 12.12 | 2 |
| Superintends | 60 | 29.63 | 18 |
| Inspectors | 1 | 71.43 | 1 |
| Sergeants | 168 | 46.51 | 78 |
| MPO/MP/MPD (Officers) | 2183 | 24.72 | 540 |
| LEO/By-laws Enforcement | 231 | 19.31 | 45 |
| Call Takers/Dispatchers | 20 | 20 | 4 |
| Breakdown Drivers | 2 | 50 | 1 |
| Breakdown Operators | 3 | 50 | 2 |
| Breakdown Assistants | 6 | 28.57 | 2 |
| Ranger (Armourers/Investigator Fire Arm Control) | 2 | 33.3 | 1 |
| | 2713 | | 701 |

Order

[50] In the premises the following order is made:

1. To the extent that the strike called by the first respondent is in pursuit of a demand relating to the introduction of pay progression system:
 - a. the strike is declared to be unprotected; and
 - b. the first respondent is interdicted from calling on its members to embark on a strike action.
 - c. the second to further respondents are interdicted from participating in the strike concerning the demand for pay progression .
2. This order does not preclude:
 - a. the first respondent from calling on a strike by its members; and
 - b. the first respondents' members, the second and further respondents from engaging in a strike action in pursuit of the demand relating to the payment of the allowances.
3. In pursuing the right to strike in terms of the demand for payment of allowance, the respondent are ordered to comply with minimum service as set out at paragraph [49] of this judgment.
4. There is no order as to costs.

E Molahlehi

Judge of the Labour Court, Johannesburg

Appearances:

For the Applicant: Adv. P Buiski

Instructed by: Salijee Du Plessis Van der Merwe Attorneys

For the Respondent: Mr Daniel of Cheadle, Thompson and Haysom
Attorneys.