

SOUTH AFRICA / JUDGMENT

**ADT Security (Pty) Ltd v South African
Transport and Allied Workers Union and
Others (J 2939/11) [2012] ZALCJHB 16;
(2012) 33 ILJ 2061 (LC) (28 February 2012)**
[2012] ZALCJHB 16

COURT

Labour Court Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

J 2939/11

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REPUBLIC OF SOUTH AFRICA

Reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

case no: j 2939/11

In the matter between:

ADT SECURITY (PTY) LTDApplicant

and

THE SOUTH AFRICAN TRANSPORT

AND ALLIED WORKERS' UNIONFirst Respondent

THE PERSONS WHOSE NAMES

APPEAR IN ANNEXURE "A"Second Respondent

Heard: 17 February 2012

Delivered: 28 February 2012

Summary: Return day. Interdict strike- non compliance with the provisions of the collective agreement. Distinction between substantive issues and process related issues. Section 65 of the LRA.

MOLAHLEHI J

Introduction

On 14 December 2011, Lagrange J made an interim order in terms of which the respondents were interdicted and restrained from embarking on a strike action because the issue in terms of which they intended striking on was governed by the provisions of a collective bargaining agreement.

The applicant now seeks to have the interim order confirmed. The application to have the order confirmed is opposed by the

respondents.

Background facts

The applicant falls within the Private Security Sector (the sector) and is accordingly covered by the Sectoral Determination 6: Private Security Sector, South Africa (sectoral determination) which was promulgated by the Minister of Labour in terms of section 56 of the Basic Conditions of Employment Act (the BCEA) and which presently regulates the basic conditions of employment within the sector.

The applicant contends that the sectoral determination which was amended in September 2010 is binding on it and has accordingly given effect to its provisions. The sectoral determination is promulgated by the Minister of Labour in terms of the provisions of the BCEA. It is also common cause that once an agreement is concluded at the bargaining forum, it is forwarded to the Minister of Labour for promulgation into a wage determination.

The negotiation process takes place under the auspices of the Sector's National Bargaining Forum. The applicant participates

in that process through its membership of Security Sector Employers' Organization (SSEO). The first respondent is one of the unions that participate in the collective bargaining process with other unions in that forum. Although the first respondent is the majority union of those unions participating in the forum, its representivity in the sector is not significant, representing about 10% employees in the sector.

The current minimum wages were promulgated by the Minister during September 2011. The determination as promulgated by the Minister

regulates a number of the terms and conditions of employment, including for the purposes of this judgment specifically the minimum

wages.

The present issue arose from a dispute which the first respondent had referred to the CCMA during August 2011. In terms of that

referral, the first respondent raised a dispute concerning wages of its members in the Port Elizabeth area. The first respondent

demanding that its members be remunerated at the same level as those in the Gauteng and Cape Town regions.

It is common cause that the sectoral determination provides differential salary grades in the different magisterial areas across

the country. The salary rates are categorised into three magisterial areas, known as Area 1, Area 2 and Area 3. The first respondent

demanding an increase in the salary of its members employed in the Port Elizabeth area. Its demand is that its members in that area should be remunerated at the same level as those employees in the sector who are based in the Gauteng and Cape Town areas.

Attempts at conciliation of the dispute took place during October

2011. The conciliation process having failed and the certificate of outcome having been issued, the first respondent issued the applicant with a notice of the intention to embark on a strike action during December 2011.

Submissions by the parties

The applicant contends that the first respondent and its members are not entitled to embark on a strike action on the basis that the issue upon which they wish to strike on is governed by the provisions of a collective agreement.

The first respondent on the other hand contends that its members in the Port Elizabeth area are underpaid in comparison to those in Gauteng and Cape Town. The applicant does not dispute that the payment between employees in the Gauteng and Cape Town areas are different to those applicable to employees employed in the sector and based in the Eastern Cape areas. The disparities between the salaries in these regions are provided for in the sectoral determination and the rationale for that is based on the differences

in the cost of living in these regions. The cost of living in the Port Elizabeth area is said to be lower than that in Gauteng and Cape Town regions.

Mr Mphahlanjani, for the respondents, in his submission argued that the issue in dispute is not covered by the provisions of the agreement because the respondents are demanding an actual wage increase as opposed to the minimum which is provided for in the sectoral

determination.

Relying on the authority of *Black Allied Workers Union and others v Palm Beach Hotel*,¹ the case decided under the 1956 Labour Relations Act, Mr Mphahlaneni argued that the sectoral determination regulates the minimum wages and not the actual salary increase as demanded by the respondents and therefore they were entitled to go on strike. In other words, the issue of the minimum salary rates provided for in the sectoral determination is a different issue to the actual wage increases demanded by the respondents.

He further relied on the academic writing of Annali Basson et al where the learned authors in dealing with this issue has the following to say:

‘Because wage determinations and sectoral determinations usually regulate only minimum terms and conditions of employment and sectoral

determinations, by their very nature, are concerned with basic conditions of employment, this would mean that employees can still

embark on strike action in support of actual or better terms conditions of employment.²’

A similar view is expressed by D du Toit et al in the following terms:

‘Under the previous Act the courts [applying similar phraseology] took the view that where collective agreements set minimum wages only, it is permissible for employees to strike in support of improved [or ‘actual’] wages. A similar approach has been adopted under the current Act. Thus, in *PSA v Minister of Justice and Constitutional Development and Others*, it was held that a demand for a once-off pay increase for certain employees to conciliation was separate and discrete from an annual salary increase for all public servants that was regulated by collective agreement. Strike action in support of the former demand was therefore not prohibited.’³

[Footnote omitted]

Before dealing with the real issue at hand, it is important to point out that the above authorities dealt with the substantive issue of the demand and not the process for dealing with the process for negotiating over that issue.⁴ The issue in this matter is whether the respondents are entitled or prohibited from calling on a strike action based on the demand for actual wage increase in the face of the provisions of the collective agreement which is still current and which requires terms and conditions of employment to be negotiated at national level.

The issue of whether a trade union is prohibited from embarking on a strike action on an issue governed by a collective agreement is regulated by the provisions of section 65 (3) (a) (i) of the LRA which reads as follows:⁵

‘(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-(a)

if that person is bound by (i) any award or a collective agreement that regulates the issue in dispute;

The prohibition against a strike action where there is a binding collective agreement is not limited to substantive issue/s in

dispute but includes the procedure laid out in the collective agreement. The collective agreement in the present instance provides:

‘1.2 ...Organised labour and organized employers, including the parties to this agreement, have traditionally negotiated terms and conditions with Private Security Sector at national level amongst each other so that any arrangements reached between them would be reflected a broadly held consensus and thus adopted by the Minister of Labour as the basis of future Sectoral Determinations.’

And clause 1.3 provides:

‘. . . The parties recognised that it is in their own interests as well as in the interests of relationships between them and some industrial

relations practice that negotiations could take place a properly regulated and the framework of such negotiations understood by all parties thereto. The parties to this agreement agree that in future all national level negotiations on terms and conditions of employment and other related matters of mutual interest in the Private Security Sector will take place in accordance with this agreement.’

The procedure to be followed for negotiations of a collective agreement is set out in clause 8 of the Frame Work Agreement. In

terms of this clause, proposals relating to terms and conditions of employment within the sector are to be tabled by parties for purposes of negotiations at national level. If an agreement is reached at national level then such an agreement is forwarded to the Minister for promulgation into a wage determination.

It has not been disputed that the Frame Work Agreement is a binding collective agreement as envisaged in the LRA. The agreement does not lapse with the promulgation of the wage determination by the Minister. It continues to exist even after the promulgation and continues to bind the parties to it. Whilst the agreement does not deal with substantive issues, like the wages it provides for a procedure through which such substantive issues may be tabled for negotiations. In terms of that procedure, parties are required to raise such issues at the national level and thus are prohibited from raising them at regional or local level. It is important to emphasise that once an agreement is reached the terms of that agreement are forwarded to the Minister for promulgation

It is thus my view that in seeking to rely on the distinction between the minimum and the actual wage demand to assert its right

to strike, the respondents overlooked the procedural prohibition of the strike action as envisaged in terms of section 65 of the LRA. It is also my view that the authorities relied upon by the respondents do not apply in the circumstances of the present case. The authorities relied upon by

the respondents deal with the substantive issues of the distinction between the minimum and the actual wage increases. There are authorities, which hold the view that the prohibition under section 65 of the LRA applies also where the parties in the collective agreement have made provision for a process through which the substantive issues may be resolved.

In *Fidelity Guards Holdings (Pty) Ltd v PTWU and Others*,⁶ the court held that:

‘In section 65 (1) parties can enter into a collective agreement which prohibits a strike. This peace obligation is in fact a substantive rule. Its relationship with the constitutional right to strike need not be explored in this judgment...I am of the opinion that the phrase “regulates the issue in dispute” refers to a substantive regulation of the issue or a process leading to the resolution of the issue.’

In granting the interim order Lagrange J, in this matter correctly interpreted the decision in *Fidelity Guard* to mean:

‘As I understand this means that if there is a procedural agreement which deals with the process for negotiating the issue in question, that agreement would regulate the issue for the purposes of section 65 [3] [a] [i] . . .’

In *Cape Gate (Pty) Ltd v National union of Metal Workers of SA and Others*,⁷ the court held that:

‘...It is correct that the main agreement does not preclude an employer from granting an increase in excess of that required by the main agreement. But proper regard and effect must be given to the provisions of clause 37, which I have quoted above. It is in my view artificial to interpret that clause as allowing unions and their members to negotiate at plant level and strike over wage increases which are over and above those provided for in the main agreement itself. The whole purpose of clause 37 is to ensure that – in contract with the pre-1992 dispensation – there is no multiplicity of forums for negotiating what is regulated in the main agreement and that there is to be no strike in respect of the matters agreed to in that agreement. Of relevance here is the determination of wages. That is one of the “matters contained in the main agreement” as contemplated in clause 37(1)(a).

The objective underlying the clause is to ensure that negotiation of such matters takes place only at the level of the bargaining council and in no other forum, such as at plant level. It is also to preclude any strike action over such matters while they continue to be regulated by the main agreement. The clause would make little sense if it had the effect now contended for and on behalf of NUMSA, namely that where wage increases are determined in the main agreement, employees and their unions are free to agitate for further increases by way of plant level negotiation and ultimately strike action. This would be subversive of the objective of promoting collective bargaining at the level of bargaining councils and the effectiveness of their agreements. This would not accord with the clear and worthy objectives of the LRA. Accordingly the interpretation which is advanced on behalf of NUMSA cannot be sustained.’

Conclusion

It is clear that the right to strike may be prohibited in terms of section 65 of the LRA where the collective bargaining agreement

between the parties makes provision for a peace clause either regulating the substantive issues that may be raised subsequent to the conclusion of that agreement or the process through which substantive issues may be raised for negotiations thereafter. The same applies where the parties agree as to the level at which the subject matter of the dispute may be raised.

The present case does not concern the substantive issue of bargaining but rather the process for the resolution of that issue.

I have already mentioned earlier that the provisions of section 65

- (1) (a) of the LRA envisages prohibition of strike action even where the union fails to follow the process for resolving the substantive issue. In other words before embarking on a strike action, a trade union has to satisfy both the substantive and the procedural aspect of dealing with the issue in dispute.

The applicant's application stands to succeed. It does not appear to me that the respondents were unreasonable in opposing the application neither do I believe that it would be in the interest of building a good relationship between the parties in the long term to allow costs to follow the results.

Order

In the premises and in confirmation of the rule nisi the following order is made:

The planned strike by the first to further respondents is unprotected in terms of the provisions of the Labour Relations Act of 1995

The planned strike action by the first to further respondents would be unlawful, if it was to take place without following the process set out in the collective bargaining agreement.

The first to further respondents are interdicted and restrained from participating in a strike action on the basis of the certificate of outcome issued by the CCMA on 9 November 2011, under case number ECPE4275/11

The first respondent is interdicted and restrained from encouraging and or inciting the individual second respondents from participating

in a strike action.

The second respondents are ordered to comply with their contractual obligations owed to the applicant.

There is no order as to costs.

Molahlehi J

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT: Adv P Kennedy SC, instructed by Routledge Modise

FOR THE RESPONDENTS: Adv Mphahlan, Instructed M M Baloyi Attorneys

1(1988) 9 ILJ 1016 [IC].

2Essential Labour Law (LLP 3rd ed 2002) at

3Labour Relations Law (LexisNexis Butterworths 1999, 4th ed) at 293 The citation for PSA v Minister of Justice and Constitutional Development and Others, [2001] 11 BLLR 1250 (LC).

4See also Motor Industry Bargaining Council v South African Motor Industry Employers' Organisation and Others [1997] 10 BLLR 1328 (LC) where it was held that the fact that the parties had in the past bargained only over minimum wage did not create an immutable rule that they could not bargain over actual wages in the future. The same approach was followed in Vereeniging Refractory Ltd v Building Construction and Allied Workers' Union

[1989] 10 BLLR 79 (W) where the court held that the matter giving rise to the planned strike action was a demand for higher actual wages and not the minimum wage which was fixed in the wage

determination.

5The phraseology used in the present LRA is very similar to that of the 1956 LRA. Section 65 (1) (a) and (b) of the 1956 LRA read as follows: '(1) No employee or other person shall instigate a strike or incite any employee to take part in or continue a strike or take part in a strike or in the continuation of the strike, and no employer or other person shall instigate a lock out or incite employer or other person to take part or to continue a lock-out or take part in lock-out or in the continuation of a lock-out- during the period of the currency of any agreement, award or determination which in terms of this Act is binding on the employees or employers who are or would be concerned in the strike or lock-out or; during the period of one year reckoned from the date of publication of a notice under section 14 [2] of the Wage Act, 1957 (Act No 5 of 1957), in respect of a determination under that Act, which is binding upon the employees or employers who are or would be concerned in the strike or lock-out and any provision of which deals with the matter giving occasion to the strike or lock-out.'

5The phraseology used in the present LRA is very similar to that of the 1956 LRA. Section 65 (1) (a) and (b) of the 1956 LRA read as follows:

‘(1) No employee or other person shall instigate a strike or incite any employee to take part in or continue a strike or take part in a strike or in the continuation of the strike, and no employer or other person shall instigate a lock out or incite employer or other person to take part or to continue a lock- out or take part in lock-out or in the continuation of a lock-out-

during the period of the currency of any agreement, award or determination which in terms of this Act is binding on the employees or employers who are or would be concerned in the strike or lock-out or;

during the period of one year reckoned from the date of publication of a notice under section 14 [2] of the Wage Act, 1957 (Act No 5 of 1957), in respect of a determination under that Act, which is binding upon the employees or employers who are or would be concerned in the strike or lock-out and any provision of which deals with the matter giving occasion to the strike or lock-out.’

6 [1997] 11 BLLR 1425 (LC) at 1433 F-H.

7(2007) 28 ILJ 871 (LC) paras 37 and 38.

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