

SOUTH AFRICA / JUDGMENT

Autopax Passenger Services (SOC) Ltd v SATAWU and Others (J111/16) [2016] ZALCJHB 113 (30 March 2016) [2016] ZALCJHB 113

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

J111/16

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THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Not reportable

Case no: J 111 /16

In the matter between:

AUTOPAX PASSENGER SERVICES (SOC) LTD

Applicant

and

SATAWU

First Respondent

PERSONS LISTED IN ANNEXURE “A” AND “B”

Second Respondent

Heard: 4 March 2016

Delivered: 30 March 2016

Summary: Return day of urgent application to declare strike action unprotected. Real dispute is interpretation and application of collective agreement. Rule nisi confirmed. JUDGMENT

PRINSLOO,J

Introduction:

- [1] On 27 January 2016 this Court per Tlhotlhamale J granted the Applicant an interim interdict declaring strike action to commence on 28 January 2016 to be unprotected, interdicting the First Respondent (SATAWU) from advising and encouraging the individual Respondents to participate in the strike, interdicting and restraining the Respondents from participating in unprotected strike action and from interfering with the running of the Applicant's business.
- [2] On 27 January 2016 the matter was unopposed and the return date was set for 4 March 2016, when the matter came again before this Court. The application is now opposed.

Brief history:

- [3] The Applicant operates a passenger bus service to various destinations in all nine provinces and transports approximately 250 000 passengers per month. It operates two brands namely Translux, a luxury bus service and City to City, a semi-luxury bus service. The Applicant employs 1 300 employees, mostly bus drivers, drivers' assistants, bus stewards and technical staff.
- [4] The Applicant and SATAWU are members of the South African Road Passenger Bargaining Council (SARPBAC) and as such they are bound by the Main Collective Agreement (the agreement) that came into operation on 1 April 2013. Approximately 800 employees fall within the bargaining unit, including members of SATAWU.
- [5] The agreement provides in clause 6 thereof for hours of work and overtime and relevant for this application is clause 6.8 that provides for Sunday work as follows:
- "Employees working on a Sunday which is not their weekly day off, will be compensated at a rate of 1.3 times their normal rate from 1 April 2013 to 31 March 2014 and 1.5 times their normal rate for each hour worked from 1 April 2014."*
- [6] On 27 August 2013 and following a dispute at SARPBAC, the Applicant and SATAWU entered into a settlement agreement on issues, which included Sunday pay. The settlement agreement was made an addendum to the main collective agreement. It was agreed that the Applicant would revert to the status quo in respect of Sunday pay at 1.5 times as had been the practice (in line with the BCEA). The implementation date was 1 August 2013 and payable at the end of September 2013.
- [7] On 23 September 2015 SATAWU approached the SARPBAC and informed the bargaining council that the Applicant changed the method of how Sunday pay was paid, that it constituted a change to a practice without consultation and that it was a contravention of clause 30 of the agreement.

- [8] SARPBAC proposed a meeting between the Applicant and SATAWU at the SARPBAC offices and on 2 November 2015 the parties indeed attended the meeting. The Applicant informed the meeting that Sunday pay was still paid at the rate of 1.5 times and that it did not at any stage effect a change in respect of Sunday pay and that the Applicant acted in accordance with the terms of the settlement agreement.
- [9] SATAWU requested that the issue be referred to arbitration and the Applicant agreed to that. On 17 November 2015 SATAWU referred the dispute to conciliation and on 14 December 2015 the parties attended conciliation but the dispute remained unresolved. A certificate of outcome was issued stating that the dispute concerned a unilateral change to terms and conditions of employment and that the dispute may be referred to strike action.
- [10] On 25 January 2016 SATAWU issued a strike notice informing the Applicant that it would embark on strike action as from 00:05 on 28 January 2016.
- [11] The contemplated strike action is in relation to two main complaints namely that the Applicant has unilaterally changed the terms and conditions of employment as they relate to Sunday pay and secondly that the Applicant refuses to employ ad hoc contract employees on a permanent basis.
- [12] On 26 January 2016 the Applicant filed an urgent application to declare the strike action to commence on 28 January 2016 unprotected and prohibited as contemplated by section 65(1)(a) and 65(3)(a)(i) of the Labour Relations Act[1] (LRA).

The urgent application:

- [13] The Applicant approached the Court on an urgent basis and submitted that the intended strike action would be unprotected for a number of reasons. Firstly clause 42 of the agreement prohibits a strike action in relation to matters dealt with therein and in accordance with section 65(3)(a)(i) of the LRA.
- [14] Secondly SATAWU's dispute is about the interpretation of clause 2.1 of the settlement agreement, which forms part of the agreement, thus it is an interpretation dispute that should be resolved via conciliation and arbitration and in accordance with the provisions of section 24(5) of the LRA.
- [15] Thirdly SATAWU has failed to invoke the remedy provided for in section 64(4) of the LRA.
- [16] Fourthly the issue of Sunday pay is provided for in the Basic Conditions of Employment Act[2] ('BCEA') and section 77 requires any dispute about Sunday pay be referred to the Labour Court.
- [17] The last issue raised by the Applicant relates to contract employees and the fact that SATAWU cannot embark on strike action over the issue as the agreement provides that it should be dealt with at company level. It is in any event not clear who the ad hoc workers are.

- [18] In addition, the Applicant submitted that the strike action would be unprotected as it has complied with clause 2.1 of the settlement agreement and has not unilaterally changed any conditions of service in relation to Sunday pay and SATAWU has not complied with section 64(4) and (5) of the LRA.
- [19] In respect of the two issues the Applicant's case is that it has always complied with the terms of the agreement in relation to payment for Sunday work and it appears that the Respondents do not understand the operation of the various shift systems and how the salaries are structured. The Applicant's case is that the salary advices attached to the Respondents' opposing affidavit do not provide evidence that employees are paid less than 1.5 times their normal pay for Sunday work. The explanation tendered by the Applicant is that the employees' normal rate is already included in their basic pay and they are paid an additional .5 times rate for Sunday work. The Applicant specifically stated that it complies with the agreement in relation to Sunday pay and any dispute in this regard is a dispute concerning the interpretation and application of a collective agreement.
- [20] On the issue of ad hoc employees, the Applicant's case is that they are employed on the basis of fulltime employment contracts to render services as and when required. A dispute in respect of the employment of ad hoc drivers was declared in 2014 and the dispute was settled on 26 November 2014. The parties agreed to allow the process that was underway through the Autopax Bargaining Forum ('ABF') and after the agreed deadline, SATAWU would reserve its rights to refer a dispute in respect of those employees whose contracts remain disputed. The process included the advertisement of positions, interviews, a vetting process and offers of employment to the successful candidates. At the time when the dispute was settled, there were 57 ad hoc drivers and 26 of them were subsequently employed as permanent drivers. Of the 31 remaining drivers, 19 are members of SATAWU and of the 19 there are 6 individuals employed on fixed term contracts, 10 (including some of the aforesaid 6) have been interviewed and passed vetting and will be offered permanent employment in the near future, 3 remain ad hoc drivers of which one failed his medical assessment and cannot be employed permanently. Only 2 of SATAWU's members remained on ad hoc contracts and they did not apply for the advertised positions.
- [21] The Applicant's case is that the ABF has not set a deadline for the completion of the process of offering permanent employment to ad hoc drivers as the process is still ongoing and offers can only be made when vacancies arise and when the ad hoc employees apply and are successful. There is no live dispute in relation to the employment of ad hoc drivers as the dispute was settled on 26 November 2014 and 13 April 2015 and the process of employing them permanently is still ongoing.

- [22] The Respondents opposed the application and in its opposing affidavit averred that the Applicant unilaterally changed the terms and conditions of employment in respect of Sunday pay and to substantiate this, the Respondents attached copies of salary advices of certain individual employees to prove that the Applicant indeed unilaterally changed terms and conditions of employment by adjusting 1.5 times Sunday pay to normal time and acts in breach of the agreement.
- [23] On the issue of ad hoc contract workers, it is the Respondents' case that the Applicant is not prepared to resolve the issue amicably and the only remaining option is to embark on strike action.

Analysis:

- [24] The question to be considered is whether the contemplated strike action is protected.
- [25] The Applicant argued that the strike action is not protected for a number of reasons, set out supra. I do not intend to repeat those reasons and I will deal with the two pertinent strike issues herein below.

Sunday pay

- [26] In my view the point of departure should be the provisions of the agreement. It is common cause that the agreement is a collective agreement and is binding on the parties.
- [27] Clause 6 of the agreement provides for hours of work and overtime and clause 6.8 with Sunday work specifically. The settlement agreement that was concluded on 27 August 2013 has been incorporated into the agreement and it provides specifically for Sunday pay. It is thus evident that the issue of Sunday pay is not only provided for in the agreement, but was previously determined by SARPAC when a settlement agreement was concluded.
- [28] The terms of the agreement are clear: the Applicant would revert to the status quo in respect of Sunday pay and pay employees working on a Sunday at 1.5 times their normal rate for each hour worked, as had been the practice (in line with the BCEA).
- [29] The Applicant's case is that it complies with the terms of the agreement in respect of Sunday pay and that it indeed pays the employees accordingly. The Applicant denies that it changed the terms of employment regarding Sunday pay. The Applicant explained that there are different shifts and Sunday pay is calculated taking the shifts worked into consideration. The employees' normal rate is already included in their basic pay and they are paid an additional .5 times rate for Sunday work.
- [30] The Respondents on the other hand submitted that the Applicant is acting in breach of the main agreement by adjusting the 1.5 times Sunday pay to Sunday normal time.

- [31] The issue is how Sunday pay is calculated and how the salaries are structured in applying the provisions of the agreement which requires the Applicant to pay employees working on a Sunday at 1.5 times their normal rate for each hour worked.
- [32] Mr Matyolo on behalf of the Applicant argued that the dispute in relation to Sunday pay is a dispute of right and not an issue over which the Respondents may go on strike. He further submitted that the issue was determined previously by the bargaining council and that the Respondents should institute enforcement proceedings. Mr Matyolo also argued that the issue of Sunday pay is provided for in the collective agreement which is binding on the parties and as such the Respondents are precluded from embarking on strike action.
- [33] There is merit in Mr Matyolo's argument.
- [34] In argument before Court Mr Maphanga on behalf of the Respondents conceded that the essence of the dispute is the interpretation of the collective agreement.
- [35] In my view the crux of the dispute in respect of Sunday pay is indeed the interpretation and application of the provisions of the agreement.
- [36] Section 24 of the LRA provides for disputes about the interpretation or application of a collective agreement. Having found that the issue regarding Sunday pay is indeed one about the interpretation and application of the collective agreement, it follows that the procedure set out in section 24 of the LRA should be followed.
- [37] The provisions of section 65(1)(c) of the LRA apply and the dispute about Sunday pay should be conciliated and if it remains unresolved, be arbitrated.

Ad hoc employees

- [38] The Applicant's case is that the dispute about the permanent employment of ad hoc contract workers was referred to the bargaining council and on 26 November 2014 the dispute was settled. In terms of the settlement SATAWU agreed to withdraw the dispute, the parties agreed to allow the process that was underway through the ABF and after the agreed deadline, SATAWU would reserve its rights to refer a dispute in respect of those employees whose contracts remain disputed.
- [39] The Applicant set out in detail the process that was followed and that is still ongoing and the number of ad hoc contract workers who have been permanently employed or are still in the process of being so employed and the reasons for those not employed permanently.
- [40] In terms of the settlement agreement SATAWU has the right to refer a dispute, after the deadline, in respect of the individuals whose contracts remain disputed.

- [41] The Applicant's case is that there is no dispute in relation to the employment of the ad hoc contract workers as the dispute was settled. Mr Matyolo submitted that this issue is the subject of a settlement agreement between the parties and there is a working arrangement in place and in the absence of a dispute and in view of the ongoing process, there is no basis for a strike.
- [42] Mr Maphanga submitted that the ad hoc contract workers were not employed because if they were, there was no need for the Applicant's CFO to ask for a name list of employees during 2015.
- [43] The fact that the CFO asked for a name list, does not show that the individuals would not be permanently employed or that the Applicant is not complying with the settlement agreement concluded between the parties. The evidence placed before this Court shows that the process is ongoing and a number of individuals will be permanently employed with effect from 1 April 2016.
- [44] In my view, based on the facts placed before me, there is a settlement agreement in place in respect of the appointment of ad hoc contract workers and the process agreed to is ongoing. The agreement put the dispute to rest until the process is finalised, which is not the case yet and the Respondents are not entitled to embark on strike action in respect of a dispute that is the subject of a settlement agreement.
- [45] The Respondents have the right to enforce whatever legal rights they have and to ensure compliance with existing agreements in respect of the issues relating to Sunday pay and the permanent employment of ad hoc contract workers, but their remedy is not strike action.
- [46] In awarding costs this Court has a discretion. In my view the interest of justice will be best served by making no order as to costs, having regard to the ongoing collective bargaining relationship between the parties and the prospect of prejudice to that relationship and the successful resolution of outstanding issues should an order for costs be made.

Order

[47] In the premises I make the following order:

47.1 The rule nisi issued on 27 January 2016 is confirmed;

47.2 There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court

Appearances

For The Applicant:

Advocate X Matyolo

Instructed by :

Maserumule Attorneys

For the First and

Second Respondents:

Mr Maphanga, SATAWU official

[1] Act 66 of 1995.

[2] Act 75 of 1997

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