

SOUTH AFRICA / JUDGMENT

Praga Technical (Pty) Ltd v Amcu obo Members (J 177/2023) [2023] ZALCJHB 25 (20 February 2023) [2023] ZALCJHB 25

COURT

Labour Court Johannesburg

BEFORE

Mabaso

CASE / FILE NUMBER

J 177/2023

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Source record**IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG****Not Reportable****Case No: J 177/2023**

In the matter between: PRAGA TECHNICAL (PTY)
LTD
Applicant
And
AMCU OBO MEMBERS
Respondent

Heard: 14 February 2023

Delivered: 20 February 2023

JUDGMENT

MABASO, AJ

Introduction

[1] On 08 February 2023, Praga Technical (Pty) Ltd ("the Applicant") successfully obtained a rule nisi before Moshoana J, on an urgent basis, interdicting and restraining AMCU obo members ("AMCU"/ "the trade union") from embarking on strike until the trade union has undertaken the mediation and advisory arbitration as required by the collective agreement between them and the provisions of the Labour Relations Act (LRA), respectively. Further, it

be declared that any strike emanating from the Notice by AMCU dated 06 February 2023, without taking such steps, would constitute an unprotected strike. This Court is now invited to determine whether such an order should be confirmed or discharged.

- [2] This Application is being opposed by the trade union, which raises the point that is being ventilated hereinafter.

Preliminary point

- [3] In paragraph 20 of the answering affidavit, the trade union is raising a point that the Applicant has failed to comply with the provisions of Section 68(2) of the LRA, which provides that an order to interdict a strike may only be granted if an applicant has given 48 hours notice to the Respondent, however, this Court may permit a shorter period of notice if an employer has given written notice to the Respondent of its intention to approach this Court for the granting of an order. The union has been given a reasonable opportunity to be heard before a decision concerning the application and good cause has been proffered why a shorter period should be permitted. Mr Cook, for AMCU, emphasised this point during oral submissions. In response, Mr Meyer, for the Applicant, responded thus: the Applicant deals with this aspect in paras 14.1 and 14.2 of its supporting affidavit, and same was considered by Moshwana J, and after hearing the argument of the latter, that Court proceeded to hear the matter and granted the rule nisi as prayed for.
- [4] This Court has considered that the strike was to commence on 08 February 2023 and that Moshwana J issued an interim order interdicting the strike; clearly, that Court did consider the application before it and the grounds raised by the Applicant relating to this point, as stated in the preceding paragraph. If Moshwana J had not, he would not have granted the Rule nisi. Consequently, this point by the trade union fails. This Court also concludes that Moshwana J also decided on the issue of urgency, so it is not permissible for this Court to revisit it. Cf See Selvan v Crossroads Distribution (Pty) Ltd (JA25/22) [2023] ZALAC 2 (16 Jan 2023) at para 13, and David v Crossroads Distribution (Pty) Ltd (JS182/17)

[2021] ZALCJHB 471 (14/ 10/2021) at para 9 to 17.

Assessment and analysis (on merits)

Issue of mediation

- [5] On or about 11 January 2019, both parties concluded a collective agreement to govern their collective bargaining and organisational rights. There, the parties declared their commitment to the objectives of industrial peace and stability; in clause 8 of the collective agreement, it was agreed that a shop steward (s) may be elected as per section 14 of the LRA; in terms of clause 10.1 read with 10.2, the following was agreed upon:

“[The Applicant] and [AMCU] to do everything reasonable to prevent strikes...by ensuring that the negotiations effectively resolve such disputes and disagreements that may arise,

No strike should take place and the Applicant and [AMCU] shall make every endeavour to ensure that a normal working conditions prevail, based on such dispute to been referred to the CCMA or Bargaining Council for conciliation and mediation. Upon a certificate of outcome indicating deadlock being issued, the party intending to strike will give the other party 48 hours prior written notice of their intention to do so. Picket rules as agreed to will be adhered to". (Own emphasis)

- [6] It is common cause that at the beginning of 2022, AMCU demanded that a "full-time" shop steward be appointed, but the Applicant did not accede to this demand; the Applicant contends that it was not willing to amend a contract of employment of one of its employees to suite this demand. Consequently, a dispute was referred to the CCMA and issues were reproduced in the CCMA referral as "to appoint full-time shop steward". The dispute was unsuccessfully conciliated. Consequently, the conciliating commissioner issued a conciliation certificate of non-resolution on 18 March 2022.
- [7] The Applicant contends that following the conciliation certificate being issued, the trade union took no action thereafter, as it did not refer the matter for mediation as per the requirements of clause 10.2. The trade union, in response, says the matter was referred to the CCMA, and a certificate of non-resolution was issued; therefore, they are entitled to call for the strike.
- [8] The Applicant further contends that after more than 325 days after issuing the conciliation certificate, a notice of intention to strike was received from the trade union. According to them, this notice is defective because it does not contain a demand, and no practical details of the strike are stated. Considering the approach that this Court is taking in this judgement, it opines that

it is not necessary to deal with the issue of the defectiveness of the strike notice, as the approach makes the latter issues academic.

- [9] Considering paragraph 5.3.2.3 of the founding affidavit and 24.2 of the answering affidavit, both parties are in agreement that the preconditions of the commencement of a strike are as contained in clause 10.2, which are (1) conciliation, and (2) mediation and (3) certificate (as highlighted in para 5 of this judgment).
- [10] In this application, a party who wants to interdict the intended strike is the Applicant, so ordinarily, it is the one with the onus of proof. However, whether mediation took place or not, it is only required to allege such; then, AMCU would have an evidential burden to show that mediation did occur. Considering the paragraphs highlighted in paragraph 9 of this judgment, AMCU has not discharged this evidential burden because it does not dispute that mediation has not taken place. Consequently, this Court accepts the version of the Applicant that mediation has not taken place, which indicates that all subsequent actions thereafter by AMCU were defective and rendered the intended strike unlawful, as it is against clause 10.2 of the collective agreement.

Issue of advisory award

[11] The next point is whether an advisory award was required or not.

[12] Section 64 (2) of the LRA signposts that if an issue in dispute between the parties relates to refusal to bargain, an advisory award must have been obtained before a 48-hour notice to commence strike is given. As that section read as follows:

“(2) If the issue in dispute concerns a refusal to bargain, an advisory award must have been made in terms of section 135

(3) (c) before notice is given in terms of subsection

(1) (b) or (c). A refusal to bargain includes-

(a) a refusal-

(i) to recognise a trade union as a collective bargaining agent; or

(ii) to agree to establish a bargaining council;

(b) a withdrawal of recognition of a collective bargaining agent;

(c) a resignation of a party from a bargaining council;

(d) a dispute about-

(i) appropriate bargaining units;

(ii) appropriate bargaining levels; or

(iii) bargaining subjects.”(Own emphasis)

[13] Regarding the CCMA referral signed on 7 March 2022 by AMCU, the issue in dispute is the appointment of a full-time shop steward, which means this is the dispute that was conciliated on 18 March 2022, and the conciliating commissioner declared the dispute being unresolved and then advised the parties that the dispute may be arbitrated / strike. Despite the conciliation certificate written

"strike", this does not mean parties must go on strike, but they still have to follow what the law requires them to do.

[14] In the papers before this Court, the parties agree that the demand was about the appointment of a full-time Shop Steward; the Applicant refused this demand as the collective agreement made no provision for a full-time Shop Steward. As a result of the no provision, parties were expected to engage about this new issue. This Court agrees with the Applicant that since this issue is not part of the collective agreement, as it is something that is outside of what parties have agreed upon; therefore, provisions of clause 13 (read with clause 5) had to apply, which provides that:

"...that certain subsidiary agreements will be negotiated subsequent to the signing of the main agreement and shall form part of the main agreement" (Own emphasis)

[15] Under the circumstances, this Court confirms that, indeed, this is a matter that required Application of the provisions of section 125(3) (c) of the LRA, in that an arbitrator be appointed to assist the parties, as the issue that the trade union has raised relates to bargaining subject, and is covered by the provisions of section 64(2)(d)(iii) of the LRA.

[16] Considering what is stated in this judgement above, this Court concludes that other issues raised by the Applicant in their papers are not relevant for a determination as this Court has concluded that the procedure followed by AMCU is not in line with the law, both the collective agreement and the LRA.

Costs

[17] This Court has considered the issue of cost as prayed for by the Applicant. Due to the ongoing relationship between the Applicant and AMCU, this Court concludes that there is no need for a costs order.

[18] In the premises, the following order is made:

Order

1. Any strike action emanating from the strike notice dated 06 February 2023 is unprotected;
2. No strike action may proceed relating to the issues in dispute between the parties herein until the mediation as per the collective agreement has taken place, and the advisory arbitration award has been issued;
3. There is no order as to costs.

Sandile Mabaso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Meyer

Instructed by:

Meyer and Partners Attorneys

For the Respondent: Mr Cook

Instructed by:

LDA Incorporated Attorneys

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