THE LABOUR COURT OF SOUTH AFRICA,
IN PORT ELIZABETH

Of interest to other Judges

CASE NO: P368/13

In the matter between:

ALGOA BUS COMPANY (PTY) LIMITED

Applicant

and

TRANSPORT ACTION RETAIL AND GENERAL WORKERS UNION (THOR TARGWU) First Respondent

THE PERSONS REFERRED TO IN SCHEDULE "1" TO THE NOTICE OF APPLICATION Further Respondents

Heard: 07 May 2015

Delivered: 07 May 2015

Summary: (Section 68(1)(b) of the LRA – compensation for losses sustained in an unprotected strike – application of principles – losses sustained after interdict and notice of intention to claim damages used as basis for order)

REASONS FOR JUDGMENT

Order

[1] On 7 May 2015 the following order was handed down in this matter:

"1.That the first and further respondents are jointly and severally liable to pay the applicant the sum of R1 406 285.33 ("the Capital Sum") in accordance with para 2 – 4 below.

2.Subject to para 3, the Capital Sum shall be paid in monthly instalments as follows:

2.1 the first respondent shall pay at least R5,280.00 per month;

2.2 the further respondents shall have R214,50.00 deducted from their salaries per month which deductions are authorised in terms of section 34(1)(b) of the Basic Conditions of Employment Act 75 of 1997.

3. Any failure or refusal of one or more of the respondents to make payment of the minimum monthly instalments referred to in para 2:

3.1 shall entitle the applicant to recover that unpaid portion of the Capital Sum from any one of and/or the other respondents ; and

3.2 shall not, until such time as the entire Capital Sum has been paid, constitute grounds for any one of and/or the other respondents refusing to continue to pay the minimum monthly instalments referred to in para 2.

4. Payment of the minimum monthly instalments referred to in para 2 shall commence on 7 June 2015 and thereafter be paid consecutively on the 7th day of each succeeding month, until the entire Capital Sum has been paid.

5. Directing the first respondent to pay the costs of this application including the wasted costs in relation to the proceedings which had to be postponed on 16 April 2014 as a result of the first and further respondents not being ready to proceed on this day."

Reasons for the judgment are set out below

Reasons

[2] This is an application in terms of s 68(1)(b) of the Labour Relations Acc, 66 of 1995 ('the LRA') concerning a claim for compensation for economic loss sustained as a result of an unprotected strike embarked on by the respondent union and its members, who are employed as drivers by the applicant. The respondents did file an answering affidavit and were represented by an attorney until a few of weeks before the hearing. However, the respondents did not instruct new attorneys nor did they request a postponement of the matter. The general secretary of the union, Mrs E P N Kovu, did attend Court and made some representations about the union's apparently parlous financial situation. However she did not wish to appear as a representative of the respondent at the hearing, so the matter proceeded on the basis that the respondents' representations were confined to what was set out in their answering affidavit and without further oral submissions on their behalf.

[3] Accordingly, the matter was decided on the affidavits, which contained sufficient detail to decide the matter, and there had been no request to refer matters to oral evidence.

[4] S 68(1)(b) sets out the following considerations governing the determination of payment of compensation, which are examined briefly thereafter.

> *"(1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction-*
>
> *…*
>
> *(b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct, having regard to-*
>
> *(i) whether-*

(aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;

(bb) the strike or lock-out or conduct was premeditated;

(cc) the strike or lock-out or conduct was in response to unjustified conduct by another party to the dispute; and

(dd) there was compliance with an order granted in terms of paragraph (a);

(ii) the interests of orderly collective bargaining;

(iii) the duration of the strike or lock-out or conduct; and

(iv) the financial position of the employer, trade union or employees respectively."

[5] There was no material dispute that:

5.1 the respondents had embarked on an unprotected strike commencing on midday on 23 January and ending on 30 January 2013, and

5.2 on 25 January 2013, the strike was interdicted.

[6] The respondents were not in a position to dispute the losses detailed in the affidavits, and there is no reason to doubt the reliability of the evidence relating to lost sales' revenue and loss of government transport subsidies during the period of the strike. Buses damaged in the course of the strike were not factored into the losses sustained, because the applicant had successfully claimed insurance for that damage. The only material challenge by the respondents to the figures provided by the applicant was to suggest that the comparison of the figures for January 2013 with the figures for a normal month like November 2012, was inappropriate as the proper comparator would have been the data for January 2012. However, the applicant pointed out that if it had used that data, the projected loss would have been an even greater amount. There was no reason to suppose that the losses were due to anything other than the consequences of the strike.

[7] The evidence available also showed, on a balance of probabilities, that the union did little if anything to discourage its members from participating in the strike or to distance itself from the strike. Broad allegations of attempts to persuade strikers to return to work were made but are so lacking in any specificity as to be of no evidentiary value at all. More particularly, even if I accept that initially, the union might not have been fully aware of the strike, there can be no doubt that it was fully apprised of the situation by 24 January 2013. By 25 January 2013 when the interdict was granted, there could have been no more doubt in the mind of the union officials that the strike was in progress and was unprotected. Immediately after the interdict was obtained, the applicant also pointedly drew the respondents' attention to the fact that a damages claim for losses sustained during the strike could be made. That ought to have limited any one reading that letter to the fact that the applicant would not necessarily confine itself simply to having the strike declared unprotected or taking disciplinary action, but that it might seek to recover any financial losses.

[8] The strike was not a spontaneous event which just began in response to some action by the applicant on 23 January 2013. In essence, it was a response to disciplinary action pending against certain members who were subsequently dismissed. In any event, even if it had been spontaneous, there was no effort by the union to restore labour peace except on the basis that the strikers' demands in relation to the suspended members should be conceded to. The disciplinary action in the circumstances was legitimate and that process should have run its course without the pressure of industrial action. Consequently, I do not think there is a case to be made that the strike was in response to unjustified conduct by the applicant. The strike also served no collective bargaining purpose.

[9] Importantly, once the Court order was obtained interdicting the strike, it was not adhered to. All in all, the strike endured for seven and a half days, a significant period within which the respondents had an opportunity to reflect on their actions. After the interdict was handed down on 25 January 2013, there could have been no doubt left about the status of the strike and the

interdict ought to have made it easier for the union to persuade members to end the strike, especially when it was coupled with the applicant notifying the union of its intention to claim damages.

[10] The union provided unconfirmed financial statements for 2011 and 2012, marked "for discussion purposes only" as evidence of its poor financial condition. Undoubtedly, if those unofficial documents were an accurate reflection of the union's financial position at that time, the union was barely scraping by. Although it is not part of the evidence presented by the union in these proceedings, the comments of the general secretary from the bar when she was explaining her attendance at the proceedings, suggest the situation is even worse presently. However, the fact that an award of compensation against the union might cause it further financial damage is not in and of itself a reason for not granting relief. In my mind, an important question that has to be considered is whether the effect of a particular award of compensation against a union is likely to seriously compromise its ability to function, bearing in mind that it will usually have responsibilities to members in other workplaces, whose right to effective representation by, and participation in the affairs of, a functioning union ought not to be seriously compromised by the unlawful conduct of a section of the membership or of a local organiser. However, this does not mean a union can expect to remain immune from the financial consequences of reckless conduct by its members or office bearers.

[11] In this instance, even on the union's version, it is apparent that it was already in a financially perilous situation and that an order of compensation against it, though adding to its financial woes, would just be one more additional burden. There was also no credible evidence of how the order of compensation would affect its collective bargaining capability. A related factor to consider in this regard is whether the imposition of an award of compensation can be ameliorated by making it repayable on extended terms, which is what I have done in this case. Notwithstanding the unconfirmed financial reports it produced, the union did not dispute the applicant's contention that it had a membership that ought to have yielded subscription income of just over approximately R 100,000 – 00 per month. Further, there

is nothing to suggest the union could not raise a small special temporary levy from all members to cover the extraordinary expenditure.

[12] In relation to the union's members, the amount they are required to pay monthly in recompense is equally apportioned between them and will amount to less than 3 % of their remuneration. This amount will also be reduced in accordance with any contribution made by the union. Considering their actions such as their failure to follow any procedures, their persistence with the strike and failure to heed the Court's order, the financial burden of the installment payments is not unduly burdensome.

[13] The nature of the applicant's business meant that financial impact of the strike on it was direct: it lost fares and subsidies for the duration of the action. There was no way these could be recovered by expedients like working in additional hours on the workers' return to work. The demand for transport for those days was not one that would accumulate and could be satisfied on a deferred basis later. The scope for the employer to mitigate its damages seems to have been non-existent. Overall, the loss of just over a week's income would have amounted to approximately 2 % or more of its yearly income.

[14] I have already mentioned the duration of the strike above. Taking into account the factors discussed above which are set out in s 68(1)(b) of the LRA, even if I make allowance for the strikers' actions until 25 January 2013 as being misguided and ill-informed, their defiance of the Court order and indifference to a prospective damages claim after that date makes it difficult to see why they should not bear the full costs of damages suffered for the remainder of the strike. Accordingly, I ordered payment of damages based on the losses sustained over five of the seven and a half days duration of the strike, or two-thirds of what the applicant sought.

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R LAGRANGE, J

Judge of the Labour Court

Appearance

For the Applicant: J G Grogan SC

Instructed by: Chris Baker and Associates

For the Respondents: None