IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: 2024-092689

In the matter between:

HEINEKEN SOUTH AFRICA (PTY) LTD **Applicant**

and

FOOD AND ALLIED WORKERS UNION **First Respondent**

THE INDIVIDUAL RESPONDENTS LISTED IN ANNEXURE A TO THE NOTICE OF MOTION **Second to Further Respondents**

Heard: **16 October 2024**

Delivered: **21 October 2024**

This judgment was handed down electronically by emailing a copy to the parties. The 21st of October 2024 is deemed to be the date of delivery of this judgment.

JUDGMENT

ITZKIN, AJ

[1] On 22 August 2024, this court (per Baloyi AJ) granted an interim order declaring that the respondents' conduct of 16 August 2024 constitutes an unprotected strike, interdicting participation therein (including various conduct in contemplation or furtherance thereof); interdicting incitement of the applicant's employees to participate in the unprotected strike or conduct in contemplation or furtherance thereof; and ordering the second to further respondents to return to work.

[2] The applicant only sought confirmation of paragraph 2.1 of the *rule nisi* which declared the conduct engaged in by the respondents on 16 August 2024 and conduct by them in contemplation or furtherance thereof, to constitute an unprotected strike.

[3] In summary, the circumstances that culminated in the *rule nisi* are as follows:

3.1 In December 2021, the applicant implemented a 3-shift system at a point when its manufacturing operation in Gqeberha was on a 2-shift system.

3.2 On or about 9 June 2022, the parties concluded a collective agreement known as a "Substantive Agreement" regulating various terms and conditions of employment.

3.3 The applicant reverted to a 2-shift system, and in June 2024, it re-implemented a 3-shift system.

3.4 On 26 June 2024, the first respondent referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), alleging that the applicant had unilaterally changed terms and conditions of employment by implementing the 3-shift system.

3.5 Following a certificate of outcome being issued by the CCMA, the first respondent issued a strike notice to the applicant relating to the commencement of the strike which was sought to be interdicted by the applicant.

3.6 This culminated in an urgent application and in the *rule nisi* being granted.

Evaluation

[4] The applicant alleged in its founding affidavit that the strike was unprotected on the basis that no demand was made to the applicant; there was no clarity on the demand in the strike notice (which suggested that the dispute may pertain to a refusal to bargain for which there was no advisory award); and to the extent that the issue pertained to unilateral changes to terms and conditions of employment, there was no unilateral change. It also referred to and relied on a collective agreement regulating hours of work (in the form of the Substantive Agreement).

[5] The respondents delivered an answering affidavit. As part of their grounds of opposition, they alleged that the strike was protected on the basis that a clear demand had been made for the applicant to cease the implementation of the changes to the shift system. They also contended that there had been a unilateral change to employees' terms and conditions of employment through the changes to the shift system, which was not permitted under the Substantive Agreement.

[6] During the hearing of the matter, both parties' representatives acknowledged that a key question for determination is whether the strike was unprotected under section 65 of the Labour Relations Act[1] (LRA).

[7] Section 65(1)(c) provides that 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 if *"the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law*."

[1] No. 66 of 1995.

[8] Section 65(3)(a)(i) provides that subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out if that person is bound by *"any arbitration award or collective agreement that regulates the issue in dispute*."

[9] It is evident that the dispute, in essence, pertains to the interpretation of the "Substantive Agreement", which is a collective agreement concluded on 9 June 2024, clause 3 of which provides that working hours will be *"a flexible average of forty-four (44) hours per week"*.

[10] Although the respondents' representative sought to contend that the dispute was not one pertaining to the interpretation or application of the "Substantive Agreement", it is evident from the following paragraphs of the respondents' answering affidavit that there is a dispute thereon which lies at the heart of the matter:

> "53.6.3 While Clause 3 of the Substantive Agreement stipulates that working hours will average "a flexible average of forty-four (44) hours per week", the union asserts that the implementation of a three-shift pattern deviates significantly from the spirit and intent of this agreement, in that it is no longer a flexible average of the 44 hours per week.
>
> 53.6.4 The interpretation suggested by the employer also impacts on certain provisions of the Agreement itself, especially those allowing for extra pay on Sundays."

[11] Section 24 of the LRA provides for disputes about the interpretation or application of collective agreements to be resolved by way of arbitration (following a referral to conciliation and an attempt at conciliation).

[12] In these circumstances, the strike was indeed unprotected by the operation of section 65(1)(c) and section 65(3)(a)(i) of the LRA.

[13] These findings are determinative of the merits without the necessity to make definitive determinations on the other grounds on which the application was brought, pertaining to whether a demand was made and whether it pertained to a refusal to bargain. Given these findings, there is also no necessity for the court to definitively determine whether or not the change in the shift pattern is, in fact, a unilateral change to terms and conditions of employment (which may well be an issue for determination by the CCMA, if a dispute is referred to it in terms of section 24 of the LRA).

[14] In these circumstances, paragraph 2.1 of the interim order of Baloyi AJ dated 22 August 2024 stands to be confirmed.

[15] Concerning the issue of costs, in my assessment, the requirements of justice and fairness militate against a costs order being made.

[16] In the premise the following order is made:

Order

1. Paragraph 2.1 of the interim order of Baloyi AJ, dated 22 August 2024, is confirmed and made final.
2. There is no order as to costs.

_____

R. Itzkin

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : I. Lawrence Edward Nathan Sonnenbergs Incorporated

For the Respondent : N Voyi of Ndumiso Voyi Incorporated