IN THE LABOUR COURT OF SOUTH AFRICA

Held at Johannesburg

CASE NO: J707/98

DATE: 7 APRIL 1998

PICK 'N PAY (PTY) LIMITED Applicant

and

SOUTH AFRICAN COMMERCIAL CATERING AND ALLIED WORKERS UNION AND OTHERS Respondent

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JUDGMENT

WAGLAY, AJ:

[1] This is a urgent application in which the Applicant seeks an order declaring the strike of which the first respondent gave notice and which was due to commence on 4 April to be in breach of section 65(1)(b) and/or (c) of the Labour Relations Act and accordingly unprotected. The matter was enrolled as one of urgency to be heard on Friday, 3 April 1998. By agreement between the parties the matter was postponed until today, Tuesday, 7 April 1998 with the parties having agreed to file the answering and replying papers.

[2] Section 65 limits the right to strike and in its subsections (1)(b) and (c) provides

that no person may take part in a strike or any conduct in contemplation or furtherance of the strike or lock-out if (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration or (c) 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.

[3] Mr Hlongwane who appeared before this court represented the Respondents. The relief the Applicant seeks is to declare the intended strike, as stated earlier, by the second and further Respondents, as per Annexure A, to be unlawful, alternatively unprotected.

[4] The attack that the Applicant makes against the intended strike by the Second and further Respondent is that such strike would be in breach of section 65(1)(b) and (c) of the Act. In terms of these subsections Second and further Respondents are not permitted to embark upon, participate or take any action in furtherance of the strike if (1) there is a binding agreement between the parties which specifically addresses the issue which is in dispute and provides that the dispute must be resolved by arbitration and/or if (2) the Labour Relations Act provides that the issue which is in dispute, be referred by the Respondents to be arbitrated upon by the Commission for Conciliation, Mediation and Arbitration or the Labour Court for adjudication.

[5] In order therefore to arrive at a proper finding, the court is firstly required to determine what is the issue in dispute and thereafter determine whether or not the issue is one which can be resolved in terms of the agreement between the parties; alternatively arbitrated or adjudicated upon as provided for by section 65(1)(c). In order to determine the issue in dispute this Court is obliged to consider the facts placed before it. It appears that in and during August 1996 a number of part-time employees of Applicant were appointed as permanent employees from amongst part-time employees. Two persons from amongst those newly appointed permanent staff were to be utilised in a supervisory capacity. Those utilised in such positions were

paid the rate applicable to such positions. The two persons referred to above were Foster and Molala. Molala was removed from the supervisory duties due to his poor work performance and continued to be remunerated at the rate applicable to a supervisor. Foster was retained in that position until December 1997, that is for some 16 months, at which time she was officially confirmed in the position as supervisor.

[6] The Applicants state that neither Foster nor Molala had any right to be appointed as supervisors. However, after serving in the capacity for over 16 months Applicant, for fear of being accused of treating Foster unfairly by permanently using her as a supervisor formally appointed her in that position. It is noteworthy that until her formal appointment. Foster merely held the position as acting supervisor which, according to Applicant, was also the case with Molala. The Second to further Respondents' representatives, on becoming aware of Foster's formal appointment, complained that the Applicant had breached the provisions of the flexibility agreement as referred to by the Applicants in its papers. According to the Applicant the complaint of the Respondent was that Foster's appointment amounted to the filing of a new vacancy which had not been advertised in accordance with the relevant provision of the said agreement.

[7] I may interpose to state that the flexibility agreement covered *inter alia* job security, flexibility and mobility of labour and a further agreement annexed to Applicant's papers marked C dealt with the procedure to fill vacancies that may occur within Applicant's various business and branches. I may also add that the agreement speaks of vacancies and not new vacancies. These agreements were properly concluded between the First Respondent, duly representing Second and further Respondents, and the Applicant.

[8] The Applicant disputed the Second and further Respondents averments and argued that they did not feel the appointment of Foster as filling of a new vacancy. It

was therefore not obliged to follow the procedures as recorded in the agreement referred to above and proposed that if the Second and further Respondents maintain that the appointment of Foster was in breach of the agreement, that the issue be referred to arbitration as provided for in the agreement.

[9] The representatives of Second to further Respondents, however, demanded that Foster be removed from the new position, arguing further that Foster was being favoured by the Applicant whereas Molala was not given appropriate training and support as a consequence of which his performance may have not been satisfactory.

[10] In response to the Second and further Respondents' demand that Foster be removed from her new position, Applicant proposed, while not agreeing to remove Foster from her post, to place Molala in a supervisory post subject to a period of probation stating that if Molala did not perform satisfactorily while on probation, after being given all the necessary support, then the Applicant would create two further vacancies which Applicant was prepared to fill by following provisions of the agreement referred to above. Applicant argued that the only reason it made the proposals referred to above was to resolve the dispute concerning the alleged breach of the agreement with regard to the appointment of Foster.

[11] The Second and further respondents refused to accept this proposal. A number of meetings were held between the representatives of the Second and further Respondents and Applicant and later included the First Respondent. A perusal of the minutes of the meeting of 4 February 1998 as kept by the Applicant with regard to the issues in dispute indicate that the complaints of the Respondent were the following:

1. That the respondent believed that the appointment of Foster was in breach of the agreements.
2. They wanted Foster to be removed from the supervisory position.
3. That once Foster was removed from the position, the post should be frozen until

such time as the issue is resolved.

[12] Further meetings were held at which the Respondents demanded that Foster be removed. After the second meeting, on 5 February 1998, persons from amongst the Second to further Respondents went on strike which continued the following day, 6 February. The Second to further Respondents returned to work after receiving an ultimatum and the organiser of the First Respondent thereafter got involved in further meetings and discussions between Applicant and Respondents. Respondents at the hearing submitted that the reason for the strike was in fact the unprocedural appointment of Foster. At the meeting between Applicant and representatives of the Respondents, according to the Applicant, the First Respondent's representative asked a number of questions relating to the appointment of Foster. At this meeting the Respondents decided that Molala and another of its members, Yedwa, be appointed as supervisors without any probationary conditions. This was in response to the offer made by the Applicants. The Applicant was not agreeable to make the appointments of Molala and Yedwa, as proposed by the Respondents. The First Respondent thereafter referred the matter to the CCMA for conciliation.

[13] The dispute was styled by the First Respondent to be one of mutual interest. It stated that the dispute was about the "inability to reach agreement with the company over the placement of two employees at the front line of supervisors without conditions and payment of another employee's salary to be the same as supervisor." The Applicant stated that it objected to the nature of the dispute as framed by the Respondents and submitted that the dispute was about the interpretation and application of the flexibility agreement. The commissioner of the CCMA none the less accepted the nature of the dispute to be as recorded by the respondent and, acting in terms of section 135(3) of the Act, conducted according to him a fact finding exercise and made recommendations for the resolution of the matter which, according to the Applicant, the Respondents rejected.

[14] Once the commissioner issued a certificate to the effect that the matter remained unresolved, the Respondent on 1 April gave notice as required by the Act of its intention to commence strike action on 4 April 1998.

[15] The Respondents dispute a number of allegations made by the Applicant while not denying the validity of the agreements referred to above. It gave examples of instances where the agreed procedure was not observed in the appointment of staff in the Applicant's business in question but stated that in all instances appointments were made in consultations with it. Respondents specifically deny that the complaint was the failure of the Applicant to follow procedure provided for in the agreement but rather the failure by the Applicant to consult with it on the appointment of Foster. According to Respondents the Applicant's response was, that to rectify the position it would offer a position of supervisor to Molala with a one month probationary period and create another vacancy for a supervisor which could be filled by advertising the post on the notice board. (According to Respondent, Applicant still had no intention of following the procedures provided for in the agreements referred to above.) In response, Respondents proposed that Molala be put in a position as supervisor without any probationary conditions and that Yedwa be appointed in the other vacant supervisory post. This, as stated earlier, was rejected by the Applicant. The Respondent further disputed that Applicant's minutes of the meeting properly recorded the discussions, stating that the flexibility agreement was never an issue, but that the only issue was that of appointing Molala and Yedwa as supervisors. The Respondents further alleged that at the meeting on 7 February 1998 Foster's appointment ceased to be an issue save that it was agreed that her placement was "not according to the agreements and will not be argued further". It further stated that there was no dispute about Molala being appointed as supervisor, the only dispute related to the probationary period proposed by the Applicant. There was a dispute about Yedwa's appointment and consequently the matter was referred to the CCMA.

[16] I may again interpose to state that from the papers before me the second part of the dispute referred to the CCMA relating to the payment of another employee's salary to be the same as a supervisor has not been taken further and is irrelevant to this proceedings.

[17] Respondents further denied that they at any time demanded the removal of Foster from the post of supervisor. In its papers it stated that the Applicant simply made two supervisory positions available which positions were not created in terms of the agreement, but created out of mutual discussions on the basis of goodwill. However, in paragraph 25 of the answering affidavits on behalf of the Respondents, it states that two vacancies created by Applicant were created in response to the problem about the appointment of Foster. It further goes on to say that the creation of the two posts had little to do with the Flexibility agreement but rather because of the Applicant's failure to consult with regard to the appointment of Foster.

[18] There are various discrepancies in the versions of the Applicant and Respondent. What is clear, however, is that Applicant appointed Foster to a position without following either the written agreements entered into between the parties or the practice of consulting with the shop stewards based at the business premises in question. After Foster was appointed, the Second and further Respondents objected to this appointment because none of the procedures were followed, or according to them the consultation process was not followed.

[19] The Applicant disputes that the consultation process was in fact a process that was required to be followed and said further that it did not consider itself to be in breach of the agreements. However, since the dispute arose relating to Foster, i.e. because of the appointment of Foster, in order to resolve the dispute it proposed the appointment of Molala as a supervisor, subject to one month probation and created

another post. It proposed to fill the other post in accordance with the flexibility agreement which is Annexure C to the Applicant's papers. However, the flexibility agreement relates to maintenance of staffing levels, shift patterns, job security, flexibility, mobility of staff and proposes the establishment of a NNC, (the National Negotiating Committee) whose task was to establish staffing levels. Clearly the proposals made by the Applicant could not be seen as failing within the ambit of the flexibility agreement. More importantly, Annexure J to the Applicant's papers, displays no intention of adhering to the procedures laid down in the agreement marked C to Applicant's papers. Clearly the Applicant's proposals emanated from what is considered to be a wrong perceived by the Respondents in appointing Foster - it proposed to create the two vacancies which did not comply with the flexibility agreement or the other written agreements. The Respondent, by its actions and discussions, clearly accepted the creation of these vacancies.

[20] The next issue was the filling of the vacancies. The Applicant proposed that the appointment of Molala was subject to one month probation and the placing of an advert on the notice board for employees within the business in question to apply. The Respondents, however, proposed that Molala be appointed without the probation period of Yedwa be appointed, without any probation as well.

[21] When one considers all the facts before me, the underlying reasons for the Applicant making the offer it did, that of appointing Molala on probation and creating a further vacancy - this was in fact to settle the dispute relating to the appointment of Foster. As such the proposal constituted an offer. The Respondents were entitled to either accept it or reject it. If it accepted the offer the matter would end there. If it rejected the offer it had to proceed with a grievance, that of the unprocedural appointment of Foster. What the Respondents however do, is after the meeting of 7 February 1998, the last meeting on the issue, they decide that the non-appointments of Molala and Yedwa constituted a dispute of mutual interest and referred it to the

CCMA. The fact that the CCMA accepted that the matter was one of mutual interest is not binding on this Court. In any event, I do not know what facts were presented to the CCMA. In the circumstances and following the decision of **Ceramic Industires** I accept that in determining the issue in dispute for purposes of section 65(1)(b) and (c), I am required not simply to look at the dispute by its literal characterisation by one of the parties but the real grievances that underlie or give rise to the dispute.

[22] The issue in dispute is the non-procedural appointment of Foster. The vacancies and proposals to fill these vacancies were simply, as I stated earlier, offers to attempt to resolve the dispute. The issue was the non-procedural appointment of Foster.

[23] As this issue was not referred to conciliation, the Respondent could not utilise the certificate issued by the CCMA in terms of which it could give notice to the Applicant of its intention to strike. The next question I have to determine is whether this was a matter that could be arbitrated upon in terms of an agreement or arbitrated upon by the CCMA or adjudicated by the Labour Court.

[24] Even if I accept that the parties consulted about appointments since 1995, the Respondents agree that the agreement, the flexibility agreement and its annexures remain in force and continue to apply until repudiation. Neither side had repudiated the agreement and consequently they are bound to the terms of the agreement. In terms of this Agreement if either party commits a breach or if there is a dispute about the interpretation or application of the agreement, such dispute must be referred to arbitration.

[25] Here there is a dispute about Foster's appointment constituting a breach of the agreement hence the dispute is clearly one which in terms of the agreement has to be referred to arbitration. In the circumstances there is clearly an agreement as

contemplated by section 65(1)(b) and this agreement specifically provides for resolution of matters by referral to arbitration. Having decided that there is an agreement in terms of section 65(1)(b) in terms of which this matter should be referred to arbitration, I have not considered it necessary to decide upon whether or not the call by the Respondents to go on strike was also in breach of section 65(1)(c). I do not consider that to be necessary at this stage.

[26] In the result I make the following order:

1.1 It is declared that the strike of which the first respondent has given notice to the Applicant, and which was due to commence at the Applicant's Norwood Hypermarket on 4 April 1998 ("the strike") would be in breach of section 65(1)(b) of the Labour Relations Act and accordingly unlawful and unprotected.

1.2 It is directed that the first Respondent shall not call upon its members to embark upon the strike.

1.3 The Second and further Respondents are interdicted from participating in the strike.

2. Service of the order is to be effected as follows:

2.1 On the First Respondent at its head office at 1st Floor, SA Centre Building, 1 Edith Cavell Street, Hillbrow, Johannesburg.

2.2 On the Second and further Respondents by a duly authorised representative of the Applicant reading out the order to such of the Second and further Respondents who may be present at the Norwood Hypermarket at 07h00 and at 09h00 on 8 April 1998 and by providing copies of the order to those of them who request same and by placing a copy of the order on its three notice boards.

Parties are entitled to request fuller reasons for this judgment.

Waglay AJ