

VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

DATE: 31 August 1998

CASE NO. J2251/98

In the matter between:

AUTOMOBILE MANUFACTURERS EMPLOYERS

ORGANISATION

Applicant

and

NATIONAL UNION OF METALWORKERS OF

SOUTH AFRICA

Respondent

J U D G M E N T

LANDMAN, J:

[1]This is an application brought by the Automobile Manufacturers Employers' Organisation and others against The National Union of Metalworkers of South Africa and various other persons referred to in a schedule. The application is brought by way of urgency. It seeks inter alia the following relief, namely, declaring that the union's notice of 21 August 1988 threatening a secondary

strike against the second to eighth respondents fails to comply with the provisions of the Labour Relations Act. In the alternative, declaring that any secondary strike that is referred to in the notice is unlawful in terms of section 66(2) of the Act and, in either event, interdicting the union and further respondents from taking part in any secondary strike action referred to in its notice of 21 August 1998 or in any conduct in contemplation or furtherance of such a strike.

[2] It is common cause that on 21 August 1998 the union gave to the applicants notice that they intend embarking upon a secondary strike. The applicants' attorney dealt with that notice by letter dated 25 August 1998 and followed it up with a further letter dated 26 August 1998. In this letter it is stated:

"This letter accordingly serves as notice in terms of section 68(3) of the Labour Relations Act that our clients, as listed at the foot of this letter, intend to bring application to the Labour Court for relief, including but not limited to an order:

1.declaring that your notice of 21 August 1998 threatening secondary strike action against the individual automobile manufacturers fails to comply with the provisions of the Labour Relations Act ("the Act").

2.Alternatively, and in any event, declaring that any secondary strike action, such as that threatened, is unlawful in terms of the provisions of section 66(2) of the Act.

3. In either event, interdicting both the union and its members from taking part in such secondary strike, or in any conduct in contemplation or furtherance of such strike. The application will be brought before the Labour Court, Johannesburg, on Monday, 31 August 1998 at 10:00 or as soon thereafter as the matter may be heard."

[3] This was followed up by a notice of application with supporting affidavits which were filed on the union and other respondents on Friday 28 August 1998.

[4] The point has now been taken that insufficient notice has been given as required by section 68(3) of the Labour Relations Act, 66 of 1995. Section 68(3) provides:

"Despite subsection (2), if written notice of the commencement of the proposed strike or lock out was given to the applicant at least ten days before the commencement of the proposed strike or lock out, the applicant must give at least five days' notice to the respondent of an application for an order in terms of subsection (1)(a)".

[5] The preceding subsections of section 68 require in the first place that an applicant seeking an interdict in this court should apply on not less than 48 hours notice of the application. However, a shorter period may be condoned inter alia if the

applicant has given written to the respondent of the applicant's intention to apply for the granting of an order.

[6] The reason for these provisions dealing with notice have been summed up in National Manufactured Fibres Employers Association and Another v Chemical Workers Industrial Union and Others (1997) 18 ILJ 1359 (LC) at 1371C-D as follows: "There are well founded reasons for the legislature requiring parties in industrial disputes to approach a court only on the basis of proper notice. This was the situation which obtained under the Labour Relations Act, 1956 by virtue of an amendment effected to the Act in 1991 as a result of Sacola/Cosatu/Nactu accord and which has been reincorporated into the present Act. The provisions requiring a party to give notice is also part of the procedural laws of other countries, including that of the United Kingdom."

[7] The question which arises is what is meant by the phrase, in section 68(3), "notice to the respondent of an application for an order in terms of subsection (1)(a)". It appears that section 68 refers to at least three types of notices. The first is the notice given by a union or employees that a strike is contemplated. See section 68(3). The second type of notice is a notice of intention to bring an application, this is the type of notice which is referred to in section 68(2)(a) of the Act and

finally we have a notice of application referred to in section 68(2) and 68(3).

[8] Du Toit et al The Labour Relations Act of 1995 2nd ed 220 have the following to say about the notice in terms of section 68(3):

"Where an applicant has received at least ten days' written notice of a proposed strike or lock-out, it must give the respondent at least five days' written notice of its intention to apply for an interdict [section 68(3)]. There is no provision for an abridgement of the five-day period, even on the grounds of urgency."

It seems to me that the learned authors, when they refer to notice of intention, are not using the wording of the Act. The wording of the Act refers to a notice of application. A notice of application is generally a notice of motion together with supporting affidavits. In my opinion this is the construction which must be given to section 68(3). A respondent, such as the union and other respondents in this case require to know what the case is that is being brought against them. They need to know whether they can oppose the case and they require more than simply the gist of the case. The applicants' attorney's letter of 26 August 1998 sets out the relief which is going to be claimed and the grounds but not the facts which are to be relied upon.

[9] The factual matrix on which the court must make a decision may be a complicated one and appears to be a complicated one in this particular matter. For these reasons the legislature has provided in section 66(3) to (6) of the Act that the court may request the CCMA to provide it with a report in order to deal with the evaluation of the question relating to the nature and extent of the secondary strike and whether that is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.

[10] It is clear that the legislature intended that where a union gives ten days' notice of the strike it is entitled to have five days' notice of the application and supporting affidavits. In my opinion the legislature intends this to be the same as *dies induciae* which are normally provided for in the rules. However, in this case it is provided for in the statute and, as Du Toit et al, 220 point out, its breach cannot be condoned.

[11] There is, however, the possibility of substantive compliance. This would depend on the circumstances. But in this case where only three days' notice was given, two of which being over a weekend, it cannot be said that there has been substantial compliance.

[12] It follows therefore that the applicants have not given the union and respondents sufficient time to prepare for this application. The respondents say they have been prejudiced, this is not gainsaid and, in any event, this court would not have the power to condone a lesser period.

[13] I therefore find that the application is defective in so far as the notice of motion and affidavits were not served five days prior to today's date. I will, however, permit the applicant to bring the matters on the same papers, if they are so advised. The application accordingly is struck off the roll/ dismissed subject to what has been said above. The applicant is to pay the costs.

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JUDGE LANDMAN

LABOUR COURT OF SOUTH AFRICA

ON BEHALF OF APPLICANT : ADV A I S REDDING

Instructed by : Chris Baker & Associates

ON BEHALF OF RESPONDENTS : ADV H VAN DER RIET

Instructed by : Cheadle Thompson

DATE OF HEARING : 31 AUGUST 1998

DATE OF JUDGMENT : 09 SEPTEMBER 1998