Sneller Verbatim/MS

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J4561/2001

2001-11-16

In the matter between

METRORAIL Applicant

and

SATAWU Respondent

J U D G M E N T

REVELAS, J:

1. Yesterday was the return day of a rule *nisi* issued by LANDMAN, J on 16 October 2001 granting an interim interdict restraining the respondents from participating in an unprotected strike.
2. This matter was postponed thereafter on three occasions.
3. The strike action in question, called upon by the union on 17 October 2001, relates to a dispute referred to the Bargaining Council on 19 September 2001 pertaining to the introduction of the applicant's new policy on drug and alcohol abuse.
4.
5. The strike was called because the union relying on section 64 of the Labour Relations Act, 66 of 1995 ("the Act") particularly section 64(3)(e), 64(4) and 64(5) thereof. The respondents' views to the implementation of the new substance abuse policy as a unilateral change to its members' terms and conditions of employment.

6.The applicant's case is that the 30 day period referred to in section 64(1) of the Act had not lapsed yet and further that the applicant did not amend existing terms and conditions of employment and had not acted unilaterally in introducing its new policy.

7.In deciding whether or not to confirm the *rule nisi* two questions arise. The first is whether there was indeed a change in existing terms and conditions which would necessitate a factual finding as to what the position was prior to the implementation of the new policy and the position thereafter.

8.The second question is whether if there was such a change that change was imposed unilaterally.

9.The policy on substance abuse which is applicable is described as follows according in the founding papers:

"1. There is random testing in terms of which a section manager of the applicant would present a bag to his subordinative carrying a number of balls with the same colouring and one ball distinguishable from the rest. Anybody picking the distinguishable ball would then be tested. This happens on an irregular basis.

2. And all inclusive testing where on any day a section manager who round all his subordinates to assemble to test for alcohol.

3. Testing on an employee that is suspected of being drunk on a particular day."

10.Previously employees were not required to submit to random testing for substance abuse. After the introduction of the policy the applicant asserted that submission to testing was a condition of employment and employees who did not cooperate would be disciplined.

11.This is evident from paragraphs 4.1 and 4.8 of the Policy found in the record at page 87 and 88 and it is necessary to quote these paragraphs fully. They read:

"Guidelines and Procedures.

4.1 Submission to random testing for alcohol or drug abuse will be required of all

Metrorail employees at anytime as prescribed by Metrorail at the cost of the company.

and:

4.8 Testing would be a condition of employment. Therefore refusal to submit a test will incur disciplinary action."

12.It is quite apparent from the above that even the applicant regarded the implementation of the new policy as a change to existing circumstances. An employee was in fact disciplined for refusing to submit to testing. This appears from the supplementary affidavit deposed to by the employee himself. Prior to the introduction of the new policy an employee who was suspended pending a disciplinary inquiry was so suspended with pay, the position now being that such an employee is suspended without pay in the same circumstances.

13.The applicant sought to obtain agreement from three trade unions, including the respondent, before it implemented the new policy. The respondent union declined to agree to the terms of the new policy whereas the other two unions agreed thereto. In my view, this further demonstrates that the applicants knew it could not unilaterally introduce changed terms and conditions of employment without the consent of its employees.

14.Clearly a change in the terms and conditions was demonstrated.

15.The applicant argued that the numerous consultations held with the unions, which preceded the introduction of the new policy, showed that the introduction thereof was not unilateral. It has been accepted in this court that **"unilateral"** in this context does not have the ordinary meaning it normally has in industrial relations. It does not mean without **consultation** but without **consent**.

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SAMRI v Toyota of South Africa (Pty) Limited 1997 18 ILJ 374 at 379 A to B.

v Sasol (Pty)

Limited, a division of the Sasol Group, 1999 20 ILJ 1222. [*Brassey: Commentary on the Labour Relations Act 1200 A 4 at 19.*]

16. It cannot be argued that since the terms and conditions of the contract of employment do not prohibit testing, testing is, in the circumstances prevailing at the applicant's enterprise, a condition of employment. It was quite correctly pointed out by counsel on behalf of the respondent that this argument, ignores the fact that compulsory testing is an invasion of an employee's right to privacy in the sense of the acquisition of information. (See: *Chaskalson et al* Constitutional Law of South Africa Revision Service 5, 1999 chapter 39, and The Right To Body And Psychological Integrity. (See: *Chaskalson supra* at 39-34 and 39-43.)

17. These basic rights are derived from the common law and are currently protected by the Constitution.

(See also: *Makale v Vitro Building Products* [1996] 4 BLLR 506 I - C at 519 C to 520 C.

18. Legally the applicant is not justified to invade the basic rights of its employees. The fact that legislation informed the introduction of the new policy does not effect the positions as it stands. The implementation of the substance abuse policy did in fact unilaterally change the terms and conditions of employment of the respondent's members as contemplated in section 64(4) of the Act.

19. The applicant failed to respond to the request to restore the *status quo* within 48 hours. The respondents therefore acquired the right to strike without complying with the provisions of section 64(1) of the Act. In other words, as argued, they did not have to wait for the 30 day period

to expire nor did they have to give a 48 hours notice provided for in this subsection.

20. Accordingly the rule should be discharged.

21. The respondent argued that the applicant should pay cost on a punitive scale because the applicant was not frank with the court. After considering the matter, I am not inclined to grant a punitive cost order against the applicant.

22. In the circumstances the rule is discharged with costs.

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E. Revelas