NOT REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO **D597/2001**

DATE 2001/05/31

REVISED

In the matter between:

STAFF ASSOCIATION FOR THE MANUFACTURING AND RELATED INDUSTRIES (SAMRI) Applicant

and

JOY DLAMINI First Respondent

SIBA MANAGEMENT CC Second Respondent

SIBA FAST FOODS CC Third Respondent

JUDGMENT DELIVERED BY THE HONOURABLE JUDGE PILLAY ON 31st MAY 2001

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J U D G M E N T

PILLAY J

This is an application for a final order interdicting the respondents from implementing proposed reductions in salary and changes in conditions of employment in respect of certain employees. Initially, relief was claimed in respect of unnamed employees. The applicant has since identified these employees although I now gather that the *locus standi* of these identified employees to participate in these proceedings remains challenged.

The first point raised *in limine* is that there has not been proper compliance with section 64(4) and (5) of the Labour Relations Act, which provide:

"(4) Any employee who, or any trade union that refers a dispute about a unilateral change to terms and conditions of employment to a council or the Commission in terms of subsection 1(a) may, in the referral and for the period referred to in subsection 1(a)-

(a) require the employer not to implement unilaterally the change to terms and conditions of employment; or

(b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.

) The employer must comply with the requirement in terms of subsection (4) within 48 hours of service of the referral on the employer."

On the conciliation referral form the applicant stated that:

"I/We require that the employer party (to) restore the terms and conditions of employment that applied before the change."

instead of including in the referral form that,

"the employer party to implement unilaterally the proposed changes that led to the dispute for 30 days."

It was common cause that the respondents did not implement changes in respect

of all employees. In so far as the conciliation form was not properly completed, the Court refuses to take an overly technical view and bar the applicant on that ground. Furthermore, the fact that the employees were not identified at the conciliation stage was not material to the conciliation since the employer representatives attended the conciliation without a mandate and no conciliation in fact occurred. In other words, there was also no engagement about the identity of the applicants.

Furthermore, it was conceded that conciliation was not a prerequisite for an urgent interdict. Unlike in the case of *Mukwevho and Others v Entertainment Catering Commercial and Allied Workers Union* 1999(20) ILJ 1078LC, the applicants did require in the conciliation referral that the employer, "return to employer's undertaking with staff and re-instate all benefits."

The *Mukwevho* decision before GROGAN AJ was refused, *inter alia*, because it had been agreed between the parties' representatives that the applicants had not expressly required the respondent to restore the *status quo* in the referral form. That is at page 1080 at paragraph 9 of the judgment.

However, the application is being brought for a final order that the respondents "are interdicted and restrained in terms of section 64(4)(a) of the Labour Relations Act". Ms Lange for the applicant submitted that the applicant did not wish to strike but may proceed to arbitration. There is no provision in the LRA for compulsory arbitration after conciliation in terms of section 64. If conciliation fails industrial action is the next step. Ms Lange relies on the applicants having a right to their conditions of service as a result of various undertakings by or on behalf of the employer. If there is such a right then the applicant should not have brought the application in terms of section 64(4).

Furthermore, the rights that the applicants seek, that is to retain their conditions of service, is not an immutable one. Terms and conditions of service may be

varied by collective bargaining. What the applicants seek to secure is a permanent right for its members' existing terms and conditions of service without the pain of collective bargaining. That the Court cannot grant. If the applicant sought an interim order on some basis such as the willingness to renegotiate changes to the terms and conditions of employment, the Court might have been favourably disposed to granting such relief pending further collective bargaining.

Ms Lange relied on the judgment of REVELAS J in *Staff Association for the Motor and Related Industries (SAMRI) v Toyota South Africa Motors (Pty) Ltd* 1998(6) BLLR 616(LC) to support her submissions. However, whether the point was pertinently raised in that matter as it was in this matter is not altogether clear. In any event this Court prefers the approach of GROGAN AJ in the *Mukwevho* matter.

In the circumstances the application is dismissed.

ADDRESSING RE COSTS

PILLAY J

In considering the question of costs the Court has taken into account that the changes to the conditions of employment could be traumatic and dramatic for the applicant's members, that they have endeavoured to pursue proper channels to seek redress instead of taking the law into their own hands. They were mistaken in good faith about the remedy that may be available through this application. The fact that the application was unsuccessful does not mean that their cause is unjust. Nor am I saying that the respondents' cause has no merit. The Court has not entered that terrain at all.

The proper order in this case, the matter having been

disposed of on a point *in limine* is that there should be no order as to costs.

FOR THE APPLICANT: NATALIE LANGE

FOR THE RESPONDENT: ADVOCATE SISHI