REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JS586/02

In the matter between:

MANGAUNG LOCAL MUNICIPALITY **Applicant**

and

SOUTH AFRICAN MUNICIPAL WORKERS UNION **Respondent**

JUDGMENT

MASERUMULE AJ:

1. The applicant seeks payment of compensation in terms of section 68(1)(b) of the Labour Relations Act, 66 of 1995 ("the Act"), for losses allegedly suffered as a result of an unprotected strike by members of the respondent. The matter was heard by way of default as the respondent did not serve and file any opposing papers nor appear on the date of hearing. The statement of claim was served by hand on the respondent at its offices in Bloemfontein and I am accordingly satisfied that there was proper service in terms of the rules.

2. The applicant called three witnesses to testify in support of its

case.

3. Messrs Adriaan Van der MerweX, applicant's electrical engineer, Vincent Tsoenyane, its Director: Personnel and Llewellyn Claasens, its Chief Personnel Officer, testified in support of applicant's claim. Their evidence is summarized below.

4. The applicant recognizes the respondent as the collective bargaining agent on behalf of its members employed by the applicant. The applicant is a member of SALGA, the employers' organization in the local authority sector, and the respondent has some 120 000 members in the sector. Disputes that arise at applicant are raised with the local shop stewards and branch committee before the regional office in Bloemfontein is required to intervene. Intervention from respondent's regional office is sought if the dispute cannot be resolved by the shop stewards or branch committee.

5. On 14 January 2002, employees in the electrical department at Bloemfontein commenced with an unprotected strike action by refusing to work. These employees also blockaded the entrance to and exit from the applicant's electrical department, with the result that some 300 vehicles and employees could not leave the premises to go and render electrical services to residences and business. The striking employees demanded that they be addressed by applicant's councilors.

6. Two councilors and members of the applicant's management, including Tsoenyane, met with respondent's shop stewards in the electricity department on 14 January 2002. This meeting ended in chaos and the applicant could not establish what the striking employees' grievances were.

7. The strike continued on 15 January 2002. The striking employees once more blockaded entrances to and exits from the electrical department, with the same result as the previous

day.

8. On 16 January, the applicant addressed a letter to the respondent and NEHAWU and MESHAWU, two members who also had members employed by the applicant. In this letter, the applicant advised the respondent that:

8.1 its members had embarked on a work stoppage, the reasons for which were unknown to the applicant;

8.2 the applicant was willing to engage in negotiations with representatives of the respondent to resolve the problems/grievances amicably;

8.3 the respondent should furnish the applicant with a list of the grievances which led to the strike;

8.4 the respondent should advise its members to resume duties by not later than the same day, i.e. 15 January 2002; and

8.5 that the principle of no work, no pay, would apply.

9. The applicant met with the respondent's branch committee on 16 January at 15h00. The applicant was informed that the reason for the strike was because the striking employees felt that the applicant was unfairly discriminating against black residents in the provision of electrical services in Greater Bloemfontein and also that white employees were being treated more leniently than black employees in respect of the same disciplinary offences. There was a further demand that a white employee be suspended, failing which the strike would continue.

10. The respondent replied to applicant's letter of 15 January on 16 January. In its reply, the respondent stated that:

10.1 it had not been possible to respond to the letter by the date

requested;

10.2 the respondent was willing to negotiate with the applicant;

10.3 the striking employees had expected to be addressed by the applicant's municipal manager and director of Human Resources on 14 January , which did not happen;

10.4 its shop stewards were available that day to meet with the applicant to discuss the striking employees' grievances.

11. The letter did not address applicant's request that the respondent should advise its members to resume their duties.

12. The strike continued on 17 January. On 18 January, the strike spread to applicant's Botshabelo' administrative department and involved more than a thousand employees.

13. On 18 January, the applicant sought and was granted an interdict by this court against the respondent, MESHAWU and the striking employees. The interim interdict issued on 18 January was subsequently confirmed on 15 February 2002. The prayers sought and granted interdicted all the respondents from participation in the strike "or in any conduct in contemplation or in furtherance of such strike" and ordered the respondents to return to work and fulfill their obligations in terms of their employment contracts.

14. The striking employees returned to work on 21 January 2002 in compliance with the interdict obtained by the applicant.

15. As a result of the strike and the blockade of the electrical department's entrances and exits, the applicant was unable to carry out electrical services, repairs and installations during the period 14 to 18 January 2002. The applicant's claim is for compensation in the amount of R272 541.84.

16. The compensation claimed is based on the amount of notional income that the applicant would have earned from the operation of its electricity department. I say notional because the income referred to is based on applicant's system of subdividing its various departments into separate cost centers, of which the electricity department was one. Each cost center has a budget, based on income derived from the services that it renders to other cost centers. The latter is calculated on the basis of hourly tariffs that attach to different categories of employees, depending on their skills: unskilled employees are charged out at a lower hourly tariff than artisans and semi-skilled employees. Thus, although there is no actual exchange of money, accounting entries reflect what the income of each cost center is, as well as the expenditure incurred in producing the income. This forms the basis of the budget for each cost center.

17. In the case of the electricity department, the income claimed by the applicant as having been lost as a result of the strike by respondent's employees is based on the income that the electricity department would have generated during the strike and which it did not as a consequence of the strike. In this respect, applicant's claim is two-fold.

18. Firstly, the applicant claims compensation for lost income based on the amount that the striking employees would have generated, calculated on the basis of their hourly rates, had they worked during the period of the strike. This loss is thus directly attributable to the strike itself, i.e. it arises as a result of the refusal by the employees to perform their normal duties.

19. Secondly, the applicant claims for income lost as a result of the non-striking employees being unable to work during the strike, as a result of the striking employees' blockade of the entrances and exits to the electricity department. The blockade made it

impossible for non-striking employees and vehicles to go and perform their duties, in respect of which they would have debited other costs centers, thereby generating income for the electricity department, and ultimately, the applicant.

20. The distinction between these two grounds of applicant's will become apparent later in this judgment.

21. In respect of both claims, the method used to calculate he income is based on fixed costs, represented by licence fees and insurance for the vehicles owned by the department and used to render electrical services. The variable costs, such as fuel and repair costs, have been excluded, as these vehicles were actually not used during the strike. In this respect, the applicant relies on the fact that it was unable to earn income and profit that would offset these fixed costs. The other component of the claim is based on the income that the employees, both strikers and non-strikers, would have generated had they worked, based on their respective hourly rates.

22. Lastly, the applicant claims compensation for overtime payments that it made to non-striking employees, whose overtime work was necessitated by the striking employees' refusal to work.

The law

23. It is important to point out at the outset that applicant's claim arose and the losses were allegedly suffered prior to 1 August 2002. Accordingly, its claim must be adjudicated on the basis of Section 68 of the Act as it was prior to the coming into effect of Act 2 of 2002, ("the Amendment Act"). The Amendment Act effected certain changes to section 68 of the Act which would lead to a different result in this case, were the Act as amended applicable.

24. Section 68(1)(b) of the Act prior to its amendment by the

Amendment Act provided as follows:

"68(1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction-

(a) to grant an interdict or order to restrain-

(i) any person from participating in a strike or any conduct in contemplation or in furtherance of a strike;

(ii) any person from participating in a lock-out or conduct in contemplation or in furtherance of a lock-out.

(b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, having regard to-

(i) whether-

(aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;

(bb) the strike or lock-out or conduct was premeditated;

(cc) the strike or lock-out or conduct was in response to unjustified conduct by another party to the dispute; and

(dd) there was compliance with an order granted in terms of paragraph (a);

(ii) the interests of orderly collective bargaining;

(iii) the duration of the strike or lock-out or conduct; and

(iv) the financial position of the employer, trade union or employee respectively." (own underlining)

25. It is immediately apparent from the above provisions that section 68 confers two different powers on the Labour Court. Firstly, and in terms of section 68(1)(a)(i) and (ii), the court is

conferred with power to interdict a strike or lock-out *or any conduct in contemplation of a strike or lock-out* that does not comply with the provisions of Chapter VI of the Act. Accordingly, the court may interdict not only a strike or lock-out that is unprotected, but may also interdict other conduct associated with a strike or lock-out, such as unlawful conduct by striking employees. Indeed, the court issues such interdicts on a regular basis.

26. Secondly, section 68(1)(b) confers on the court power to order payment of just and equitable compensation, for any loss attributable to the strike or lock-out that does not comply with the provisions of Chapter VI of the Act. One cannot but immediately notice the absence of "conduct in contemplation of or furtherance of a strike or lock-out" in Section 68 (1)(b). The powers of the court to award just and equitable compensation in terms of section 68(1)(b) is thus limited to situations where the loss is attributable to an unprotected strike or lock-out. This power does not extend to losses that attributable to other things, such as the conduct of strikers or the employer who has instituted the lock-out.

27. I am fortified in my conclusion by the judgment of the Labour Appeal Court in *Stuttafords Department Stores Limited v SA Clothing and Textile Workers Union* (2001) 22 ILJ 414 (LAC). Zondo JP, in analyzing sections 67 and 68 of the Act, and in particular, in considering the Labour Court's jurisdiction to grant compensation in terms of section 68(1)(b), says the following:

"[32] Section 67 sets out in great detail the effects, implications and consequences of protected strikes and lock-outs as well as of conduct in contemplation or in furtherance of such strikes or lock-outs. A reading of section 68 reveals the same in respect of unprotected strikes and lock-outs and, to a rather limited extent, conduct in contemplation or in furtherance of such strikes or lock-outs." (own emphasis)

28. The reason for the reference to "*a limited extent*" in relation to conduct in contemplation or in furtherance of strikes or lock-outs

is not hard to find. It lies in the absence of reference to conduct in contemplation or furtherance of strikes and lock-outs in section 68(1)(b).

29. I am also fortified in my view by the subsequent amendment of section 68(1)(b), to which the words "*or conduct*" have been added after "*strike or lock-out*". The amendment now makes it possible for the court to adjudicate a claim for payment of compensation in respect of a loss that is attributable to conduct in furtherance of an unprotected strike or lock-out.

30. In *Rustenburg Platinum Mines Limited v Mouthpeace Workers Union* (2001) 22 ILJ 2035 (LC) at 2041D-E, the court, per Farber AJ, held that:

> "…it must be demonstrated that the party sought to be fixed with liability (under section 68(1) of the Act) participated in the strike or committed acts in contemplation or in furtherance thereof. This much is evident from the provision of subsection 1(a) which, in its delineation of the nature of the acts which might legitimately form the subject-matter of n interdict or restraint, identifies who might be held accountable therefore. " at 2041D-E (own underlining)

31. The reference in *Rustenburg Platinum*, *supra*, to a party being held liable for committing acts in contemplation or furtherance of an unprotected strike or lock-out is, with respect to the learned judge, not a correct interpretation of the section. As already indicated, section 68(1) of the Act deals with two distinctive matters. The one, being subsection (1)(a), relates to the grant of interdictory relief and no more. The other, being subsection (1)(b), relates to the payment of compensation. Each power is contained in a separate subsection and there is no justifiable reason, in my view, to import into subsection (1)(b) words which are patently not there. Farber AJ relies on the fact that the court is granted power to interdict unprotected strikes and lock-outs, as well as conduct in contemplation or furtherance thereof to

conclude that the powers of the court in relation to ordering payment of compensation also extent to conduct in contemplation or furtherance of such strikes or lock-outs. Such an importation is, in my view, unwarranted, particularly in the absence of any finding by Farber AJ that there is a *lacuna* in section 1(b).

32. In any event, Farber AJ was dealing with a case where the losses claimed were attributable to the unprotected strike itself. The applicant in *Rustenburg Platinum, supra,* did not rely on any conduct in contemplation or furtherance of the strike for its claim. Its case was that as a result of the strike as manifested by employees' refusal to work, it had lost a day's production, the value of which was quantified. The claim thus fell squarely within the provisions of section 68(1)(b). That part of the judgment, in so far as it refers to liability attaching to losses arising out of conduct in contemplation or furtherance of an unprotected strike or lock-out is, therefore, *orbiter*. In so far as it may represent what Farber AJ considered to be the correct interpretation of section 68(1)(b) prior to the promulgation of the Amendment Act in relation to what gives rise to liability under that section, I consider the judgment to be clearly wrong and I am accordingly, not bound to follow it, *cf JDG Trading (Pty) Ltd v Brundson* (2000) 21 ILJ 501 (LAC) at 517A, and the authorities cited therein.

33. It follows that for the court to come to the assistance of the applicant in the present matter, the applicant must show that it suffered some loss, which is attributable to an unprotected strike and further that the respondent is liable for such loss, see *Rustenburg Platinum, supra* at 2041D-E.

34. On the uncontested facts before me, the strike by applicant's employees from 14-18 January 2002 did not comply with the provisions of Chapter IV of the Act. No dispute was referred to the CCMA nor was notice given of the strike as required by

section 64(1)(b) of the Act. There is no evidence before me that there was a collective agreement that contained strike procedures and that the employees who participated in the strike or the respondent complied with such procedures. The strike was thus unprotected and a cause of action would thus arise in respect of any losses that the applicant may have suffered as a result of the strike.

35. The second issue is whether the applicant suffered any loss which is attributable to the strike.

36. On the uncontested evidence before me the applicant did suffer losses. I am mindful of the fact that the nature of the income that the applicant says it lost is not quantifiable by reference to production lost or profit forfeited. The fact of the matter is that when the electricity department renders electricity services, it charges a fee. In the case of services supplied or rendered to businesses, there is an actual loss suffered in so far as such services were not rendered, and could not be charged for as a result.

37. The real question is whether the applicant has shown that the losses that it suffered are attributable to the strike by respondent's members.

38. As already indicated, a portion of the claim is in respect of loss of income arising from the striking employees' refusal to work and overtime payments to non-striking employees who worked such overtime as a result of the strike. Such a loss is attributable to the strike and the applicant is entitled to claim compensation in respect thereof. This is so because had the employees worked, they would have generated such income for the applicant. Their refusal to work is thus the cause of the loss. Similarly, had the employees worked, it would not have been necessary for the applicant to require other employees to work overtime and consequently, no overtime payment would have been payable. The overtime portion of the loss is thus also

attributable to the strike.

39. The portion of the loss that relates to income lost as a result of non-striking employees being unable to go and work due to the blockade of entrances to and exits from the electricity department, cannot be said to be attributable to the strike. The evidence is clear that such loss arose as a result of the unlawful conduct of the striking employees who, in *furtherance* of their unprotected strike, blockaded entrance to and exit from the electricity department, with the result that non-striking employees and vehicles could not leave to render electrical services. This portion of the loss, therefore, is attributable to conduct in furtherance of the unprotected strike and is not recoverable under section 68(1)(b) of the Act.

40. The amount of R272 5410.84 claimed is made up of losses suffered as a result of the strike itself and conduct in furtherance of the strike. This brings me to the question of who is liable to pay this amount or any amount that the court may consider to be fair and equitable.

41. In *Rustenburg Platinum*, *supra*, the court settled the union with liability in that case because it concluded, on the evidence before it, that the union had instigated the strike and had also committed acts in furtherance of the strike. (at 2043B). I have already expressed my views about the correctness of the judgment in so far as it relates to liability for losses arising out of conduct in furtherance of a strike or lock-out, as the case may be. The finding that the union was liable to pay compensation because it was found to have instigated the strike, appears to me to be sound.

42. In the present matter, the applicant is claiming compensation from the respondent only and not from its members who participated in the strike, none of whom have been joined as respondents. The applicant submitted that the respondent is liable on various grounds. Firstly, because it associated itself

with the striking employees. Secondly, because it failed to persuade its members to end the strike after being requested to do so. Thirdly, because it never expressed its disapproval of the strike to the applicant or the striking employees who were its members. Fourthly, because it instigated the strike. Before dealing with applicant's submissions, it is necessary to first examine whether section 68(1) provides any guide as to who is liable for the payment of compensation for a loss suffered as a consequence of an unprotected strike.

43. Section 68(1)(b) does not say who should be ordered to pay compensation for a loss suffered as a result of an unprotected strike. It simply confers powers on the court to order the payment of such compensation. However, if one looks at the subsection as a whole, and in particular, the factors that a court is required to consider in determining whether to order payment of compensation as set out in (1)(b)(i)-(iv), it is clear that either a trade union or its members or both can be held liable. Employees would be liable because they participated in the strike and are to that extent, the direct cause of the losses suffered by their employer. A trade union can be liable if it calls for a strike which is unprotected and which leads to losses by the employer, as was the case in *Rustenburg Platinum*. The question is whether a trade union can be held liable not because it called for or instigated the strike, but because it failed to take any steps to bring the strike to an end, i.e. by omission.

44. In the present case, the submission that the respondent instigated the strike is not supported by the evidence. The evidence indicates that the employees arrived at work on 12 January 2002, and without any warning, refused to work. There is no indication that the respondent was aware of the employees' intention to strike or of the strike itself when it initially started. There is no evidence that the respondent communicated with the employees or the applicant prior to the commencement of the strike, regarding the possibilities of such a strike. The respondent cannot, therefore, be held liable to pay

compensation to the applicant on this ground.

45. The remaining three grounds on which the applicant says the respondent is liable to compensate it all relate to the respondent's alleged failure to act and bring the strike to an end. I include herein the submission that the respondent associated itself with the strike because support for this proposition is based on respondent's failure to take any action to end the strike.

46. The respondent was made aware of the strike on 15 January 2002 and was specifically requested to get the striking employees to return to work. In its response in the letter dated 16 January, the respondent did not dispute the fact that its members were taking part in an unprotected strike, nor did it claim that it was not obliged to take steps to bring the strike to an end. It merely stated that it could not respond earlier and that its shop stewards were available for a meeting. The respondent itself did not sent a union official to speak to the striking employees. It was content to leave the resolution of the strike to the shop stewards. It did not send a union official to attend the meeting of 16 January. It did not give the undertaking sought by the applicant that it would take steps to end the strike or advise its members to end the strike. The strike only came to an end after the applicant obtained an interdict from this court.

47. I am of the view that where a trade union has a collective bargaining relationship with an employer, and its members embark on unprotected strike action and the trade union becomes aware of such unprotected strike and is requested to intervene but fails to do so without just cause, such trade union is liable in terms of section 68(1)(b) of the Act to compensate the employer who suffers losses due to such an unprotected strike. Similarly, if a trade union elects to delegate the responsibility to resolve the strike to its shop stewards employed by the employer facing an unprotected strike, and

such shop stewards fail to discharge the same obligation that the trade union has, the trade union is also liable to compensate the employer for any losses that it has suffered as a result of such strike. The obligation arises because the trade union, as a party to a collective bargaining relationship with the employer, has a duty to ensure that its members comply with the provisions of the Act in relation to such an employer when they seek to exercise their collective power by way of strike action.

48. In arriving at the above conclusion, I have also had regard, for comparative purposes, to the provisions of Item 6 of Schedule 8, relating to the dismissal of employees engaged in an unprotected strike. The guidelines there provide for the employer to solicit the assistance of a trade union official to discuss the course of action that the employer intends to adopt, clearly, with a view that the union official should intervene and prevent dismissals, if that is what the employer contemplates doing, by securing a return to work by the striking employees. This guideline indicates that a trade union shoulders some responsibility with regard to participation by its members in an unprotected strike. This responsibility extends to liability to compensate an employer where the trade union fails to discharge its duty of intervening during unprotected strikes by at least attempting to secure a return to work by its members.

49. In the present matter, over and above the fact that the union was aware of the strike, its shop stewards at the electricity department were aware of and participated in the strike. They took part in meetings with the applicant and instead of agreeing to call of the strike, made demands in support thereof. In addition, the evidence was that the branch committee, which includes shop stewards outside of the electricity department, was part of the meting with the applicant on 16 January 2002 and did not take any steps to end the strike. The respondent, having made it clear in its letter of 16 January that its shop stewards were available to meet with the respondent to discuss the striking employees' grievances, delegated responsibility to

them to take whatever steps were necessary to deal with the strike. The obligation to advise the striking employees that the strike was unprotected and that they should return to work, rested on the branch committee. They did not do so and as a result, the strike continued and the applicant incurred losses in the process.

50. I am accordingly satisfied that the respondent is liable to compensate the applicant for losses that the latter suffrered as a result of the unprotected strike by respondent's members.

51. In so far as the amount that the respondent is liable to pay is concerned, I am of the opinion that a robust approach is appropriate for determining the amount. A message needs to be send to the respondent and its members that given the ease with which a protected strike can be embarked upon, unprotected strikes will not be tolerated. At the same time, the court must have regard to the fact that the compensation payable will be paid from the respondent's coffers, and consequently, the funds of its other members who were not involved in the strike will probably be used to make such payment, to the latter's detriment.

52. Taking all the above factors into account, I accordingly order that the respondent should pay the applicant compensation in the amount of R25 000-00, payable within 30 days of the date of this judgment. The respondent is also ordered to pay applicant's costs on an unopposed scale.

On behalf of the Applicant: Adv N Snellenberg, instructed by Honey & Partners Attorneys Inc

On behalf of the Respondent: No appearance

Date of hearing: 7 August 2002

Date of judgment: 13 December 2002.

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MASERUMULE AJ