IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN JOHANNESBURG)

Case number: J579/06

In the matter between:

LOBTRANS SA (PTY) LTD	Applicant
And	
MOTOR TRANSPORT WORKERS UNION OF SOUTH AFRICA	First Respondent
PATRICK SIMUKONDO & OTHERS	Second to Forty Second Respondents

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JUDGMENT

Freund A.J.:

INTRODUCTION:

1. On 12 April 2006 the First Respondent ("the Union") gave notice to the Applicant ("the Company") that its members would embark on a strike with effect from 18 April 2006. In issue at this stage is whether the Company is entitled to a final order declaring the proposed strike unprotected and interdicting the affected employees from participating in the strike. The matter comes before the Court in opposed motion proceedings.

THE FACTUAL BACKGROUND:

2. The Company conducts a freight haulage business. It and its employees are subject to the National Bargaining Council for the Road Freight Industry ("the Bargaining Council").

3. In June 2005 the Union referred a dispute pertaining to a number of matters of mutual interest to the Bargaining Council. That referral resulted in the conclusion of a written agreement.

4. On 20 October 2005 the Union again referred a dispute for conciliation by the Bargaining Council. It did so by filling in (in part) the Bargaining Council's standard referral form, which corresponds with the "LRA form 7.2" utilised by the CCMA. In the portion of the form in which it was required to tick a box indicating what the dispute was about, the Union ticked the "mutual interest" box. The portion of the form in which the Union was required to "summarise the facts of the dispute you are referring" was left blank. The portion of the form in which the Union was required to state "what outcome do you require?" was also left blank. There is no indication in the referral form as to what the nature of the referred dispute was, other than the fact that the "mutual interest" box was ticked.

5. It appears from the Answering Affidavit filed on behalf of the Union that the referral of 20 October 2005 resulted in a conciliation meeting held at the offices of the Bargaining Council on 24 January 2006. According to the affidavit, the Commissioner decided to postpone the matter so as to give the parties an opportunity to have a meeting and to negotiate at shop floor level. The parties were, however, unable ultimately to agree upon a date for a meeting, which led the Union to believe that the Company had no interest or intention of resolving the employees' grievances. The Union therefore requested a certificate of outcome. The Bargaining Council responded by setting the matter down for conciliation once again on 5 April 2006. That meeting was unproductive and the Commissioner then issued a certificate of outcome on 5 April 2006.

6. On 12 April 2006 the Union addressed a letter to the Company giving notice that its members would embark upon a strike as from 18 April 2006. Annexed to the letter was a 3-page typed document headed "Issues in dispute between employees and management Lobtrans/ Johannesburg". The

document lists nine separate “mutual interest disputes”, four separate “disputes of right/ unfair labour practices” and seven “law enforcement issues”. I shall refer to this document as the “list of issues”. The strike notice letter makes it clear that the strike is to take place in respect of the “mutual interest disputes” listed in Clauses 1.1 to 1.8 of the list of issues. These issues pertain to disputes concerning lunch breaks; the current incentive bonuses; disputed clauses in the standard letter of employment; uniforms; allocated vehicles; locker room facilities; after hours transport and overnight stops.

THE CASE MADE OUT IN THE COMPANY’S FOUNDING AFFIDAVIT:

7. In the Founding Affidavit, the Company’s human resources manager referred to the notice received by the Company of the conciliation hearing scheduled for 5 April 2006. He alleged that this notice was the first notification that the Company had received of a matter requiring conciliation and that no copy of the request for conciliation had been received by the Company. Whilst, having regard to the facts set out in the Answering and Replying Affidavits, it is clear that this evidence is erroneous, it is equally clear to me that the error was understandable and reasonable. The Company did not appreciate, for reasons that I well understand, that the conciliation meeting held on 5 April 2006 was a result of the referral made by the Union on 20 October 2005.

8. The main case made out in the Founding Affidavit is that, from what took place at the meeting on 5 April 2006, it was apparent that the issue which was the subject matter of that meeting was the Company’s alleged unwillingness to meet with the Union. This it characterised as

a dispute concerning a refusal to bargain (as contemplated in Section 64(2) of the Labour Relations Act No. 66 of 1995 ("the LRA")). The Company contended that the strike was unprotected for want of compliance with Section 64(2).

9. In its Founding Affidavit the Company also made out a case, however, that the issues in respect of which the strike was to take place were issues which had not been the subject matter of conciliation in terms of the LRA.

THE CASE MADE OUT IN THE UNION'S ANSWERING AFFIDAVIT:

10. The Union's general secretary pointed out in her Answering Affidavit that "a mutual interest dispute" had been referred by the Union to the Bargaining Council on 20 October 2005. The referral form described above was annexed to her affidavit. She pointed out that the meeting held on 5 April 2006 was a conciliation meeting following from this referral. She stated that the dispute referred was not about convening a meeting but "was a mutual interest dispute with a list of issues to be resolved as discussed at both the conciliation hearings on the 24th of January 2006 and the 5th of April 2006". She submitted that the strike was protected in that the Company "was aware of the mutual interest issues in dispute". Essentially, the case made out was that the strike was protected because the Union had complied with the requirements of Section 64(1)(a) of the LRA.

EVALUATION OF THE ISSUES:

(i) Dispute about a refusal to bargain?

11. Mr. Vally, who appeared for the Company, submitted that the true dispute between the parties pertained to a "refusal to bargain" as contemplated in Section 64(2) of the LRA and that the strike would be unprotected because of the Union's failure before embarking on a strike to obtain an advisory award, as required by that provision.

12. I am not persuaded that, on the evidence before me and applying the test laid down in Plascon Evans Paints Ltd vs Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A) at 634 to 635, I am entitled to find that the issue in dispute concerns the Company's refusal to meet with the Union or to bargain with it. The Union's general secretary has expressly asserted on affidavit that the dispute referred for conciliation was not about convening a meeting. The referral form gives no indication that the dispute referred for conciliation was about a refusal to meet or a refusal to bargain. The Union did not tick the "refusal to bargain" box in the referral form. On the totality of the evidence I am simply not persuaded that the dispute referred for conciliation concerned a refusal to bargain. I therefore reject the argument that the

strike will be in breach of Section 64(2) of the LRA.

(ii) <u>Were the relevant issues referred for conciliation?</u>

13. To my mind the more difficult question is whether the Company discharged the onus on it of establishing that the issues in dispute over which the strike is to take place have not been referred for conciliation to the Bargaining Council, as required by Section 64(1)(a). This is an issue on which Mr. Vally, in my view correctly, conceded that the onus lies on the Company. For the reasons which follow I am persuaded that the Company discharged that onus and that the strike is accordingly not protected.

14. The primary (though not necessarily exclusive) source of information as to whether the relevant issues have been referred to the Bargaining Council is, in my view, the referral document. As referred to above, that document makes no reference whatsoever to any of the eight issues referred to in Clauses 1.1 to 1.8 of the list of issues, i.e. the issues over which the strike is to take place. Whilst the "mutual interest" box on the form has been ticked, the Union refrained from summarising at all the facts of the dispute which it was referring or the outcome which it required.

15. Section 64(1)(a) of the LRA requires "the issue in dispute" to be referred to a Bargaining Council or to the CCMA. Section 134(1) of the LRA permits any party to "a dispute about a matter of mutual interest" to refer "the dispute <u>in writing</u>" (my emphasis) to the CCMA. Regulation 11(2) of the Labour Relations Regulations (as published in

GN 1442 GG 25515 of 10 October 2003) provides that a referral of a dispute to the CCMA for conciliation in terms of Section 134 “must” be made in the form of Annexure LRA 7.11. Annexure LRA 7.11 requires more than the mere ticking of one box when identifying the nature of the dispute referred. It specifically requires that the referring party “summarise the facts of the dispute you are referring”. It also requires the referring party to state the outcome desired, which, if completed, will probably give a good indication of the underlying nature of the dispute.

16. The referral form utilised by the Bargaining Council is substantially in the same format as the form LRA 7.11. The Bargaining Council must have been accredited, in terms of Section 127(1)(a) of the LRA, to resolve disputes through conciliation. Its “Rules for the Conduct of Processes and Proceedings” require a referral for conciliation to be on its “Form RD”, which is practically identical to an “LRA 7.11” form used by the CCMA. The Bargaining Council’s referral form has, in my view, a similar if not identical legal status to an LRA 7.11 form utilised by the CCMA.

17. The Union was, in my view, obliged to make clear in the referral form the gist of the dispute(s) being referred by it. It did not do so. It is not unarguable that this rendered the referral invalid, but this was not addressed in argument and I refrain from making any finding in this regard. What I do not find is that, by not summarising the facts of the dispute which it was referring to the Bargaining Council and by not indicating the required outcome, the Union deprived itself of the opportunity of demonstrating that it had in fact referred to the Bargaining Council the disputes on which it ultimately wished to strike.

18. This failure on the part of the Union must be taken together with its failure in the period preceding the referral clearly to identify to the Company the demand, grievance or other dispute which it alleged existed between the parties. In the Founding Affidavit the deponent on behalf of the Company stated that the issues listed in the annexure to the strike notice letter had last been discussed with the Union in May and June 2005 and had, on 6 June 2005, been resolved by agreement. Whilst the Union disputed that all those

issues had been resolved by the agreement of 6 June 2005, it did not allege that these issues had again been raised with the Company subsequent to the agreement and before the referral of 20 October 2005. I also take note of the Company's deponent's evidence that, prior to the conciliation meeting on 24 January 2006, he had not been informed by the Union (or by the Bargaining Council) as to what the issues in dispute were. On the affidavits before me it appears therefore that the issues over which the strike is due to take place were not raised by the Union with the Company in the period after 6 June 2005 before the referral now relied upon by the Union.

19. It therefore appears that, at the time of the relevant referral, no dispute existed between the parties in respect of the issues on which the Union now seeks to strike. That, on its own, does not necessarily preclude a valid referral to the Bargaining Council. This is because the definition of "dispute" in Section 213 of the LRA includes an alleged dispute. Nevertheless, for a strike to comply with Section 64(1)(a) and thus be protected, the "issue in dispute" in the strike must have been referred for conciliation; and the term "issue in dispute", in relation to a strike, is defined in Section 213 of the LRA to mean "the demand, the grievance, or the dispute that forms the subject matter of the strike…". What must therefore be referred to the bargaining council is the relevant demand, grievance or dispute. The question is whether it has been shown that the Union failed to do this.

20. Mr. Levin, who appeared for the Union, submitted that the Court should infer from the list of issues annexed to the strike notice letter that the issues set out therein were the issues which had been referred by the Union to the Bargaining Council. I do not accept that there is any legitimate basis for doing this. As referred to above, the list of issues in dispute includes not only "mutual interest disputes" but also "disputes of right/ unfair labour practices" and "law enforcement issues". In the referral form the Union ticked only the "mutual interest" box. It therefore seems clear that the referral did not relate to all the issues in the relevant list of issues and there is no reason simply to assume that the referral related to the "mutual interest disputes" identified in the list of issues. There is no pertinent allegation in the Answering Affidavit that the "mutual interest" disputes referred for conciliation were the mutual interest disputes referred to in that list. I can therefore see no basis for concluding that the dispute referred to the Bargaining Council was a dispute in respect of the "mutual interest disputes" listed in the annexure to the strike notice letter.

21. Mr. Levin submitted that, if a Union refers an unspecified "mutual interest" for conciliation, in the manner that the Union did in this case, that entitles it, after the expiry of the periods described in Section 64(1)

(a) of the LRA, to embark on a protected strike in respect of any dispute over a matter of mutual interest. I do not accept this. Such an interpretation of Section 64(1)(a) would, in my view, be incompatible with the scheme of the Act and with the purpose of requiring the issue in dispute to be referred to a bargaining council or to the CCMA and the elapsing of the periods specified in Section 64(1)(a) before a protected strike may be embarked upon. The clear purpose of the provision is to afford the parties an opportunity to endeavour to resolve the referred issue or issues in dispute before resorting to a strike or a lock-out. That purpose can obviously not be met if it is not possible to identify what the referred issue in dispute is. It is also plainly contrary to the statutory scheme to permit a protected strike in respect of a dispute over a matter of mutual interest which may not even have existed at the time that the referral to the Bargaining Council took place. Yet the implication of the argument advanced for the Union is that a strike over such an issue would be protected, provided the Union had previously referred an unspecified and unidentifiable "dispute" over a matter of mutual interest to the Bargaining Council.

22. I agree with the following views expressed by Grogan A.J. in FGWU and Others v The Minister of Safety and Security and Others (1999) 4 BLLR 332 (LC) at Paragraph [27]:

"This submission overlooks the fact that would-be strikers must identify and declare the issue in dispute prior to setting in motion the procedure prescribed by section 64(1)(a). Once that issue has been identified and dealt with in conciliation, the would-be strikers can only strike over that issue. They cannot change the goal posts when they issue the notice in terms of section 64(1)(b). How the applicants understood and designated the issue in dispute when they referred the matter to conciliation is therefore of crucial importance."

23. I accept that the characterisation of a dispute by a union in a referral form is not necessarily determinative of the proper characterisation of the dispute (Ceramic Industries Ltd t/a Betta Sanitary Wear vs National Construction Building and Allied Workers Union (2) (1997) 18 ILJ 671 (LAC) at 677 to 678) and that in determining whether a particular issue in dispute has been referred to a bargaining council, it may be legitimate to have regard not only to the content of the referral form but also to other evidence, such as the events preceding the referral. At the end of the day, however, a union which fails properly to identify the dispute said to be referred in a referral form runs the risk of a finding that it has not referred a dispute which it claims to have referred. That, in my view, applies in this case. There is, in my view, simply no evidence to show that the issues in respect of which the Union wishes

now to support strike action are issues that were in fact referred by it to the Bargaining Council for conciliation. The Company's allegation that those issues were not referred for conciliation stands uncontradicted in any meaningful sense.

24. It is true that in the Union's Answering Affidavit its general secretary alleges that the dispute which it referred was a mutual interest dispute "with a list of issues to be resolved as discussed at the two conciliation meetings". I agree, however, with the point made in the Replying Affidavit that nowhere in the Answering Affidavit does she spell out what the "mutual interest" disputes are which were allegedly referred by the Union to the Bargaining Council for conciliation. The vague allegation quoted above does not go far enough to show that the issues over which the strike is intended to take place were indeed referred for conciliation. Furthermore, as was correctly pointed out by Mr. Vally, the general secretary's evidence on what took place at the conciliation meeting is clearly hearsay evidence. I am of the opinion that the interest of justice do not require that this evidence be hold to be admissible (see Section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988).

25. I have therefore concluded, as stated above, that the Company has discharged the onus on it of showing that the issues in dispute in respect of which the strike is to take place are not issues that have been referred to the Bargaining Council in terms of Section 64(1) of the LRA. The proposed strike is therefore not in compliance with the LRA.

CONCLUSION:

26. It was not contended for the Union that, if I should find that the strike would be unprotected, I should nonetheless dismiss the application on other grounds. I am satisfied that the Applicant has made out a case for the declaratory order and interdict which it seeks. The parties were in agreement that, whatever the result of this application, no order as to costs should be issued.

27. I therefore make the following order:

1. It is declared that the strike which the individual Respondents intended to embark upon on 18 April 2006 will, if embarked upon,

constitute an unprotected strike.

2. The individual Respondents are interdicted and restrained from embarking upon or participating in the aforementioned unprotected strike.

3. There shall be no order as to costs.

FREUND, A.J.

APPEARANCES:

FOR THE APPLICANT:	Adv. B. Vally
INSTRUCTED BY:	Ayob Kaka Attorneys
FOR THE RESPONDENT:	Mr. Levin
OF:	Clifford Levin Attorneys
DATE OF HEARING:	5 May 2006
DATE OF JUDGMENT:	25 May 2006