IN THE LABOUR COURT OF SOUTHN AFRICA

HELD AT JOHANNESBURG

In the matter between:	**Case no JR 435/08**
LESEDI LOCAL MUNICIPALITY	**APPLICANT**
And	
SOUTH AFRICAN MUNICIPAL WORKERS UNION OBO MEMBERS	**RESPONDENT**

JUDGEMENT

Molahlehi J

Introduction

[1] The applicant Lesedi Local Municipality seeks an interim order interdicting the proposed strike by the respondents which was intended to commence on 11 March 2008. The application was opposed by the respondent on the basis of the papers filed by the applicant.

[2] The applicant in challenging the planned strike relied on two grounds. The first ground concerns the variation of the certification of outcome of the conciliation by the conciliating

Commissioner. The second ground concerns the provisions of the collective bargaining agreement which according to the applicant's founding affidavit provides that disputes relating to salary adjustment and salary increases are matters that cannot be dealt with at the divisional level.

[3] The applicant abandoned the second point during argument.

Background facts

[4] It is common cause that the respondent referred a salary adjustment and salary dispute to the South African Local Government Bargaining Council (SALGBC) during June 2007. This dispute was a mutual interest dispute and concerned as stated earlier, the adjustment of the salaries of certain employees and an increase for the rest.

[5] The dispute was conciliated on 29 November 2007, and the certificate of outcome was issued promptly. The commissioner indicated in the certificate that the dispute ought to be referred to arbitration.

[6] During February 2008, the respondent addressed a letter to SALGBC wherein it stated the following:

> *"1. SAMWU obo its members employed by Lesedi Municipality referred a dispute of mutual interest to the Bargaining Council on 18 June 207 and a certificate issued that the dispute remains unresolved.*
>
> *2. The commissioner however made a mistake when indicating where the dispute should be referred to instead of ticking a strike/lockout, she ticked the Arbitration column. It is common cause that a dispute of this nature must refer for Strike/ Lockout as the union has requested in both the referral and conciliation.*
>
> *3. We were not able to notice the error as the certificate to was issued to after conciliation meeting when the parties where already on their way out. Our members intend to serve the employer with the 48 hours notice of commencement of the strike action.*

4. *We therefore request a Bargaining Council to issue a corrected certificate and allow members to proceed with their protected strike action as a matter of urgency. Although the error is negligible given the precise nature of the dispute, we prefer the error to be corrected"*

[7] The Commissioner who conciliated the dispute issued another certificate (the second certificate) and indicated that the dispute can be referred to strike or lockout.

[8] The applicant contended that the second certificate was a nullity because the Commissioner varied the first certificate without following due process. The applicant equated the second certificate to a variation or a ruling or an award and in this regard argued that the application for the variation of the certificate was defective as it was not accompanied by a supporting affidavit. The applicant further contended that the commissioner varied the certificate without considering its objection to the variation.

[9] The applicant in its affidavit supporting the objection to the variation contended that the letter of the respondents requesting for the variation did not comply with the provisions of section 144 of

the Labour Relations Act 66 of 1995 (LRA) and also rule 31 of the CCMA rules which requires that an application be brought on notice.

[10] The applicant argued that because of failure to comply with the provisions of rule 31, the second certificate was null and void. The other point raised by the applicant is that, it was not afforded a hearing despite having filed its objection with the CCMA.

[11] Having received the second certificate the respondent issued a notice of intention to commence its strike action on the 11 March 2008. The notice reads as follows:

> *"Attached hereto please find a certificate of outcome clearly indicating that the dispute remains unresolved. We have on 22nd February, 2008 requested the Bargaining Council to correct one, common mistake on it's although it is not a determining factor in terms of Labour Relations Act.*
>
> *In terms of section 64(b) of the Labour Relations Act 66 of 1995 please be informed that our members in your employ we'll be embarking on a protected strike action on 11th March 2008. We are prepared to engage in discussions with*

you regarding maintenance of skeleton staff during the duration of the strike in certain service. If you accept our proposal kindly indicate your availability as a matter of urgency.

Hoping you will find the above in order."

The law

[12] The procedure to follow before acquiring the right to embark on a protected and lawful strike is provided for in section 64 of the LRA. The relevant part of section 64 reads as follows:

"Right to strike and recourse to lock out

(1) Every *employee* has the right to s*trike* and every employer has recourse to lock out if-

(a) the issue *in dispute* has been referred to a *council* or to the commission as require by this Act and-

(i) A certificate stating that the *dispute* remains unresolved has been issued; or

(ii) A period of 30 days, or any extension of that period agreed to between the parties to the *dispute*, has elapsed since the referral was received by the *council* or the commission;…"

[13] There is no dispute in the present matter that the respondent referred its dispute of mutual interest to the bargaining council which after failing to resolve issued a certificate stating that the dispute remains unresolved. The issue of the nature of the dispute is no longer an issue, the applicant having abandoned the issue of the appropriate bargaining level. The categorization of the dispute as being that of mutual interest was not contested by the applicant. The issue that requires consideration is whether the commissioner had the power of varying the first certificate or issues the second certificate.

[14] In **Metal Steel 1 South Africa Limited v Solidarity & Others (reported j1655/05),** the court held per Francis J, that:

> *"24.2 The certificate stating that the dispute remains unresolved had been issued in terms of section 64 (1) (a) (i) …the certificate is valid until a competent court has set aside the certificate."*

[15] The first certificate in the present matter has not been reviewed or set aside by the court. Therefore the certificate remains valid and operative until set aside by the court. The question that then

remains is whether the commissioner has power to determine the true nature of the dispute which ordinarily would fall outside the jurisdiction of the CCMA once conciliation has failed.

[16] In **Cape Gate (PTY) v National Union of Metal Workers of South Africa & Other** (unpublished J21223/05) Kennedy J held that:

"… Neither the CCMA nor the Bargaining Council and the commissioners have the necessary jurisdiction to determine whether the strike is prohibited or protected particularly at this stage of an attempt to conciliate the dispute."

[17] Thus whether or not a strike is protected cannot be determined by the mere entry in the certificate of non resolution that the dispute should be referred to a particular process. Section 64 (1) (a) (i) of the LRA simply requires the conciliating commissioner, to issue a certificate indicating that the dispute remains unresolved. There is nothing in the LRA that gives the commissioner the power to determine the true nature of the dispute including whether or not the strike is protected.

[18] The entry in the certificate by commissioner indicating where the dispute should be referred serves as a mere guidance to the parties as to the next step they may wish to follow in taking forward the resolution of their dispute. This is however not determinative of the true nature of the disputes.

[19] This court is therefore not precluded from determining whether or not the strike is protected because of the entry made by the commissioner that the dispute be referred to arbitration. The court has the power to determine what the true nature of the dispute is, despite the classification or categorization of the dispute by the commissioner in the certificate.

[20] I have indicated earlier that the applicant had abandoned its contention that the strike was unprotected because the issue in dispute relates to matters that cannot be dealt with at the divisional level. It is evidently clear that the issue in dispute relates to matters of mutual interest. This the applicant has not contested in its papers or in argument.

[21] In summary my view is that the planned strike is protected because in the first instance there has been compliance with the provisions

of section 64 (1) (a) (i) of LRA. And secondly by its definition the dispute which the respondent referal to the bargaining council is one which entitles it and its members to embark on a protected to strike.

[22] In the circumstances it is my view that the applicant had failed to discharge its burden of showing that it had a prima facie right, (which may though be in doubt) not to be subjected to an unprotected and unlawful strike.

[23] Consequently, I make the following order:

1. The strike called by the respondent constitutes a protected and lawful strike action.
2. The applicant's application is dismissed.
3. The applicant is to pay the costs of the respondent.

Molahlehi J

Date of Hearing:
Date of Judgment: 11 March 2008

APPEARANCES:

For the Applicant: W Mkhare
Instructed by: Werksman Attorneys

For the Respondent: Cheadle Thompson & Haysom Attorneys