IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J60/09

In the matter between:

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY APPLICANT

and

SOUTH AFRICAN MUNICIPAL WORKERS' UNION 1ST RESPONDENT

JAFTA MPHAHLANI NO 2ND RESPONDENT

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL (SALGBC) 3RD RESPONDENT

JUDGMENT

VAN NIEKERK J:

The Johannesburg Metropolitan Municipality applied this morning, Friday 30 January 2009, as a matter of urgency, for a final order to interdict a strike intended to commence on Monday 2 February 2009. In the alternative, the Municipality sought interim relief, interdicting the strike pending the outcome of an application to review a ruling made by the second respondent (to whom I shall

refer as the commissioner) who was appointed to conciliate the dispute between the parties. Mr Kennedy SC, who appeared for the applicant, stated at the outset of the hearing that the applicant would be pursuing only the final relief that it sought, and that no argument would be presented in support of the claim for interim relief. When argument was concluded, I stated that I would deliver a judgment at 2pm. Given the time constraints under which this judgment was prepared, I must necessarily reserve the right to supplement its terms should this become necessary.

The relevant facts are briefly the following. On 6 November 2008, the union referred a number of disputes to the third respondent, the bargaining council. Seven disputes were captured in an annexure to the dispute referral form. The first dispute related to a demand that the chief superintendent of internal affairs, a Mr Kganyago, be suspended pending disciplinary action. The second dispute related to a demand that the deputy director of internal affairs, a Mr Nkosi, be suspended pending a disciplinary enquiry. The third dispute related to payment of monies to human resources staff consequent on a settlement agreement reached by the union and the JMPD. The fourth dispute related to a demand that the JMPD should not re-engage pensioners. The fifth dispute related to a demand that an external technician be suspended pending a disciplinary enquiry. The sixth dispute related to a demand that a manager employed by the applicant, a Mr Essau, be suspended on account of his allegedly altering certain test results. Finally, the applicant demanded that certain employees of the JMPD who

had resigned, including a Mr van der Westhuizen, should not continue in employment or be re-employed.

It is common cause that the parties had reached deadlock on these matters, and that at the time the dispute was referred to conciliation, the union sought the applicant's compliance with all these demands.

The applicant objected to the referral, contending that the bargaining council had no jurisdiction to conciliate the disputes referred to it, or to issue a certificate to the effect that they had not been resolved. The essence of the applicant's points in limine was that all of the disputes referred to the bargaining council were not strikeable. Given that the applicant does not in these proceedings pursue the interim relief that it initially sought pending a review of the commissioner's ruling, it is not necessary for me to say more about those proceedings or the circumstances under which the commissioner issued a certificate of outcome. The certificate is dated 5 January 2009.

On 6 January 2009, the union issued a notice of its intention to call on its members to commence strike action on 2 February. The strike notice does not refer to the particular issues referred to the bargaining council. The notice notes in general terms that the issues referred to the council remained unresolved, and that the union's members intended to participate in protected strike action. The last sentence of the letter reads:

> We hope management will be in a position to address issues that resulted in a dispute and confirmed by the Commissioner that those issues are strikeable issues.

The implication here is that the union intends to strike only on those issues that the commissioner considered strikeable. This is confirmed by Mr Langa, the union's branch secretary, in the answering affidavit to which he deposed. The union claims that its strike is called only in respect of 2nd, 4th, and 6th demands referred to in the annexure to the referral form. In regard to the first demand, the suspension of Mr Kganyago, the union records that the day after the deponent deposed to the founding affidavit, Mr Kganyago was indeed suspended, and that the strike is not in support of the demand for his suspension. In regard to the demand that the applicant should agree not to use the services of an external technician pending the outcome of an internal investigation (the 5th demand), the union states that it does not intend to strike in support of that demand.

In summary, the strike is called in respect of the demand that Mr Nkosi and Mr Essau be suspended, and that the JMPD should not re- employ pensioners. There is a further refinement in relation to the suspension demands. The union confirms in its answering affidavit that the suspensions it demands should be effected in accordance with due process, by which it means in a manner that does not constitute an unfair labour practice. The applicant contests this

averment, suggesting that the union for the first time in the answering affidavit qualified its demand to this effect, and that this is no more than a disingenuous afterthought. This is a matter that assumes some significance in these proceedings, for reasons that will become apparent.

The proper approach to the determination of the issue before the Court is based on three questions:

1. What is the issue in dispute that gives rise to the proposed withdrawal of labour?
2. Given the issue in dispute that is identified, does the proposed action meet the definition of “strike” in section 213 of the LRA, in so far as that definition requires the purpose of the action to be the remedying of a grievance or the resolution of a dispute in respect of any matter of mutual interest between employer and employee? In other words, is the proposed withdrawal of labour a strike as defined?
3. If it is a strike, is the strike protected? The answer to this question depends on whether the procedural and substantive preconditions established by sections 64 and 65 respectively have been met.

In relation to the first question, the union intends to strike only in support of the 2nd, 4th and 6th demands in the annexure to its referral to the bargaining council.

The 2nd and 6th demands might conveniently be labelled the 'suspension demands' and the 4th demand the "employment of pensioners" demand.

The suspension demand has been refined by the union - it avers, as I have noted, that its demand is that the suspensions be effected fairly; in other words, in circumstances that do not give rise to an unfair labour practice. The 4th demand, that the applicant should not employ persons who have retired in view of the fact that they possess no exceptional skills and prejudice the opportunities of the applicant's members, remains cast in the terms of the referral to conciliation. The parties have failed to reach agreement on both the suspension demand and the employment of pensioners demand, and these are the issues in dispute for the purposes of the proposed industrial action.

The next question is whether the proposed action meets the requirements of the definition of strike. The relevant part of the definition reads:

> The partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee…

The Labour Courts have previously held, in the context of a strike and in relation to the issue in dispute, that when a demand is made of an employer, it must be a lawful demand. In *TSI Holdings (Pty) Ld & others v NUMSA & others* (2004) 25 ILJ 1080 (LC), this Court declined to interdict a strike in support of a demand that a supervisor be dismissed. The Court held that since the employees had not demanded that the supervisor be dismissed without a hearing, and without proof of wrongdoing, the demand was not that the supervisor be unlawfully dismissed. It was therefore unnecessary to decide whether the strike was unlawful on the basis of the unlawfulness of the demand. The Court expressed the view *obiter* that a strike in respect of an unlawful demand could not be protected - seeming to indicate, as John Grogan suggests, that a work stoppage in support of an unlawful demand could conceivably constitute a strike, though it may not be protected. The Labour Appeal Court reversed that decision on the basis that the purpose of the concerted refusal to work contemplated in the definition of strike cannot be conduct that would constitute a violation of the right not to be unfairly dismissed in violation of the LRA. On the facts, the LAC held that had the employer complied with the demand made of it; it would have dismissed the supervisor unfairly. In other words, the demand was that the supervisor should be dismissed, come what may. This finding indicates that the lawfulness of a demand is an issue that is relevant to the definition of strike, rather than to the question whether the strike is protected. In other words, a unlawful demand directed to an employer does not give rise to a strike.

The LAC left open the questions whether a strike in support of a demand that an employee be fairly dismissed could constitute a strike, and if so, whether it is protected. John Grogan, writing in *Collective Labour Law* (Juta 2005, at p135) suggests that there seems to be no reason why such a strike should not enjoy protection. In *TSI,* the strike was declared unprotected only because the demand was unlawful - or, put another way, because the employees required that their employer perform an unlawful act. (Grogan suggests that there is nothing unlawful in a demand that an employee be subjected to disciplinary action.)

The issue in dispute in relation to a strike (in these proceedings, the demands made by the union) is to be ascertained from the relevant facts. These include the referral form, any relevant correspondence, the negotiations between the parties and the affidavits filed in this Court. (See *SA Transport and Allied Workers Union v Coin Security Reaction* (2005) 26 *ILJ* 1507 (LC)). In these proceedings, the suspension demands, originally tabled in broad terms, have been clarified by the union in its answering affidavit. Its members seek to strike in support of a demand that the employees concerned be fairly suspended. The applicant suggests that the narrowing of the demand is expedient. That may be so, but I disagree with Mr Kennedy's submission that the union is bound to the terms of the dispute concerning suspension as it is articulated in the annexure to the referral form.

The general rule, of course, is that the issue in dispute over which a strike may be called must be the same as that referred to conciliation. But this is not a rule to be applied in a literal sense. To hold a union to the terms of a dispute or the formulation of a demand as articulated in a referral to conciliation would defeat the purpose of collective bargaining which is, after all, a process of engagement designed to persuade one's adversary to modify positions previously adopted and views previously expressed. The flexibility that must necessarily be adopted here was recognised by the Labour Appeal Court in the *TSI* case, where Zondo JP said the following:

> One accepts that in a conciliation process a party may make a demand which he is prepared to later moderate and that a party may sometimes put up a demand that it is aware the other party will not agree to (at para [30].

The Court went on to say that the strike notice was an important source from which to ascertain the views of the union at the time that they notified the employer o f their intention to strike, thus clearly recognising that the terms of a demand as originally put to the employer or recorded in a referral to conciliation are not cast in stone.

In the present instance, in my view, the suspension demand referred to conciliation i.e. that Mr Nkosi and Mr Essau be suspended, is hardly far removed from a demand, as presently articulated, that they be suspended fairly.

But is this a lawful demand? I have previously expressed the view that an employer wishing to effect a fair preventative suspension must satisfy three requirements. (See *Mosweu v Premier North West Province and others* unreported J2622/08 06 January 2009). The first is that the employer must be satisfied that the employee is alleged to have committed a serious offence. The second requirement is that the employer must establish that the continued presence of the employee at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the well-being or safety of any person or property. The third is that the employee must be given a hearing in the form of an opportunity to make representations before a decision to suspend is taken.

It is not apparent to me from the papers in the present application that the municipality has as yet complied with these requirements. The deponent to the founding and replying affidavits says only the applicant has conducted an investigation and that it is satisfied that the employees concerned should not be suspended. I am not persuaded on the papers before me that the union demands the suspension of Mr Nkosi and Mr Essau “come what may”. By implementing the requirements to which I have referred, the applicant is in a position to comply with the union’s suspension demands, and at the same time to ensure that the

rights of the affected employees are respected. A demand which is effectively that the applicant comply with the requirements relevant to a fair preventative suspension is not unlawful. What the situation might be once the applicant complies with the relevant requirements relating to a fair suspension but persists with a decision not to suspend an employee whose suspension has been demanded is not a matter that I am required to decide, and I refrain from expressing any view in this regard.

That leaves for consideration the 4th demand i.e. the employment of pensioners demand. That demand, as I understand it, is that the applicant should not employ retirees, as this would prejudice the interests of the union's members. There is nothing unlawful about this demand.

The third and final question is whether the proposed strike meets the procedural and substantive limitations respectively established by sections 64 and 65 of the LRA. Section 64 establishes the procedural preconditions to protected strike action. For present purposes, these are that a dispute must have been referred to the bargaining council and that a period of 30 days, or any agreed extension to that period, must have elapsed from the date of the referral.

The union referred the disputes that form the subject of these proceedings on 6 November 2008. The 30-day period therefore expired on 6 December 2008. The union was entitled to issue the required notice of intention to strike on 7

December. All of the procedural requirements of section 64 have thus been satisfied.

Section 65 places a number of substantive limitations on the right to strike. Amongst these is the requirement that the matter giving rise to the strike is not a matter that the LRA provides can be referred to arbitration or to adjudication by this Court. The limitation on strike action established by section 65 is expressed in the negative - in other words, provided a proposed strike meets the procedural conditions established by section 64, it is unprotected if and only if one of the substantive limitations in section 65 applies. There is nothing in section 65 that requires a dispute that has as its basis a demand that an employer fairly suspend an employee to be referred to arbitration or to adjudication. Similarly, section 65 does not require a dispute based on a demand that an employer refrain from re-engaging pensioners to be referred to arbitration or adjudication. Mr Kennedy urged me to regard the employment of pensioners demand as one concerning an unfair labour practice, which in terms of section 191(5) (a) must be referred to arbitration. This is to unduly strain the wording of the demand. The demand reads:

> SAMWU demanded that, the department should not employ retirees in view that no exceptional skills can be demonstrated by these people and this prejudices our members who can perform those functions. Parties have reached a dead lock on this issue (sic).

This is no more than the statement of a demand that the applicant should not employ retirees, coupled with a motivation for that demand. It may well be that the re-engagement of retirees will prejudice the work opportunities available to union members who have the skill, qualifications and experience to do the jobs into which retirees may be placed. However, it does not necessarily follow that it is only prospects of promotion that will be at issue here, nor, as Mr Kennedy submitted, that the underlying basis of the demand is a request for the promotion of the union's members. . The definition of unfair labour practice refers to an act or omission involving unfair conduct by the employer relating to promotion. The union is not complaining about the applicant's conduct in relation to promotion. Its complaint is directed at a policy that provides for the re-employment of pensioners, because of the prejudicial consequences that that policy would have, broadly speaking, for the interests of its members. In my view, a refusal by the applicant to withdraw the policy is not a dispute about its conduct in relation to promotion. It is therefore not an unfair labour practice, and not a dispute that must be referred to arbitration. It follows that there is no substantive limitation to the proposed strike.

In summary - the proposed strike action complies with the definition of strike contained in section 213 of the LRA. The procedural requirements contained in section 64 have been met, and none of the substantive limitations in section 65 applies. In my view, the proposed strike is protected. In the absence of a clear right, there is no basis on which to grant the final relief that the applicant seeks.

I make the following order:

The application is dismissed, with costs

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

30 JANUARY 2009.

Appearances:

For the applicant Adv P Kennedy SC with Adv Mpho Siaga

Instructed by Werksmans Inc

For the First Respondent Adv J Van der Riet SC

Instructed by Cheadle Thompson and Haysom Inc