IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO J 1316/10

In the matter between:

DIGISTICS (PTY) LTD	**Applicant**
And	
SOUTH AFRICAN TRANSPORT	
AND ALLIED WORKERS UNION	**First Respondent**
ERENS MASHEGO & OTHERS	**Second to further Respondents**
THE COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**Third respondent**
HLATSHWAYO, T N.O.	**Fourth Respondent**

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an urgent application in which the applicant seeks an order declaring that a strike commenced by members of the first respondent is unprotected, coupled with an interim interdict restraining the first respondent's members from participating in the strike.

Factual background

[2] The applicant has been engaged in protracted negotiations with the first respondent (the union) since February 2009 with a view to concluding a recognition agreement, intended to regulate both organisational and collective bargaining rights.

[3] In late October 2009, the parties reached deadlock. They were unable to agree on four issues – the definition of the bargaining unit, the appointment of a full time shop steward, paid time-off for shop stewards, and the time period within which collective bargaining would commence.

[4] In November 2009, the union referred a dispute to the CCMA. The dispute was classified by the union as one concerning a refusal to bargain, and described as an inability to reach agreement on certain issues relating to the collective agreement. A conciliation hearing was held on 18 January 2010. The fourth respondent (the commissioner) declined to issue a certificate of outcome, and a week later, presented the parties with what is termed an 'advisory award'. To date, no certificate of outcome has been issued.

[5] The advisory award reads as follows:

> "*Having considered the submissions of the parties the following advisory award is made:*
>
> 1. *Parties are advised to extend the lifespan of the conciliation process for 30 days in order to engage in meaningful consultation and explore options of reaching a resolution.*
>
> 2. *Furthermore, an opportunity exists to seek CCMA assistance in term of s 150 should parties so desire.*
>
> 3. *It is unfortunate that the referral to the CCMA appears to have been solely to unlock the relevant section and open the parties to a potential strike which may not be in the interest of promoting sound employment relations in the short term.*

4. It is envisaged that this could still be attained as provided for in points 1 and 2 above."

[6] On 26 February 2010, the applicant filed an application to review and set aside the advisory award. Those proceedings remain pending.

[7] On 26 June 2010 union issued a strike notice, in which a strike was called in support of the demands for the inclusion of supervisors in the bargaining unit, the appointment of a full time shop steward, and paid time-off for shop stewards.

Legal issues

[8] In these proceedings, the applicant relied initially on the fact of the pending application to review and set aside the advisory award to seek an order interdicting the second and further respondents from embarking on strike action. I will deal with this issue in due course. Mr Boda, who appeared for the applicant, raised a number of additional arguments. First, he relied on the wording of s 64(1) (a) read with s 135(5) (a)[1] to submit that the strike was unprotected because the commissioner had failed to issue a certificate of outcome. The use of the word "must" in s 135 (5)(a), he contended, necessarily required a commissioner to issue a certificate of outcome,

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[1] Section 135(5)(a) reads:

"When conciliation has failed, or at the end of the 30-day period or any further period agreed between the parties-

(a) the commissioner must issue a certificate stating whether or not the dispute has been resolved…".

Section 64(1)(a) reads:

"Every employee has the right to strike and every employer has the right to lock out if-

(a) the issue in dispute has been referred to a council or to the Commission as required 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;…."

even if a conciliation meeting was never convened, and the issuing of the certificate was a necessary procedural step prior to the acquisition of any right to strike.

[9] There is no merit in this submission. While s 135(5) (a) requires a commissioner to issue a certificate of outcome, it does not follow that a failure to do prejudices the right to strike. The clear wording of s 64(1) (a), and in particular the use of the word "or" between items (i) and (ii), contemplates that the procedural requirements established by s 64 (1) are met once 30 days have elapsed from the date of the referral, whether any commissioner appointed to conciliate the dispute certificate has issued a certificate or not. The purpose of item (i) of subsection (a) is to cater for a situation where conciliation fails within the 30 day period referred to in item (ii). In other words, the procedural requirements imposed by the section are met once a certificate of outcome is issued by a commissioner, or 30 days have elapsed from the date of the referral, whichever occurs first.

[10] Mr Boda's second submission was that in effect, the nature of the dispute referred to the CCMA was one of a refusal to bargain. As I understood the submission, the demands for the inclusion of supervisors in the bargaining unit, a full time shop steward and paid time-off for shop steward were all made in the context of a demand for recognition. That being so, it was necessary for the commissioner to have made a valid advisory award on all of these issues before the union was entitled to issue a strike notice in terms of s64(1)(b).

[11] There is similarly no merit in this submission. Although the preamble to the definition of a 'refusal to bargain' in s64(2) is clearly open-ended, the list does not refer to nor does it include disputes about what the Act elsewhere refers to as organisational rights.[2] There is thus a clear a distinction between disputes that concern the right to organise, and those that concern matters more closely associated with the right to bargain. Organisational rights disputes may be referred

[2] See Part A of Chapter III of the LRA, which establish the rights of access to workplaces, check-off, the appointment of shop stewards, leave for trade union activities, and the disclosure of information.

to arbitration or become the subject of strike action, at the union's election.[3] Although the LRA does not establish a duty to bargain, the intention of s 64(2) is to provide a basis for advice to be given to the parties in dispute on issues relating to elements of the right to bargain that is being sought by a union and resisted by an employer. It was hoped, no doubt, that the wisdom and experience of commissioners would be reflected in advisory awards made in terms of s 64(2), which would in turn persuade the parties in dispute to adapt their bargaining positions. To consider disputes about organisational rights as disputes about a refusal to bargain, even when a demand for these rights forms an integral part of a recognition battle, would be to muddy a distinction that the LRA clearly makes, and would have the consequence of imposing restrictions on the exercise of the right to strike which are simply not sustainable having regard to the plain wording of the statute. [4]

[12] I should mention, for the sake of completeness if nothing else, that while paid time off for shop stewards is a right established by the LRA (see s 14(5)), the Act does not establish a right to the appointment of full-time shop stewards. To this extent, the union has an election to strike or to refer the dispute to arbitration in relation to its demand for paid time off, but there is no election in relation to the demand that a full time shop steward be appointed. This is a matter in respect of which the provisions of Part A of Chapter III of the Act do not apply.

[13] Finally, I turn to the issue of the advisory award itself. The less said about it the better. It was not the commissioner's brief to pass judgment, as he appears to have done, on the union's motives in referring the dispute to the CCMA. Even if the union had done so with the intention, as the commissioner put it, "to unlock the relevant section and open the parties to a potential strike…" this was the union's right. What the commissioner was required to do (and what he manifestly failed to

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[3] See s 21(7), read with s 65(2). Section 65 (2)(b) provides that if a trade union gives notice of intention to strike on an organisational rights issue, it may not exercise eth right to refer the dispute to arbitration for 12 moths from the date of the strike notice.

[4] This is not to suggest that the distinction between refusal to bargain disputes and other disputes is always an easy one to make. See, for example, *County Fair Foods (a Division of Astral Operations Ltd) v Hotel, Liquor Catering Commercial & Allied Workers Union & others* (2006) 27 *ILJ* 348 (LC), a case that concerned the withdrawal of recognition during a wage dispute.

do) was to isolate those elements of the dispute that concerned a refusal to bargain (in the present case, the demand for the inclusion of supervisors in the bargaining unit) and to issue an advisory award that addresses the merits of the competing contentions. Of course any opinion expressed in these circumstances is by definition not binding on the parties, but it seems to me that the commissioner ought at least to have addressed the relevant factors,[5] come to some rational conclusion (expressed as advice to the parties) and briefly set out the reasoning for the advice proffered. While the Act does not prescribe precisely when and how an advisory award is to be made, I find it difficult to conceive how these obligations can be properly discharged without affording the parties the opportunity to make submissions in support of their respective positions, and if necessary, to lead evidence. However, the nature of these proceedings does not require me to assess the reasonableness of the commissioner's advisory award; that is the function of the review court in due course. For the purposes of these proceedings, my view is that the commissioner's award, on the face of it, is not an advisory award contemplated by s 64 (2), and that the procedural hurdle to protected strike action established by that section, in so far as the demand for the inclusion of supervisors in the bargaining unit is concerned, has accordingly not been met.

[14] This leaves the issue of the effect, if any, of the demand for an expanded bargaining unit on the validity of the strike notice (which, as I have noted, incorporates all three demands) and the strike itself. In other words, does the single bad apple (in the form of the demand that concerns a refusal to bargain issue made in circumstances where no advisory award has been issued) taint the entire barrel? In *Samancor Ltd & another v National Union of Metalworkers of SA* (1999) 20 *ILJ* 2941 (LC), Landman J considered the same question and held that if it is possible to distinguish between the permissible and impermissible demands, once the impermissible demands have been abandoned, the strike is protected. This matter was not raised for debate by either party at the hearing of this application, and in these circumstances, I am inclined simply to apply the same principle. I am also inclined to the view that there should be no order as to costs, having regard to the outcome of these proceedings, the fact of an on-going collective bargaining

[5] These are conveniently set out in *SA Society of Bank Officials v Standard Bank of SA Ltd* (1998) 19 *ILJ* 223 (SCA).

relationship between the parties, and the prospect of prejudice to that relationship and the successful resolution of outstanding issues should an order for costs be made.

I accordingly make the following order:

1. To the extent that the strike called by the first respondent is called in pursuit of a demand relating to the inclusion of supervisors in the bargaining unit:
    a. the strike is declared to be unprotected; and
    b. the second to further respondents are interdicted from participating in the strike.
2. This order does not preclude the second and further respondents from engaging in strike action in pursuit of demands relating to the appointment of full time shop stewards and paid leave for shop stewards, provided that the first respondent has notified the applicant of the withdrawal of the demand relating to the inclusion of supervisors in the bargaining unit.
3. There is no order as to costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of hearing: 2 July 2010
Date of judgment 4 July 2010

Appearances
For the applicant: Adv F Boda, instructed by Eversheds
For the respondents: Ms Ruth Edmonds, Ruth Edmonds Attorneys.