Reportable
Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C 600/2010

In the matter between:

SWISSPORT (SOUTH AFRICA) (PTY) LTD	**Applicant**
and	
SATAWU	**First respondent**
The employees listed in Annexure "A1"	**Second and further respondents**

JUDGMENT

STEENKAMP J:

INTRODUCTION

[1] This is the return day of a rule *nisi* interdicting the respondents from calling for or participating in unprotected strike action. The threatened strike never ensued. The applicant no longer seeks a confirmation of the rule *nisi* but both parties are persisting with an argument over costs. The argument raises questions about protected strike action in the context of an alleged unilateral change to terms and conditions of employment.

THE INITIAL APPLICATION

[2] The applicant is a baggage handler and logistics facilitator at airports in South Africa and across the world. It brought the initial application on an urgent basis on Saturday 20 June 2010. The matter was heard *ex parte*. Basson J granted a rule *nisi* calling upon the respondents to show cause on the return day why an order should not be made final, declaring that the action of the respondents in calling a strike would constitute unprotected strike action; and interdicting the respondents from calling for, orchestrating or participating in any such strike action.

[3] In considering any factual disputes on the papers before me, I do so according to the well-trodden principles set out in *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd*[1], ie:

> "It is correct that, where in proceedings on notice of motion, disputes of fact have arisen on the affidavits, a final order, whether it be interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which had been admitted by the respondent, together with the facts alleged by the respondent, justify such an order."

[4] A dispute concerning an alleged unilateral change in a shift roster between SATAWU and Swissport arose during March 2010. This dispute was settled at the CCMA when Swissport agreed not to implement a new shift roster unilaterally.

[5] According to the trade union, Swissport reneged on that agreement when it unilaterally implemented a new shift roster which had not been agreed between the parties for June 2010.

[6] SATAWU referred a dispute about the alleged unilateral change in terms and conditions of employment to the CCMA on 9 June 2010. Although Swissport initially denied having received that referral, on the return day Ms *Bailly*, who appeared for Swissport, conceded that the CCMA referral form had clearly been properly served on Swissport.

---

[1] 1984 (3) SA 623 (A)

[7] On 18 June 2010, SATAWU's Western Cape organiser, TK Roto, wrote to Swissport. The letter was headed: "RE: UNILATERAL CHANGE IN TERMS OF CONDITIONS OF EMPLOYMENT". It states the following:

> "I refer to my letter dated 20 May 2010, and my referral to the CCMA re: the above mentioned.
>
> In terms of s64(4) of the Labour Relations Act the company did not comply. We therefore give you 48 hours to go on strike."

[8] It was as a result of this strike notice that Swissport brought the urgent application on 19 June 2010. Roto states that he only became aware of the application when a representative of Swissport telephoned him on Saturday 19 June 2010. He went to meet a representative of Swissport, Charisse Alexander, at its offices at Cape Town International airport. He travelled by public transport to the office, but when he got there, the office was locked and neither Alexander nor anyone else was available. He returned home to Bellville. (It must be borne in mind that this was on a Saturday and trade union officers were closed).

[9] Alexander telephoned Roto again between 1300 and 1400 and apologised for not being at the office. Alexander and Roto agreed to meet again on Monday, 21 June 2010 to negotiate the implementation of a new shift roster. Roto told Alexander that the strike would not commence on Monday 21 June 2010.

[10] Roto states that he was contacted by Swissport's legal representative again after 1400. He says in his answering affidavit:

> "I confirmed that there would be no strike on Monday given the agreement that have been reached between the parties. He then asked me to reduce is undertaking on the part of the respondent to writing. I advised him that I was unable to do so that I was not in the respondent offers, was quite a distance away, dependent on public transport, and in any event was not proficient in operation of the respondent's computers in its office. I confirmed the oral undertaking not to strike."

[11] Nevertheless, Swissport proceeded with the urgent application and the order was granted late in the afternoon of Saturday 19 June 2010.

[12] It is common cause that no strike took place on Monday, 21 June 2010.

Would the intended strike have been protected?

[13] The requirements for protected strike action under the Labour Relations Act[2] are well-known. Compared to the regime under the old Labour Relations Act of 1956, the requirements are relatively simple. The trade union must refer the issue in dispute to the CCMA or relevant bargaining council; the CCMA must issue a certificate that the matter could not be resolved at conciliation, or a period of 30 days (or a longer period agreed between the parties) must elapse; and the trade union must then give the employer 48 hours' notice of the commencement of the strike, in writing.[3]

[14] But even these requirements do not not apply to a strike if the employer has failed to comply with subsections (4) and (5) of s 64. These subsections provide as follows:

> "(4) Any employee through or any trade union that referred the dispute about a unilateral change to terms and conditions of employment to a council or the commission in terms of subsection (1)(a) may, in the referral, and for the period referred to in subsection (1)(a) –
>
> (a) require the employer not to implement unilaterally the change to terms and conditions of employment; or
>
> (b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.
>
> (5) The employer must comply with a requirement in terms of subsection 4 with in 48 hours of service of the referral on the employer. "

[15] As Clive Thompson[4] points out:

> "In order to qualify for this release from the statutory requirements, the would-be strikers or their union, at the time of referring the dispute about the unilateral alteration to the Council or CCMA, must require the employer not to implement the change (or if it has already done so, to restore the pre-existing conditions) for the duration of the conciliation period. If the employer fails to comply with this requirement within 48 hours, a protected strike can commence with adherence to any further statutory procedures."

---

[2] Act 66 of 1995
[3] s 64(1)
[4] Helen Seady and Clive Thompson, "Strikes and lock-outs" in Thompson & Benjamin, *South African Labour Law* AA1 – 320.

[16] There was no need for SATAWU to give 48 hours' notice of the intended strike action – even though it did do so, *ex abundante cautela* – and, contrary to the averments of the applicant's Mr Moodley in his founding affidavit, the proposed strike action was neither "illegal" (as he termed it) or unprotected.

[17] The application was wholly misconceived on the basis of this, its main point of departure for the relief sought. Had the applicant placed all the facts before the court in the *ex parte* application, it would have been clear that it had not established even a *prima facie* right for the interim relief sought. At this stage, and having regard to the full facts set out in the answering papers and the *Plascon-Evans* rule I referred to earlier, the applicant has failed manifestly in establishing a clear right.

The trade union's conduct

[18] The applicant made much in its founding papers and in argument of the "unreasonableness" of SATAWU's conduct and the resultant irreparable harm that would result from a strike.

[19] In this regard, the applicant relied mainly on the fact that it was responsible for baggage handling during the time of the 2010 FIFA World Cup in South Africa. It submitted that a strike would cause disruption and lead to operational as well as reputational damage.

[20] These submissions, emotional as they are, are largely irrelevant. It is an inevitable consequence of any strike that the employer's operations will be disrupted. It is also, depending on the nature of the employer and its interaction with the public, often an uncomfortable but inevitable fact that members of the public will be inconvenienced. That is the price we pay for orderly collective bargaining in a constitutional democracy. As long as the trade union complies with the procedures discussed above[5] the strike is protected. And as long as its members behave in a peaceful manner, they may even picket in support of that protected strike. Violent or unlawful behaviour cannot be condoned and can be dealt with in disciplinary terms

[5] As set out in s 64 of the LRA

or in terms of the criminal law. Such behaviour may lead to dismissal, despite the fact that the strike is protected. But that is not what I'm dealing with on the facts of this case. The strike – had it gone ahead – would have been protected. The fact that it may have caused disruption and inconvenience, even during the hallowed month of the 2010 FIFA World Cup, is irrelevant. Contrary to what some pundits may believe, FIFA and Mr Sepp Blatter have neither the power nor the jurisdiction to usurp the laws or Constitution of this country and impose their own rules of the game on its citizens. The economic and logistical harm inflicted by protected strike action are part and parcel of the powerplay inherent in collective bargaining. If a trade union chooses to exact maximum leverage by timing that maximally inconveniences the employer – and even members of the public – it may seem to be unreasonable, but it is not unlawful.

The role of the attorneys

[21] The rule *nisi* was extended by agreement on 13 July 2010 to enable the parties to file further pleadings.

[22] On 22 July 2010 SATAWU's attorney, Mr Wayne Field, addressed a letter to Swissport's attorney, Ms Caroline de Villiers. He pointed out that –

22.1 Roto had given an oral undertaking that the strike would not proceed on Monday 21 June;

22.2 Swissport had not complied with s 64(4) within 48 hours; and

22.3 SATAWU was not required to comply with the provisions of s 64(1).

[23] Given those facts, and in an effort to avoid incurring the costs of drafting further pleadings and attending further court proceedings, Mr Field proposed that the matter be settled on the following basis:[6]

23.1 Swissport withdraw its application; and

[6] The letter was not written on a "without prejudice" basis and Mr Field was not prevented from drawing it to the court's attention.

23.2 Each party bear its own costs (at that stage SATAWU's costs were limited to the perusing of documents, a consultation and the drafting of that letter).

Field noted that, if that proposal was not acceptable to Swissport, his instructions were to draft opposing papers and to seek costs on an attorney-client scale.

[24] Field received no response to that letter. On 26 July 2010 De Villiers phoned him, but she told him that she had not received the letter. Field read and explained his client's proposal of 22 July 2010 to her. She responded that the proposal was not acceptable to the client and that she had instructions that the matter should proceed. The attorneys then agreed to a further timetable for the exchange of further pleadings.

CONCLUSION

[25] Given the clear explanation in Field's letter of 22 July 2010 that the application was bad in law, it was wholly unnecessary for the parties to incur further costs. The offer that the application should be withdrawn, with each party to bear their own costs, was an eminently reasonable one. The application was misconceived and based on an incorrect understanding of s 64 of the Act. There is no reason in law and fairness why the applicant should not bear the respondents' costs.[7]

ORDER

25.1 The rule *nisi* is discharged.

25.2 The applicant is ordered to pay the respondents' costs.

[7] In argument, Mr Field did not persist with the prayer for punitive costs.

_____

ANTON STEENKAMP

JUDGE OF THE LABOUR COURT

CAPE TOWN

Date of hearing:	25 November 2010
Date of judgment:	30 November 2010
For the applicant:	Adv Chantal Bailly
Instructed by	Caroline de Villiers attorney
For the respondents:	Mr Wayne Field
Instructed by	Bernadt Vukic Potash & Getz