IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: J 385/10

In the matter between:

PROTEA COIN GROUP
[SECURITY SERVICES] (PTY) LTD **Applicant**

and

SAPSWU **1st Respondent**

MEMBERS OF 1ST RESPONDENT LISTED
IN ANNEXURE "A" TO THE NOTICE
OF MOTION **2nd and Further Respondents**

JUDGMENT

LAGRANGE,AJ

1. This is an application for a final order to interdict strike action which the respondents intend embarking on following their referral of a dispute to the CCMA. On 11 March 2010, the applicant obtained an interim interdict declaring the strike action planned to start on 22 February 2010 unprotected. The order also restrained the respondents from commencing, carrying on, or encouraging such strike action.

2. In December 2006, a settlement agreement was concluded between the applicant ('the employer') and the first respondent ('SAPSWU') in full and final settlement of a dispute that was referred to the CCMA. That dispute was described in the LRA 7.11. referral form as "1. Living out allowance. 2 Performance bonus. 3 Unfair position. 4. Polygraph testing. 5. Salary advise and 6. Travelling allowance."

3. The living out allowance agreed upon by the parties in terms of the agreement provided that certain employees, who would no longer be accommodated in barracks provided by the employer's client, would receive a living out allowance of R 500-00 per month from January 2007. The parties also acknowledged that the optional accommodation provided at the barracks was part and parcel of the employees' terms and conditions of employment. Other provisions in the agreement described the details agreed upon for each of the other issues listed in the dispute referral form.

4. The agreement did not limit payment of the allowance to a particular period but merely stated when it would begin. The duration of the settlement agreement was similarly indefinite.

5. SAPSWU approached the employer in 2009 to consult on a number of items which were part of the terms and conditions of its members, including performance bonuses, living out allowances, travel and allowances and danger pay. The employer advised that these issues were already regulated by the settlement agreement which it considered a collective agreement. Nevertheless, the union declared a dispute which eventually resulted in the conclusion of a further settlement agreement on 29 June 2009. On this occasion the agreement was not an agreement on the items in question, but entailed a commitment by the parties to engage with each other using a joint task team to review the settlement agreement of December 2006. Once proposals were finalized, the parties aimed to conclude the review process by early August 2009.

6. The parties could not reach agreement on a number of items and in October 2009, the union referred a further dispute to the CCMA, which it described as follows in the LRA 7.11 form "The employer refuses to review the living out allowance/sleep out since December 2006. Peformance bonus and danger allowance not part of the initial

agreement" (sic). The desired outcome sought was stated as "Protea Coin to pay the workers a living out allowance & danger allowance." In describing the nature of the dispute the union classified it under "Other" and expanded on this by stating: "the parties signed an agreement in December 2006 as a right." The union did not tick the box on the form indicating it was a dispute concerning the interpretation and application of a collective agreement, but in the paragraph dealing with the date the dispute arose, wrote the words "Section 24 dispute".

7. By the time the dispute was referred to the CCMA in October, the position of the union and the employer respectively on the revision of the living out allowance, was that the former was demanding a 60 % improvement whereas the latter was offering to increase it by 10 %. On the evidence, this position appears not to have changed by late December 2009.

8. Various attempts were made to set up meetings to conciliate the matter at the CCMA, and the parties did eventually meet on 21 December 2009. On or about 9 December the parties also agreed to extend the conciliation period for a period of 30 days.

9. There is some dispute about what was to happen if no settlement of the dispute was reached by the end of the extended period, which would have expired on 8 January 2010. However, on 18 January 2010 a certificate of outcome was issued which describes the dispute as one concerning "matters of mutual interest". The certificate further indicates that the dispute can be resolved by means of a strike or lockout.

10. On 1 February 2010, the employer launched an application to review and set aside the certificate of outcome on the basis, that *inter alia* the dispute was incorrectly identified by the commissioner as one that could be resolved by strike action, when it is in fact a dispute that ought to have been arbitrated and when no conciliation of the dispute had in fact taken place.

11. On 17 February 2010, the union issued the applicant with a strike notice warning of a strike to commence on 22 February 2010 and stating that the strike action would

continue until the employer "responds positively to all the demands submitted by the workers."

12. In its replying affidavit in this application the applicant admits that "the only unresolved issue between the Applicant and the Respondents pertains to a increase in the living out allowance paid by the Respondent."

The legal status of the planned industrial action

13. The applicant contends any planned strike action by the union pursuant to the failure to resolve the above dispute will be unprotected on one or more of the following grounds:

    13.1. The living out allowance is regulated by the 2006 settlement agreement, which constitutes a binding collective agreement on the parties and their members.

    13.2. The dispute concerns the interpretation and application of a collective agreement which ought to be referred to arbitration.

    13.3. The certificate of outcome, which is the subject matter of a review application, ought not to have been issued.

    13.4. Even if it were a dispute over a matter of mutual interest and strike action was a legitimate means of trying to resolve the dispute, the strike notice is defective as it fails to set out all the demands the strike refers to. As such it is not a valid notice under section 64 of the Labour Relations Act 66 of 1995, as amended.

14. These grounds are addressed below.

The status of the settlement agreement as a collective agreement.

15. In principle there is nothing which precludes a settlement agreement being a collective agreement.[1] In this instance the settlement agreement of December 2006 was one which settled a dispute about various terms and conditions of employment, and the content of the agreement was typical of what might be found in a collective agreement concluded between parties to collective bargaining. Mr Manchu, representing the respondents conceded that there was indeed no real basis for disputing the dual status of the agreement as a settlement agreement and a collective agreement.

The nature of the dispute

16. The applicant contends that the dispute concerns the interpretation or application of the 2006 settlement agreement. However, it is clear from the conduct of the parties in 2009 that they were engaged in negotiating a revision of the agreement. Although the engagement was referred to as consultation, in practice it involved the trading of offers and was indistinguishable in substance from collective bargaining. There is nothing in the correspondence between them that suggests that an issue had arisen concerning the application or interpretation of the settlement agreement itself.

17. The applicant made much of the mention of section 24 of the LRA in the dispute referral form, but the substance of the dispute as it emerges from the conduct of the parties, is clearly one about the variation of living out allowances and not the enforcement of the existing allowance. Insofar as the contents of the LRA 7.11 referral form is concerned it is also noteworthy that despite the reference to section 24 of the LRA, the dispute is not classified as a dispute over the interpretation and application of a collective agreement in paragraph 3 of the form.

18. Moreover, when I asked the applicant's representative, Ms Lancaster, what the interpretation or application issue in dispute between the parties might be, she was unable to illuminate matters further.

[1] See e.g, ***Mhlongo & Others v Food & Allied Workers Union & another*** **(2007) 28 ILJ 397 (LC)**

19. I am satisfied that the dispute over the living out allowance concerns the extent to which the existing allowance should be revised: the union was seeking a 60 % improvement and the employer was willing only to improve it by 10 %.

20. Such a dispute is not about whether the existing right to a living allowance of R 500 is being properly implemented, but about the amount by which it should be varied in future, which concerns the creation of a new right.

The certificate of outcome

21. The parties agreed to extend the conciliation period to 8 or 9 January 2010. It appears they did meet each other on 21 December 2009 in a further attempt to resolve the dispute during the extended period, but this did not occur in the context of conciliation proceedings.

22. Section 64(1)(a) of the LRA states:

> "Every employee has the right to strike 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 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; and …." (emphasis added).

23. The provisions quoted clearly indicate that if either one of the events in subsections 64(a)(i) or (ii) occur, one of the pre-conditions for protected industrial action is met. In this instance both conditions appear to have been satisfied. Accordingly, even if the certificate of outcome were set aside, this would not alter the fact that the time provided for conciliation has elapsed and that the provisions of subsection 64(a)(ii) have been met. In any event, the value of the certificate of outcome beyond

confirming that the dispute remains unresolved is questionable. It certainly does not have the status of some kind of binding determination about the nature of the dispute.[2]

24. Accordingly, I am satisfied that whatever flaws the certificate of outcome may entail, the requirements of section 64(a)(ii) have been met in any event, and it is irrelevant for the purposes of my decision what the ultimate status of the certificate of outcome is.

The validity of the strike notice

25. The applicant argues that the strike notice ought to have stated what the demands of the respondents were, and the failure to do so renders the strike notice invalid. In advancing this proposition the applicant relies on the Labour Court judgment in the unreported case of ***South African Airways (Pty) Ltd v SATAWU*** **(Case no J 2166/09)** dated 19 October 2009.

26. In that case Van Niekerk J held, relying partly on the LAC judgment in ***Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building and Allied Workers Union (2)*** **(1997) 18 *ILJ* 671 (LAC)**, that:

> "*[26] It is clear from the judgment in Ceramic Industries that the two purposes of a notice of intention to strike (i.e. to enable the employer to decide whether its interests are best served by resisting the union's demands or acceding to them; and in the former case, to take steps to protect the business) are linked to the minimum content of the notice. A strike notice ought thus necessarily to specify the date and time at which the strike action was intended to commence, since this would enable the employer to take whatever steps it wished to protect the business at the time that the strike commenced.*

[2] In this regard see the unreported judgment of Van Niekerk J in ***Ingo Strautmann v Silver Meadows Trading 99 (Pty) Ltd t/a Mugg and Bean South Coast and others*** (C**ase no D412/07**) dated 9 June 2009, at paragraph [9]

[27] The same purposive approach adopted by the Labour Appeal Court requires that a strike notice should sufficiently clearly articulate a union's demands so as to place the employer in a position where it can take an informed decision to resist or accede to those demands. In other words, the employer must be in a position to know with some degree of precision which demands a union and its members intend pursuing through strike action, and what is required of it to meet those demands. Some of the issues giving rise to the intended strike, as they are articulated in the strike notice, are clear. The issue of the disciplinary action demanded in respect of Venter, as well as the demand in relation to retention bonuses, are relatively clearly expressed, and to require more would be to adopt an unnecessarily and unjustifiably technical approach. The same cannot be said however in respect of the reference to "demands for which Certificate of non-resolution was issued on 21st September 2009." This is particularly so in a case such as the present, where the referral to conciliation was made, it would seem, in respect of unspecified and various grievances and petitions lodged over a period of months preceding the notice. Any employer faced with a strike notice issued in such imprecise terms would be hard pressed to know which element of what grievance and petition it was being asked to resist or concede. It is not an answer for a union to say, as the union does in the present matter, that it is for the employer to ask. A union elects to call a strike on those of its demands that it wishes to pursue to the point of economic pressure. It is incumbent on a union to articulate those demands in sufficiently clear terms when it issues a strike notice."[3]

27. In the *Ceramic* case, in which a strike notice was challenged on the basis that it stated only that a strike would commence "at any time after 48 hours from the date of this notice", the LAC held that**:**

[3] At paragraphs [26] and [27] of the judgment.

"Whatever kind of approach is adopted in interpreting a statute or other legal instrument it must be kept in mind that its actual language cannot be neglected (see S v Zuma & others 1995 (2) SA 642 (CC) at 652H-653A). According to The Shorter Oxford English Dictionary 'commencement' means 'the action, process or time of beginning', and 'commence' means '[b]egin (an action, doing, to do), enter upon … make a start or a beginning; come into operation'.

In determining whether there has been compliance with s 64(1)(b)of the Act an interpretation must be sought, as stated earlier, which best gives effect to the broader purpose of the Act and the specific purpose of the section itself. Section 64(1)(a) sets out the first requirement to be met before embarking on a protected strike, viz an attempted conciliation of the issue in dispute before collective action is taken. Section 64(1)(b) sets out the next requirement: notice of the proposed strike to the employer. Its purpose is to warn the employer of collective action, in the form of a strike, and when it is going to happen, so that the employer may deal with that situation. By their very nature strikes are disruptive, primarily to the employer, but also to employees and, sometimes, to the public at large. One of the primary objects of the Act is to promote orderly collective bargaining. Section 64(1)(b) assists in that orderly process. A failure to give proper warning of the impending strike may undermine that orderliness. This might, in turn, frustrate labour peace and economic development, other important purposes of the Act (s 1). Compliance with the provisions of the section is thus called for.

The specific purpose of warning employers of a proposed strike may have at least two consequences for the employer. The employer may either decide to prevent the intended power-play by giving in to the employee demands, or may take other steps to protect the business when the strike starts. For the former the notice in the present case might suffice, as a

minimum period of 48 hours is given to deliberate on whether to accede to the demands or not For the latter, however, the notice is deficient, because the employer does not know when, after 48 hours, the proposed strike will commence."[4]

28. There are two points that must be made in relation to the authority cited. Firstly, the LAC was not directly concerned with determining whether the strike notice should express the union's demands. It was concerned specifically with interpreting the text of section 64(1)(b) to determine whether the requirement of giving at least 48 hours notice required the union to state the actual time the strike would commence. While the judgment does indicate the purpose of the strike notice, the LAC did not have to address itself to the question of an indeterminate dispute.

29. Secondly, the decision in the SAA matter concerned strike notice in respect of what can only be described as a compendium of disputes. The true extent and nature of some of the disputes referred to could not be determined from the strike notice. I agree that on the facts of that case, the strike notice ought to have detailed the disputes in question. However, in this instance I do not believe the applicant can genuinely claim to have been uncertain about the nature of the dispute. It knew what the last stated demands of the union on the living out allowance were and that this was the only outstanding issue in dispute. In such circumstances, I don't believe the employer could have been unaware of what was required to avoid the strike by way of conceding to the employees' demands. Consequently, the failure to reiterate the demands in the strike notice does not in this instance invalidate the notice in my view, though it might be required in situations such as the one confronting this Court in the *SAA* matter.

Conclusion

[4] At 676A-H of the judgment.

30. In the circumstances, the applicant has failed to make out a case for confirming the rule.

31. The parties were agreed that costs should follow the result.

Order

32. Accordingly, it is ordered that:

    32.1. the rule issued on 22 February 2010 and extended on 11 March 2010, is discharged, and

    32.2. the applicant must pay the respondents' costs of opposing the application.

ROBERT LAGRANGE

ACTING JUDGE OF THE LABOUR COURT

Date of hearing: 18 March 2010

Date of judgment: 24 March 2010

Appearances:

For the applicant: Ms S Lancaster of

G Van Der Westhuizen MacRobert Inc.

For the respondent: Mr T Manchu

Attorneys: K D Maimane Inc.