IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C420/2020

In the matter between:

INDEPENDENT COMMERCIAL HOSPITALITY &

ALLIED WORKERS UNION (ICHAWU) **Applicant**

and

IRVIN & JOHNSON LIMITED:

DANGER POINT - AQUACULTURE **First Respondent**

IRVIN & JOHNSON LIMITED:

PROCESSING WOODSTOCK & VAP **Second Respondent**

IRVIN & JOHNSON LIMITED:

SHORE-BASED TRAWLERS **Third Respondent**

IRVIN & JOHNSON LIMITED:

WALKER BAY CANNERS LTD **Forth Respondent**

IRWIN& JOHNSON LIMITED:

AUCKLAND COLD STORAGE **Fifth Respondent**

Date heard: 20 October 2020

Delivered: 23 October 2020

JUDGMENT

RABKIN-NAICKER, J

[1] This application was brought on an urgent basis. The applicant sought the following relief:

"3. A Rule Nisi be issued in the following terms:

3.1 Declaring the conduct on the part of the Respondents in putting its offer directly to members of the Applicant, to be in breach of its undertaking to bargain in good faith;

3.2 Setting aside any agreements concluded between the Respondents and individual employees who are members of the Applicant on 13 and/or 14 October 2020;

3.3 In the alternative, declaring that the individual agreements concluded between Respondents and the members of Applicant did not settle the wage dispute declared by Applicant and accordingly, in addition to the 5.5% agreed to between the Respondent and individual employees, Applicant and its members are entitled to proceed to proceed to strike for a further 7% increase;

3.4 Pending the return date, on a date to be determined by this Honourable Court, that prayers 3.1 and 3.2 alternatively prayer 3.3 operate as an interim Order;"

[2] A full set of papers was before Court and it was left in the Court's hands as to whether to treat the matter as an application for final relief. Given that the application was brought on three court days' notice and that a full set of papers was before Court, the matter is decided as an application for final relief. In any event, the prayers as drafted in the notice of motion are essentially prayers for final relief. The representatives of the parties were

afforded the opportunity to make oral submissions in open court in this application.

[3] The background to the application is contained in the founding affidavit and can be summarized in material part as follows:

3.1 The applicant entered into a process of negotiations with the respondents with a view to reaching an agreement on wage increases.

3.2 When the union polled its members the indication was that an increase of between 9 and 7 percent was required;

3.3 On about 31 August 2020 the parties were deadlocked and they agreed to facilitation by the CCMA;

3.4 The applicant referred a dispute to the CCMA to establish picketing rules. The conciliations in question occurred on the 13 October 2020;

3.5 On the 13 October 2020, the parties attempted to negotiate a settlement once again, the picketing rules were agreed;

3.6 Deadlock was reached on the 13 October 2020 when the proposals were rejected on both sides;

3.7 After the conciliations, the respondents advised the applicant's shop stewards that there was no need to return to work;

3.8 The respondents then spoke directly to the applicant's members in the absence of the shop stewards and gave them a deadline of 14 October to accept their offer of 5.5 per cent. If it was not to be accepted on the 14th October 2020, there would be no guarantee of it being back dated to the 1 July 2020.

[4] The General Secretary of the applicant avers in the founding affidavit that it is his 'belief' that union members were subjected to 'extreme intimidation and duress' in signing the agreements. The application is silent as to the numbers of members who signed the agreements and the precise terms of the agreements. No copy of an agreement is annexed to the founding or replying

papers. Furthermore there are no confirmatory affidavits by members in respect of the alleged intimidation or duress used by the respondents to induce the individual members to sign the agreements. The individual members who entered into these agreements have also not been joined to the proceedings.

[5] There is simply no evidence on the papers to support a finding that the onerous requirements for proving duress have been met.[1] In addition, and in any event, as I have noted above, the individual members of the applicant who are parties to the agreement and who have a direct legal interest in the matter have not been joined to the application. In all these circumstances, Prayer 3.2 of the Notice of Motion cannot be granted.

[6] There are two prayers for declaratory relief before me. As the Constitutional Court in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*[2] held:

"It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own."

[7] Prayers 3.3 of the Notice of Motion seeks as an alternative prayer to the setting aside of the agreements, that the Court declare that these agreements did not settle the wage dispute and that accordingly Applicant and its members are entitled to proceed to strike for a further 7 per cent.

[8] This is asking the Court to make a declaration of rights when the individual members of the applicant, parties to the agreements and whose rights may be affected by such order are not before Court. It is simply not competent for the

[1] See the leading case of Broodryk v Smuts 1942 TPD 47
[2] Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others 2005 (2) SA 359 (CC) (2005 (4) BCLR 301; [2004] ZACC 20) (paras 106 – 107)

Court to do so in these circumstances. In addition, the Court has not had sight of the said agreements, as I stated above.

[9] This brings me to the first prayer set out in the notice of motion which asks the Court to declare that the conduct of the respondents in putting its offer directly to the members of the Applicant to be "in breach of its undertaking to bargain in good faith".

[10] The undertaking referred to is in the recognition agreement attached to applicant's papers between the union and the Company at Primary Processing Plant. The particular clause underlined in the proceedings before me was the following:

"2.2 The Parties will accordingly observe all the procedures set out in this agreement, the LRA and other applicable legislation and will strive to act in good faith to each other."

[11] A letter written by the respondent to the applicant's general secretary, dated the 11 October 2020, which is copied to the CCMA Commissioner, is referred to in the founding papers. It is averred by the applicant that the respondents' action of going directly to applicant's members was to deliberately intimidate them into accepting the employers wage offer referred to in the letter as "5.5% effective 1st July 2020 if accepted by the union. If not accepted, backdated is not guaranteed."

[12] The applicant further relies on the Code of Good Practice on Industrial Action in submitting that the respondents are in breach of their undertaking to act in good faith in the collective bargaining relationship.

[13] The respondents do not dispute that they went directly to the members of the applicant with the offer of 5,5% on the 13 October 2020. However, in the answering affidavit, the following is averred:

"21.4 On the 13 October 2020 the parties came together at the CCMA to agree picketing rules and again the Respondents reiterated their offer, which offer was rejected out of hand

21.5 Conspicuous by its absence is any reference to the discussion that took place with Mr Fish[3] at the end of the conciliation meeting in the presence of Commissioner Jacobs. We informed Mr. Fish that we would be communicating the Respondents' final offer to all the employees in the bargaining units at the various workplaces and should employees indicate that they accept such offer we would be implementing it. We further stated that the offer to have the increase backdated would be limited to those that accept by 14 October 2020. Mr. Fish agreed that we could go ahead, in response to which Commissioner Jacobs said that he must listen carefully as this was very important. He indicated that he had no difficulty with the Respondents doing so and that it would in fact give everyone an indication of where the employees stood."

[14] In reply to these particular allegations, the applicant pleads as follows:

"For the sake of good record, I expressly deny the contents of paragraph 21.5 of Mr Dwayi's Answering Affidavit in so far as it relates to a deadline."

[15] One of the annexures to the founding papers is an email dated the 13 October 2020 and sent at 18.54 pm to the respondents entitled: "Strike Ballot/ I&J Woodstock/VAP/ACS/ Trawlers Shore Base/Danger Point" which reads as follows:

"As discussed, we propose that the strike ballot be completed over the course of 3 days and where applicable 3 nights.

To achieve your desire of monitoring the ballot box, we suggest that you use one of the many cameras to monitor the box.

We would like an opportunity of addressing the workers before the ballot begins We have no difficulty with you being present in person at that time we also have no difficulty with you choosing to be present thoughout the entire 3 day and 3 night period.

[3] Dale Fish the applicants General Secretary

What we do have difficulty with is your management meeting with each of our members and intimidating them to agree to your 5,5% backdated to 1 July 2020, including an ultimatum if not accepted by 14 October 2020 no backdated, your latest proposal. This is intimidation.

Unless you immediately cease this pernicious practice which is a deliberately designed to put our members under pressure to agree to your wage proposal under circumstances where that very issue is implicitly part of the balloting process on which our members are being asked to vote. It undermines the balloting process, it's unfair and amounts to intimidation.

After all, if ICHAWU were to do the same as part of the ballot, you would cry out that the ballot is not fair. Why do believe you are entitled to conduct yourself in this fashion.

If you do not cease with immediate effect, we will interdict your conduct.

We now await to hear from you at your earliest convenience."

[16] A reply to the above was written on behalf of the respondents on the 14 October 2020. This letter was not referred to in the founding papers, but is annexed to the answering affidavit and referred to in paragraph 23 of the answering papers. Paragraph 5 of the letter reads as follows:

"We disagree with your view that management of the Company is intimidating staff by communicating an offer of 5.5% to staff. The offer was provided to the trade union on the 8th October 2020 at the CCMA during Conciliation, and again on 11th October in writing to the trade union The wording in the letter sent to the trade union states that 5.5% effective 1st July 2020 if accepted by the union. **"If not accepted, backdated is not guaranteed."** On the 13th October 2020, the offer was presented again at the CCMA to the trade union leadership, and shop stewards, it was rejected. The employers also told you and your team that the offer will be communicated to all employees in the bargaining unit group with the deadline of 14 October 2020. No one raised any concerns of intimidation. We are very surprised with dismay that you are

making allegations of intimidation when the employers are duty bound to inform the employees about the status of the negotiations."

[17] In as far as replying to paragraph 23 of the answering papers and the above excerpt of the annexure is concerned, the applicant pleads as follows:

"Whatever has happened after the breach by the Respondent of its undertakings of Good Faith is irrelevant to the consideration of the issues as raised in this matter. The Respondents denials of Bad Faith and its attempts to avert attention from its bad faith bargaining is irrelevant".

[18] Applying the principles of *Plascon Evans* to the dispute of facts regarding whether the respondent informed the applicants representatives of the 14 October deadline, and in particular in respect of the pleadings I have highlighted above, I must accept the respondents' version as set out in in answering papers.

[19] In these circumstances, on the facts before me, I cannot find that the respondents conducted themselves in bad faith and issue a declaratory order to that effect. As the recently published Code of Good Practice: Collective Bargaining, Industrial Action and Picketing (the code) notes, good faith bargaining requires that the parties should engage each other in a constructive manner and not act unreasonably.[4] On the respondents' version, which I accept, they informed the applicant of the 14 October deadline, and as a result cannot be considered to have acted unreasonably or in bad faith.

[20] The respondents have asked for costs if I should find in their favour. However, taking into account the ongoing relationship between the collective bargaining partners, I decline to do so. I make the following order:

Order

1. The application is dismissed.

2. No order as to costs.

[4] Johannesburg Metropolitan Bus Services SOC Ltd v Democratic Municipal & Allied Workers Union & others (2020) 41 ILJ 217 (LC) at para 9.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Herold Gie Attorneys

For the Respondents: ENS Africa