REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D 268/2011

In the matter between:

NGCOBO LUNGILE & SIX OTHERS **Applicants**

and

CHESTER BUTCHERIES **Respondent**

Heard: 10 April 2012

Delivered: 08 May 2012

Summary: Withholding bonuses for having engaged in a protected strike contravenes section 5 (1) of the LRA. The applicants have the initial evidentiary burden to establish only a credible possibility that the non-payment of their bonuses was based purely on the fact that they had exercised their right to strike. The employer who engaged in such conduct must then prove that the conduct did not infringe section 5 (1). The applicants did not satisfy their evidentiary burden to put the respondent to a defence.

JUDGMENT

WHITCHER AJ

Issue to be determined

[1] The key question raised in this matter is whether the respondent by not paying bonuses to the applicants for the year 2010 discriminated against the applicants for participating in a lawful strike. In other words, the issue is whether the respondent contravened section 5(1) of Chapter 11 of the Labour Relations Act (the Act).[1]

The evidence

[2] Mr Bheki Shabane, the provincial secretary of the applicants' union, testified on behalf of the applicants. Mr V Criticos, the Financial Director of the respondent, testified on behalf of the respondent.

[3] The respondent operates a chain of about 19 butchery stores. In early 2010, the applicants' union recruited members at three of the respondent's stores: the Richards Bay Taxi Rank store, the Empangeni store and the Belvedere store. The applicants were employed at the Richards Bay Taxi Rank store which only opened in 2009. The respondent pays discretionary bonuses on an annual basis. The applicants were paid bonuses in January 2010 for the year 2009 and in January 2012 for the year 2011. No bonuses were paid to the applicants for the year 2010. The applicants linked the non-payment of this bonus to their having engaged in a protected strike in November 2010. The applicants pleaded that the respondent took a unilateral decision that all employees who had participated in the November 2010 strike would not receive a bonus while other employees of the respondent were paid bonuses.

[4] It, however, became apparent during Mr Shabane's testimony that members of the union working at the Empangeni and Belvedere stores were in fact paid bonuses although they had participated in the November strike and that 60 employees from various stores nationwide were not paid bonuses.

1 66 of 1995.

[5] In response to this, Mr Shabane then stated that the employees who were paid bonuses at the Empangeni and Belverdere stores returned to work from the strike a day earlier than the seven applicants who held out longer at the Richards Bay Taxi Rank store. Moreover, an employee at the Richards Bay Taxi Rank store, one "Deena", who initially went on strike but returned to work early, was also paid a bonus. These facts then served as the basis for the essentially punitive and unfairly discriminatory decision to withhold bonus payments from the applicants. This contention did not form part of the applicants' pleadings.

[6] Mr Criticos testified that the respondent pays discretionary bonuses which are based on the performance and profitability of the particular store and in this regard the bonuses vary from store to store. The Richards Bay Taxi Rank store opened in 2009 and the applicants were paid bonuses only once in the past in 2010 for the year 2009. This was based on the financial performance of the store in 2009. The applicants' participation in the strike had nothing to do with the respondent's exercise of the discretion not to pay bonuses to the applicants. No bonuses were paid at the store in question because it ran at a loss. It was running at a loss even before the strike. As bonuses are funded out of the profits of the store, if a store does not make a profit no bonus is paid. Mr Criticos conceded "Deena" participated in the strike in question and was paid a bonus. It was common cause that she returned to work early in the strike and when she returned, she was deployed to the Belverdere store because the Richards Bay Taxi Rank store was closed because of the strike. According to Mr Critcos, she should not have been paid a bonus because she was employed at the Richards Bay Taxi Rank store. Her payment had been an administrative mistake which arose from the fact that when she was deployed to the Belvedere store she was placed on the Belverdere staff list. When bonuses were paid, they were paid according to the staff list of the profitable stores listed for bonus payments and that is how this anomaly crept in.

The law

[7] Section 5 (1) in Chapter II of the Act provides that no person may discriminate against an employee for exercising any right conferred by this Act. This section protects employees from victimisation for having exercised a right under the Act. The right to strike falls within the ambit of this provision. If the employer's conduct has the effect of discriminating, it will fall foul of the protections offered by section 5.

[8] The burden of proof provision of section 10 in Chapter II of the Act stipulates that an employee who alleges that a right or protection conferred by section 5(1) has been infringed must prove the facts of the conduct and the employer who engaged in that conduct must then prove that the conduct complained of did not infringe the provisions of section 5(1).

[9] In the present case, this meant that the applicants had an initial evidentiary burden to produce evidence which showed that they underwent differential treatment by the respondent on the ground that they had participated in the strike in question. In this regard, they were required to establish only a credible possibility that the non-payment of their bonuses was based on the fact that they had 'participated in the strike' in question. Only in that evidentiary event would a burden have come to rest upon the respondent to prove otherwise [see K*roukam v SA Airlink (Pty) Ltd* (2005) 26 *ILJ* 2153 (LAC); *Janda v First National Bank* (2006) 27 *ILJ* 2627 (LC); *Thomas v Mincom (Pty) Ltd* [2007] 10 BLLR 993 (LC); *Mahlanyana v Cadbury (Pty) Ltd* (2000) 21 ILJ 2274 (LC) and *Stojce v UKZN and Another* (2006) 27 ILJ 2696 (LC)].

[10] It is also relevant that an employer is permitted to reward employees unequally even though they are doing the same job. The basis for such differentiation must though be objective and fair, for instance, greater skill, experience, years of service or productivity.

Analysis of Evidence and Argument

[11] Having regard to the legal principles mentioned above, the applicants did not

make out a *prima facie* case to even put the respondent to a defence.

[12] I say so, first, taking note of the concessions made by the applicants' witness under cross-examination to the effect that striking members of the union at other outlets were indeed paid bonuses. This, as a matter of logic, puts paid to the applicants' complaint under section 5 of the Act that the strike was the cause of bonuses being withheld from them.

[13] The applicants' witness also conceded that bonuses were withheld from employees working at stores where the union did not organise and which did not go on strike at all. This seriously undermined the applicants' claim that the respondent's exercise of its discretion to pay bonuses was made on the discriminatory ground of who had not participated in the protected strike. As a matter of probability, the respondent's explanation for the differential conduct (profitability of individual stores) accords far better with the established facts of this matter than the applicants' explanation (as a punishment for striking).

[14] Although it was not pleaded, I have also considered the amended ground of discrimination advanced by the applicants under cross-examination. This was that the differentiating ground upon which bonuses were awarded by the respondent was how long individual strikers held out. Those who held out longest at the Richards Bay Taxi Rank store were denied bonuses. Once again, in my view, the probabilities favour the conclusion that bonuses were withheld for less sinister reasons relating to store productivity. The applicants' explanation for why they were not given bonuses cannot account for the countervailing facts and concessions mentioned. Additionally, there was no real evidentiary basis from which it could be inferred that bonuses were withheld from workers who continued with a very short strike for just a day or two longer.

[15] I can understand how, in a post-strike environment, the fact that "Deena" received a bonus might feed suspicions of unfair discrimination. The "Deena" anomaly was however not sufficient to offset the fact that other employees at many other stores also received no bonus in 2010. On the balance, I accept

the respondent's evidence that Deena's bonus was awarded as a result of her mistaken inclusion on the Belvedere store employee list and not to reward her for an early ending of her participation in the strike.

[16] An issue was made of the fact that the respondent did not produce its financial records to corroborate its version. However, the effect of the respondent's omission to produce certain evidence and its evidentiary burden to produce such evidence depended on the reliability and weight of the evidence against it. In this case, considering the finding that the applicants failed to establish a *prima facie* case, there was no need for the respondent to produce this evidence in addition to its testimony which, on the facts that emerged during the applicants' case, was not improbable.

Order

[17] The applicants' claim is dismissed.

There is no order as to costs.

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Whitcher AJ

APPEARANCES:

FOR THE APPLICANT:	Peter Hobden from Tomlinson Mnguni James Attorneys
FOR THE RESPONDENT:	Glen Kirby-Hirst from Macgregor Erasmus Attorneys