REPUBLIC OF SOUTH AFRICA

LABOUR COURT OF SOUTH AFRICA, DURBAN

Not reportable

Case no.: D816/14

In the matter between:

APOLLO DURBAN (PTY) LTD **Applicant**

and

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA (NUMSA) **First Respondent**

SHOP STEWARDS (as per Annexure "A") **Second to Twelve Respondents**

EMPLOYEES (as per Annexure "B") **Further Respondents**

Heard: **12 September 2014**

Order: **12 September 2014**

Reasons: **10 December 2014**

Summary: **Interdict — strike notice issued prior to conciliation — strike**

unprotected; collective agreement — procedural requirements — parties obliged to meet requirements before referral to the CCMA

REASONS FOR THE ORDER

MOOKI AJ

[1] The applicant brought an urgent application on 12 September 2014, seeking various relief. The court made order an order:

1. Declaring that this application be heard as one of urgency and dispensing with the provisions and Rules of the above Honourable Court relating to time limits and manner of services;
2. Declaring that this application satisfies the requirements of Section 68 (2)(a), (b) and (c) of the Labour Relations Act, 1995 as amended ("the Act");
3. Declaring the conduct of the Second to Further Respondents in continuing with and participating in a strike as defined in Section 213 of the Act, in support of the underlying substantive demand referred to the CCMA, constitutes an unprotected strike;

    3.1 Declaring that the Lay-Offs instituted by the Applicant does not constitute a unilateral change in terms and conditions of the Second to Further Respondents terms and conditions of employment;

3.2 The conduct of the Second and Further Respondents in continuing with and participating in a strike as defined in Section 213 of the Act, in support of the substantive demand, referred to the CCMA is not functional to collective bargaining;

3.3 The conduct of the Second to Further Respondents in continuing and participating in the unprotected strike as defined in Section 213 of the Act, in support of a demand referred to the CCMA, is not functional to orderly collective bargaining as the Respondents are in material breach of duties and obligations placed upon them in terms of the main collective agreement entered into with the Applicant and Respondent on 8 November 2013;

3.4 Interdicting and restraining the Second and Further Respondents from being at the Applicants premises situated at 265 Sydney Road, Durban, unless it is to lawfully and peacefully tender their service to Applicant in accordance with the Applicant’s instruction;

3.5 Directing the Second to Further Respondents to work normally in accordance Applicant's instruction;

3.6 Interdicting and restraining the Second to Further Respondents from being at the Applicant's premises, except for any lawful reason;

3.7 Directing the First Respondent to ensure that the Second and Further Respondents comply with this order and act lawfully in

tendering their service in compliance with the Applicant's instruction;

3.8 In the event of their failure to lawfully and peacefully tender their services to the Applicant in accordance with the Applicant's instruction, Second to Further Respondents be interdicted and restrained from being upon the Applicant's premises situated at 265 Sydney Road, Congella, Durban, Kwa-Zullu Natal;

3.9 That the Second to Further Respondents be and are hereby interdicted and restrained from assisting any of the other Respondents from committing any unlawfully act in relation to the Applicant;

3.10 Directing the officials and office bearers of the First Respondent, once duly served, to forthwith make the contents of the Court Order known to the Second and Further Respondents.

4. The Respondents be ordered to pay the costs of this application both jointly and severally, the one paying the others to be absolved;

5. That this Order be served as follows: -

5.1 on the First Respondent at its Regional Offices situated at 129 Che Guevara Road by the Sheriff of Court;

5.2 by the Sheriff of the Court handing a copy of the Order to each of the Second to Eleventh Respondents (Sithembiso Jali, Bheki Dzanibe, Mazwi Mathole, Musa Dlamini, Africa Myeza, Vukani Mthethwa, Siyabonga Mazibuko, Joshua Sithole, Petros Zulu,

Bongani Khumalo) as set out in annexure "A" , or by the Sheriff of the Court handing to so many of the Second to Eleventh Respondents as are gathered at the premises of the Applicant by the Sheriff of the Court;

5.3 by the Sheriff of Court reading the contents of the Order to the Twelfth to Further Respondents or to so many of the Respondents as are gathered at the premises of the Applicant and by pinning a copy of the Order at the Main Gate of the Applicant's premises and on the Notice Boards at the Applicant's premises normally used to convey information to the employees of the Applicant."

[2] The applicant raised various considerations on why the court should hear the matter on an urgent basis. This included the fact that the first respondent had, in the past, embarked on a number of unprotected industrial actions that caused the applicant to lose millions of Rand.

[3] The applicant contended that it was facing severe financial instability that compelled the applicant to implement "lay-offs', by reducing the working week from 5 days a week to 3 days a week. The financial instability was due to in part to Sumitomo Rubber Industries South Africa (Pty) (Ltd) ("Sumitomo"), a customer of the applicant, reducing its orders substantially. The applicant averred that maintaining a five-day working week would result in the applicant retaining excess stock that the applicant would not be able to sell to recover its operating

costs in the production of such stock. The applicant contended that such an outcome would impact on the financial viability of its business.

[4] The applicant set out the bases for which it contended that it had a clear right to the relief being sought. In this part of its affidavit, it is alleged on its behalf that the applicant "has a clear right in terms of the collective agreement dated 8 November 2013 which entitles the applicant to embark on "lay-off" and/or "short time". It is also contended on behalf of the applicant, that the applicant is entitled to the service of the individual employees who are to render the service in accordance with the applicant's instructions. The respondents did not address these allegations, which must be taken as admitted. I agreed that the application be heard on an urgent basis.

[5] The applicant employs some 600 workers and manufactures tyres at its Durban factory. The manufacture of tyres is essentially a 24-hour seven-day a week operation. The rubber compound used as a raw material is costly and is purchased in the international market. The purchase is made using US dollars. Stoppages at the factory cause severe loss of energy and resources. Such stoppage also endangers the mixing machines. Production of tyres takes place in phases. A stoppage in one area affects successive areas in the production of tyres. A work stoppage in any one area effectively puts a stop to the entire production process.

[6] Sumitomo is one of the applicant’s major customers. Sumitomo accounts for 60-70% of the applicant's orders. The applicant was previously able operate on the

basis of a three shift basis, with a seven day working week. This was at the time of increased demand for new tyres. The applicant was thus able to implement the shift pattern agreed in the collective agreement.

[7] The applicant became obliged, following the reduction in the order by Sumitomo, to implement a five-day working week from the previous seven-day working week. This change led to the first respondent referring a dispute to the CCMA, complaining that the change was a unilateral amendment of the conditions of employment and that the applicant should revert to the seven-day working week. Conciliation failed and the CCMA issued a certificate of non-conciliation. The first respondent then served the applicant with a 48-hour notice to strike, with the strike was to commence on 10 April 2014.

[8] The strike was averted when the parties concluded a shift pattern agreement on 23 April 2014. The agreement concerned the shift pattern to be implemented at the plant. This agreement did not change the terms of the 8 November 2013 agreement; a prior collective agreement. The shift pattern in the 23 April 2014 agreement would result in employees working a maximum of 45 hours a week in accordance with the Basic Conditions of Employment Act 75 of 1997. Employees agreed to work in two shifts of 11.25 hours over the course of five days in the week.

[9] Sumitomo advised the applicant at the beginning of August 2014 that it would reduce its orders. The applicant advised the respondents of this development. The applicant also advised the respondents that it would implement lay-offs in

accordance with the collective agreement and that it intended to effect the lay-offs on 15 August 2014. The applicant invited the respondents to suggest alternatives to the lay-offs.

[10] The respondents submitted their proposals before 15 August 2014. The applicant advised that it required time to consider the proposals but that the lay-offs would be implemented on 15 August. The applicant subsequently advised the respondents that their proposals were not financially viable.

[11] The applicant effected the lay-offs on 15 August 2014. This was followed by a meeting with the respondents on 19 August 2014, during which the respondents stated that they wanted to know the real reason behind Sumitomo's decision to reduce its order. The applicant advised that the reduction was on account of the cost of the tyres.

[12] The respondents were not satisfied. They referred a dispute to the CCMA on 21 August 2014, alleging that the applicant implemented a unilateral change to the terms and conditions of employment. The respondents wrote to the applicant on 22 August 2014, seeking assurance that there would be no job losses for a period of one year from 15 August 2014. The respondents also wanted the applicant to restore the terms and conditions set out in the 23 April 2014 agreement.

[13] The applicant advised the first respondent on 26 August 2014 that certain areas within the applicant's plant will not be affected by the lay-off. This was met by a

response on 28 August 2014 that such action was unlawful; that the action was provocative because it gave preferential treatment to certain employees.

[14] The referral to the CCMA was in the meantime set down for conciliation to take place on 17 September 2014. The applicant was notified on 29 August 2014 that conciliation was scheduled for 17 September 2014.

[15] The applicant advised that respondents on 1 September 2014 that Sumitomo had made further reductions to its orders. The applicant advised that it would have to implement further lay-offs as a result. The applicant also advised that it would do its best to ensure that the plant operated in the normal fashion and that the applicant was exploring various avenues to reduce the duration of the lay-offs. The applicant's management met with the shop stewards to consider why Sumitomo stopped its orders.

[16] The meeting referred to above was followed by various exchanges between the parties, culminating in the first respondent issuing a 48-hour strike notice for a strike to commence on Monday, 8 September 2014. Members of the first respondent were, in the meantime, refusing to work. There was a work stoppage as at the date of this application.

[17] The respondents contend that they have reason to believe that the issues between the applicant and Sumitomo are due to the applicant’s fault because the applicant breached certain contracts with Sumitomo. This is denied by the applicant.

[18] The respondents contend that the lay-offs are a unilateral variation of the terms and conditions of employment set out in the 23 April 2014 agreement; and that there is no need for the lay-offs as shown by the continuation of the staggered lunch break and increase in the daily target. The applicant disputes that the use of the staggered lunch break militates against the applicant being in dire straits, and that the use of a staggered lunch break is due to the necessity to work continuously to ensure that the factory operates cost effectively. The applicant also had to employ additional individuals to work the staggered lunch break because the respondents were refusing to work. This added to the costs in the production of tyres.

[19] The applicant denies that its implementation of the lay-off is a variation of the terms and conditions of employment. The applicant avers that it was implementing the lay-off provisions in the 8 November 2013 agreement.

[20] The applicant seeks declaratory relief together with relief in terms of section 68 (1) of the LRA on account of the facts as set out above.

[21] The CCMA had not, as at the time when the respondents issued the 48-hour strike notice, conciliated the referral by the first respondent. The first respondent could not have issued the notice prior to such conciliation. This renders the work stoppage by members of the first respondent unprotected.

[22] The respondents were obliged to have complied with the procedural requirements for a strike notice before embarking on a strike. The purpose of

such a strike notice "*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*'.[1]

[23] The admonition in *Metal & Electrical Workers Union of SA v National Panasonic Co*[2] that the Court will intervene where one of the parties has not complied with the procedural requirements remains a salutary caution to parties in how parties must address labour disputes.

[24] I am satisfied that the applicant has met the requirements in section 68 (2) (a), (b) and (c) of the LRA. The applicant is entitled to direct its employees to act normally in accordance with instructions by the applicant. The respondents have not shown that the applicant may not oblige its employees to render services.

[25] The shift pattern agreement concluded on 23 April 2014 expressly states that this agreement did not alter the agreement concluded on 8 November 2013. The 8 November makes provision for "lay off", which is defined as follows: "Lay off relates to the situation where there is reduction in the number of ordinary hours of work owing to the slackness of trade, discontinuation and reduction of plant or operation, or for the purpose of annual inventory excluding reasons related to short time conditions".

[1] *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union* (2) (1997) 18 ILJ 671 (LAC) at 676D–E; *Equity Aviation Services (Pty) Ltd v SA Transport & Allied Workers Union & Others* (2009) 30 ILJ 1997 (LAC)

[2] (1991) 12 ILJ 533 (C).

[26] The reduction in orders by Sumitomo undoubtedly resulted in a slackness of trade, amongst others, as contemplated in the 8 November 2013 agreement. Sumitomo, the applicant's main customer, reduced its orders substantially. The respondents do not dispute that the orders were reduced. The respondents contend themselves with speculation as to the reasons for the reduction.

[27] The parties agreed a mechanism to regulate their disputes. This mechanism is set out in the 2004 agreement. Clauses 7 and 8 of the 2004 agreement set out the procedure to be followed. The first respondent did not comply with the dispute procedure before referring a dispute to the CCMA. The allegations by the applicant in this regard are not challenged in the answering affidavit. It must follow that the first respondent's referral to the CCMA was premature in the circumstances.

[28] The October 2004 agreement is a salutary instrument. It allows the parties to resolve disputes before rushing to court. This is consistent with the need to maintain sound labour relations. The respondents are bound to act in accordance with this agreement.

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O Mooki

Judge of the Labour Court (Acting)

Appearances:

Applicant:	Dunstan Farrel
Instructed by:	Farrel Inc. Attorneys
Respondents:	B Whitchers
Instructed by:	Brett Purdon Attorneys