REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICAN, DURBAN

JUDGMENT

Not Reportable

Case no: D1267/19

In the matter between**:**

TIGER BRANDS LIMITED **Applicant**

and

AFRICAN MEAT INDUSTRY & ALLIED

TRADE UNION (AMITU) **First Respondent**

THOSE PERSONS MENTIONED IN

ANNEXURE "A" TO THE FOUNDING AFFIDAVIT **Second Respondents**

Heard: 25 October 2019

Order: 25 October 2019

Reasons:

Summary: A collective decision by members of a trade union to stop working voluntary overtime after they had made a demand which was not acceded to by the employer constitutes an unprotected strike if the procedural steps prescribed in s 64 of the LRA were not followed. Even if the actual notice to stop working overtime does not contain a demand, the surrounding circumstances and the context may determine whether the requirement for a demand or grievance has

been met. In this case, on the facts, it was found that a demand was indeed made, and the strike (overtime ban) was interdicted.

JUDGMENT

MGAGA AJ

Introduction

[1] The applicant in this matter is Tiger Brands Limited, a listed company that carries on business of manufacturing snacks and treats at its factories in Mobeni and Jacobs, Durban.

[2] The first respondent is African Meat Industry & Allied Trade Union (AMITU), which is a registered trade union recognized by the applicant. The second to further respondents are employees of the applicant and members of the first respondent whose names are listed in annexure A to the founding affidavit. Collectively, the first, second and further respondents will be referred to as respondents.

[3] At the instance of the applicant, on 27 September 2019 Rabkin-Naicker J issued a *rule nisi* returnable on 25 October 2019. The material terms of the *rule nisi* are as follows:

> "1.1 Declaring that the combined acts of the First Respondent and the Second and Further Respondents as listed in annexure "A" in refusing or failing to work normal overtime with the intention of compelling the Applicant to accede to their demands constitutes

an unlawful strike in terms of s 64 of the Labour Relations Act 66 of 1995;

1.2 That the First Respondent and Second & Further Respondents …are hereby interdicted and restrained from participating in and continuing with the conduct set out in para 1.1 above without first complying with the provisions of s 64 of the Act.

1.3 That the Second & Further Respondents … are directed to work the normal overtime worked by them prior to the imposition of the overtime ban.

1.4 That the First Respondent and/or Second & Further Respondents…are hereby interdicted and restrained from continuing to instigate or instigating the strike referred to in para 1.1 above or any related work stoppage or inciting any of Applicant's employees to take part in or continue such a strike or work stoppage until the provisions of s 64 have been complied with."

[4] Paras 1.2; 1.3 1.4 of the *rule* were ordered to operate with immediate effect pending the final determination of the urgent application on the return date.

[5] On the return date the matter came before me for final determination. The granting of the final relief is opposed by the respondents.

Salient facts

[6] The following facts are either common cause or not seriously disputed on the papers.

[7] Approximately a year ago, in response to the applicant's obligations in compliance with the Occupational Health and Safety Act 85 of 1993, the applicant implemented its Drug and Alcohol policy ("DAP") which entailed that all persons entering the premises of the applicant were to be subjected to an alcohol breathalyzer test.

[8] The implementation of the DAP resulted in an increase in misconduct dismissals related to the abuse of alcohol. In the main, members of the first respondent were at the receiving end of the implementation of the DAP. The first respondent and its members repeatedly expressed their disapproval of the use of the breathalyzer as it was resulting in so many dismissals.

[9] At a union-management meeting held on the 16th September 2019 the first respondent recorded that employees were proposing to ban overtime until the breathalyzer test was removed or stopped[1]. The applicant responded by stating that any such conduct would be perceived as an unlawful strike. However, the applicant undertook to consult with its central group risk team around the application of the breathalyzer and revert to the first respondent by 23 September 2019.

[10] At the second union-management meeting held on 23 September 2019 the applicant informed the first respondent that the implementation of the DAP would proceed as it was the duty of the employer to provide and maintain a working environment that is safe and without risk to the health of its employees.

[11] On 25 September 2019 the first respondent emailed correspondence signed by its General Secretary to the applicant worded as follows[2]:

> "**RE: Notice of Stopping Overtime – Snacks Treats & Beverages**
>
> We refer to the (sic) and in particular with the decision taken by the members at the feedback meeting held at **Mobeni today 25 September 2019**.
>
> Please be advised that our members have decided to stop working overtime with immediate effect tomorrow **26 September 2019**.
>
> This is the mandate given to the union AMITU by the members."

[1] See minutes of union management meeting held on 16 and 23 September 2019 – Pleadings, p66 item 1.
[2] Pleadings, page 70

[12] On the same day (25 September 2019) the applicant replied to the first respondent, pointing out, *inter alia*, that if the respondents were to proceed with the threatened overtime ban the applicant would immediately approach this court to interdict such conduct. The applicant further urged the first respondent to carefully consider the wisdom of its actions[3].

[13] On the 26th September 2019 the first respondent replied to the applicant's letter of 25 September 2019[4]. In this letter the focus shifted completely from dissatisfaction with application of a breathalyzer test to dissatisfaction with the Ministerial Determination the applicant had applied for an obtained from Department of Labour which allowed the applicant's employees to exceed the weekly overtime limitation of 10 hours by not more than 10 hours per week. The first respondent complained that this Ministerial Determination was applied for clandestinely, without consulting the first respondent; the applicant failed to display the Ministerial Determination and give a copy thereof to the first respondent; and the employees were not remunerated at the rate of 1.75 per hour as prescribed in the Ministerial Determination. In this letter the first respondent also emphasized that it was voluntary to work overtime as there was no agreement compelling employees to do so.

The law

[14] The stalemate between the applicant and the respondents prompted the applicant to approach this court on urgent basis to interdict the imminent overtime ban on the basis that it constituted an unprotected strike as the procedural steps set out in s 64 of the LRA had not been followed by the respondents. It is common cause that such procedural steps were not followed by the respondents prior to issuing the notice to stop working overtime.

[15] In opposing the final relief sought by the applicant on the return date the respondents submitted that the threatened overtime ban does not constitute a strike as defined in s 213 of the LRA because the employees of the applicant are not compelled to work overtime and the first respondent did not make any

[3] Pleadings, pages 71-72
[4] Pleadings, pages 93-94

demand to the applicant when it issued a notice to stop working overtime. Relying on cases such as *Simba (Pty) Ltd v FAWU & oth*ers[5]; *FAWU & others v Rainbow Chickens*[6] and *Stuttafords Department Stores v SACTWU*[7], Mr *Sisilane*, who appeared for the respondents, submitted that without a demand that the applicant had to accede to, the conduct of the first respondent's members does not constitute a strike.

[16] Mr *Titus*, who appeared for the applicant, submitted that even if the employees were working overtime on a voluntary basis, their collective conduct of banning overtime constitutes a strike because in the definition of a strike reference to 'work' covers overtime work whether it is voluntary or compulsory. With regard to the respondent's submission that there was no demand made, Mr *Titus* submitted that on the facts of this case a demand was made by the first respondent. According to the applicant the demand made was that the applicant had to stop the implementation of the DAP, in particular, the application of the breathalyzer test which had led to the dismissal of many employees.

[17] In s 213 of the LRA strike is defined as follows:

> "…the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory" (emphasis is mine)

[18] Based on the contested terrain as set out above, the issues to be decided in this matter are (1) whether the fact that the employees of the applicant were not compelled to work overtime entitles them to stop working overtime without falling foul of embarking on an unprotected strike, and (2) whether on the facts

[5] [1998] 9 BLLR (LC)
[6] (2000) 21 ILJ 615 (LC)
[7] [2001] 1 BLLR 47 (LAC)

of this case a demand was made by the first respondent. Put differently, does the conduct of the employees meet the definition of a strike?

Analysis/evaluation

[19] I now turn to deal with the contested issues.

[20] On the first issue of voluntary versus compulsory overtime, it appears to me that even if the employees of the applicant were working overtime on a voluntary basis it does not absolve them from falling foul of embarking on an unprotected strike if they collectively decide to stop working overtime without observing the procedural steps prescribed in s 64 of the LRA. Obviously, this will also depend on whether a demand was made, an issue I will turn to later in this judgment.

[21] From the definition of the strike it is clear that voluntary overtime work is also included. Therefore, the respondents' submission in this regard cannot be sustained.

[22] In any event, it appears that it is a condition of employment for the employees of the applicant to work overtime. I say so because a sample of an employment contract attached to the first respondent's supplementary affidavit marked 'AA1' contains the following clause[8]:

> "HOURS OF WORK
>
> …It is a condition of your employment that you agree to work occasional overtime as may be reasonably required by the company, provided that in such event reasonable notice is given to you."[9]

[23] The second issue is now considered, i.e. whether on the facts of this case, a demand was made by the first respondent?

[8] Pleadings, pages 128-131
[9] Pleadings, page 130

[24] It is correct that in the notice to stop working overtime referred at para 11 above there is no recordal of a demand or a grievance that the applicant was expected to accede to or resolve. The first respondent simply informed the applicant that its members would stop working overtime from 26 September 2019. However, this is not the end of the inquiry. It is important to explore the context in which the notice to ban overtime was made. Otherwise a trade union may easily circumvent the definition of a strike by not including a demand or grievance in a notice to stop working issued immediately after a deadlock has been reached with the employer on issues of mutual interest.

[25] It is not in dispute that at a union-management meeting held on 16 September 2019 wherein the DAP was first on the agenda, the first respondent proposed "to ban overtime until the Breathalyzer is removed" (my emphasis). Clearly, this constitutes a demand that the applicant had to accede to or face overtime ban. Management undertook to revert to the first respondent on the 23rd September 2019 after consulting with its central group risk team on the application of the breathalyzer.

[26] On the 23rd September 2019 the applicant informed the first respondent that the implementation of the DAP would proceed. In other words, the applicant did not accede to the demand made by the first respondent at the meeting of 16 September 2019.

[27] Two days later, the first respondent informed the applicant in writing that its members would stop working overtime from 26 September 2019. Although there is no demand made in the notice to stop working overtime, the proximity of the overtime ban to the applicant's refusal to accede to the first respondent's demand to stop using the breathalyzer test, and the absence of any other reason to stop working overtime in the first respondent's notice make it plain that the overtime ban was as a result of the applicant's refusal to stop using the breathalyzer test. The purpose of the overtime ban was to cajole the applicant to accede to the first respondent's demand.

[28] The above finding is buttressed by paragraph 27 of the first respondent's answering affidavit wherein the following is stated by the deponent, Mr F.G.

Mkhwanazi, who was also present at the union-management meetings of 16 and 23 September 2019:

> "Than (sic) the First Respondent suggested that the Applicant must not be so harsh on them instead they must send those being found smelling alcohol back home with no work no pay, instead the Applicant said no (sic) the employee's proposal. That is when they decide (sic) to ban overtime." (emphasis is mine)

[29] As correctly submitted by Mr *Titus* in his heads of argument, in *National Union of Metalworkers of South Africa & others v MacSteel (Pty) Ltd*[10] the following was stated by the then appellate court:

> "Any employee was thus always free to refuse to work voluntary overtime. That freedom was not infringed by the terms of the order of the court a quo. That order does no more than declare that an 'overtime ban' introduced, instigated and persisted in by NUMSA in the circumstances which prevailed in August/September 1988 constituted an unfair labour practice. It did not entitle Macsteel at any time thereafter to require or permit an employee to work overtime otherwise than in terms of an agreement concluded by it with the employee. Where an employee prior to the order could refuse to work overtime so could he refuse to do so after the order was made. What he could not fairly do was to become a party to concerted action with other employees to withdraw voluntary overtime usually worked in the circumstances in which that occurred in August/September 1988, ie inter alia, without notice to Macsteel and in order to bring pressure to bear on it in the context of current wage negotiations." (my emphasis)

Conclusion

[30] The conduct of the second and further respondents in deciding to stop working overtime meets all the essential requirements of a strike as defined in s 213 of the LRA. Since it is common cause that the procedural steps prescribed in s 64 of the LRA were not complied with by the respondents, it

[10] (1992) 13 ILJ 826 (A)

follows that the strike would have been an unprotected one. In the circumstances, I am satisfied the three requirements for a final relief have been met, i.e. (a) clear right; (b) an injury actually committed or reasonably apprehended and (c) absence of any other satisfactory remedy[11]. Therefore, the applicant is entitled to a final relief interdicting the unprotected strike.

Costs

[31] What remains for determination is the issue of costs. In argument Mr *Titus* did not vigorously pursue a costs order against the respondents. I am also of the view that it is not in accordance with requirements of law and fairness to order the respondents to pay costs. There is an ongoing relationship between the applicant and the respondents that needs to be nurtured.

[32] In the result, and for the reasons set out above, on 25 October 2019 I made an order in the following terms:

1. The *rule nisi* (as set out in para 3 above) is confirmed.

2. There is no order as to costs.

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S.B. Mgaga AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant: Mr M. Titus

Instructed by: Macgregor Erasmus Attorneys

[11] *Setlogelo v Setlogelo* 1914 AD 221 at 227

For the respondents: Mr X. Sisilane

Union official