

SA CLOTHING & TEXTILE WORKERS UNION v FREE STATE & NORTHERN CAPE  
CLOTHING MANUFACTURERS' ASSOCIATION (2001) 22 ILJ 2636 (LAC)

LABOUR APPEAL COURT (JA28/01) E

6 September; 29 October 2001

Before ZONDO JP, NICHOLSON JA and PAGE AJA F

Judgment

Zondo JP:

Introduction

[1] Pursuant to hearing argument in this appeal on an urgent basis on 4 September 2001, this court handed down an order on 6 September 2001. The order that was handed down was in the following terms:

'1 The appeal is upheld with costs which, by agreement between the parties, shall include the costs in the court a quo.

2 The order of the court a quo is set aside and is replaced by the following one: "The application is dismissed.' "

[2] This court indicated then that it would furnish its reasons for the order in due course. These are they.

The facts

[3] The clothing industry in South Africa has five bargaining councils. One of them is the Free State and Northern Cape Bargaining Council which has jurisdiction in the Free State and Northern Cape provinces. Another one is the Northern Areas Bargaining Council. This one has jurisdiction in the areas falling under the former Transvaal. The others are the Western Cape, Eastern Cape and Natal Bargaining Councils.

[4] The appellant is a registered trade union which has many of its members employed by employers in the clothing and textile industry throughout South Africa. It is party to each one of these councils. The respondent is a registered employers' organization whose members are involved in the clothing industry in the Free State and Northern Cape provinces. The respondent is the sole employer party to the Free State and Northern Cape Bargaining Council. It has only two members, namely, a company called Jaff & Co Ltd and another one called Newclo (Pty) Ltd.

[5] The chairman of the respondent is one Mr Jaff. Mr Jaff is also chairman and managing director of Jaff & Co Ltd. Jaff & Co Ltd has its head office in Johannesburg. It has a manufacturing branch in Kimberley. This means that Jaff & Co Ltd has operations in at least two areas, namely Johannesburg and Kimberley. Its head office operation falls under the jurisdiction of the Northern Areas Bargaining Council. Its branch in Kimberley falls under the jurisdiction of the Free State and Northern Cape Bargaining Council. For purposes of its branch in Kimberley Jaff & Co Ltd is a member of the respondent which in turn is a party to the Free State and Northern Province Bargaining Council. For purposes of its head office in Johannesburg, Jaff & Co Ltd is a member of an employers' organization called the Transvaal Clothing Manufacturers' Association (TCMA) which in turn is a party to the Northern Areas Bargaining Council.

[6] It will be seen from the above that the two areas from which Jaff & Co Ltd operates, namely, Kimberley and Johannesburg, fall, respectively, under the Free State and Northern Cape Bargaining Council and the Northern Areas Bargaining Council. Newclo (Pty) Ltd also operates in areas that fall under two different bargaining councils. Like Jaff & Co Ltd, Newclo (Pty) Ltd has its head office in Johannesburg. It also has a branch in Kroonstad. Its head office falls within the jurisdiction of the Northern Areas Bargaining Council. Its branch in Kroonstad falls under the area of jurisdiction of the Free State and Northern Cape Bargaining Council. Newclo (Pty) Ltd is a member of the respondent for purposes of its branch in Kroonstad.

[7] There is no statutory central bargaining structure for the clothing industry. However, the various clothing bargaining councils come together annually and negotiate wage rates and others terms and conditions of employment contained in their respective main agreements in an informal forum that they call the National Bargaining Forum. This has been the practice since 1993. Every year each council passes a resolution to negotiate the wage rates and other terms and conditions of employment contained in its main agreement at the National Bargaining Forum. If an agreement is reached at the National Bargaining Forum, each council 'adopts' that agreement and incorporates its provisions in its main agreement. Each council then requests the Minister of Labour to extend its agreement to non-parties within its registered scope.

[8] In May this year the appellant sent its negotiation proposals or demands to each employer party in the various clothing bargaining councils as well as to each clothing bargaining council. The appellant's proposals or demands in respect of each bargaining council were identical. After Mr Jaff had attended a number of meetings at the National Bargaining Forum in his capacity as a representative

of the respondent, an agreement was reached between the appellant and the respondent that the respondent did not need to attend further meetings of the NBF. It was agreed that, once agreement had been reached between the appellant and other employer organizations at the NBF, the respondent and the appellant would commence negotiations on the appellant's proposals to the respondent for purposes of the amendment of the main agreement of the Free State and Northern Cape Bargaining Council in accordance with previous practice.

[9] The negotiations at the NBF failed. The appellant then started pursuing its demands on other councils separately but did not do so as yet in respect of the Free State and Northern Cape council. In some councils, like the Natal one, the negotiations produced a settlement. This also happened in the Eastern Cape as well as in the Western Cape ones. In the Northern Areas Bargaining Council the negotiations failed to produce a settlement. The appellant then complied with all the requirements of s 64 of the Labour Relations Act 66 of 1995 (the Act) in respect of the Northern Areas Bargaining Council in order to be able to call a protected strike. The employees employed by Jaff & Co Ltd and Newclo (Pty) Ltd in their respective offices in Johannesburg who are members of the appellant were to participate, and, ultimately did participate, in that strike. The respondent accepted that that strike was a protected strike.

[10] Before that strike could commence, the appellant sent a notice to Jaff & Co Ltd as well as to Newclo (Pty) Ltd to the effect that its members employed by Jaff & Co Ltd in its Kimberley branch and its members employed by Newclo (Pty) Ltd in its Kroonstad branch would be going on strike. In the notice the appellant stated that the strike that its members employed by Jaff & Co Ltd in Kimberley and by Newclo (Pty) Ltd in Kroonstad would embark upon would be a 'secondary strike' in support of the demands made by the appellant in respect of the wage rates and terms and conditions of employment in the main agreement of the Northern Areas Bargaining Council. As already stated, the main agreement of such council covers, among others, those employees employed by Jaff & Co Ltd and Newclo (Pty) Ltd who are based in those companies' respective offices in Johannesburg.

[11] The notice to Jaff & Co Ltd reads thus:

'Dear Sir

Re: Written notice of secondary strike in terms of s 66(2) (b) of the Labour Relations Act 66 1995

Please take notice that the Southern African Clothing & Textile Workers Union (SACTWU) hereby gives written notice of the commencement of the secondary strike in terms of s 66 of the Labour Relations Act 66 of 1995 at Jaff & Company in Kimberley.

The abovementioned secondary strike shall commence on Thursday 23 August 2001 as from 06:00.

Take further notice that the abovementioned secondary strike is in compliance with s 66 of the Labour Relations Act 66 of 1995.

The abovementioned secondary strike is in support of the primary strike by the clothing and garment knitting employees falling within the jurisdiction of the Northern Areas Bargaining Council.

The primary strike is in compliance with s 64 and s 65 of the Labour Relations Act 66 of 1995 notice of which was given in terms of s 64(1)(b) on 16 August 2001.

Take further notice that this notification applies to all employees of Jaff & Company who are members of Southern African Clothing & Textile Workers Union.

Yours sincerely,

WAYNE VAN DER RHEEDE

NATIONAL ORGANIZING SECRETARY'

Newclo (Pty) Ltd received a notice in similar terms in respect of its employees based in Kroonstad who are members of the appellant.

[12] The strike notice prompted Mr Jaff to write to the appellant on behalf of the respondent on 17 August. In the letter the respondent adopted the attitude that the intended strike did not comply with s 66(1) of the Act and that, because of that reason, it would bring an application in the Labour Court to interdict such strike unless the appellant reconsidered its decision to pursue a strike of the employees employed by Jaff & Co Ltd in Kimberley and of the employees employed by Newclo (Pty) Ltd in Kroonstad.

[13] Section 66 sets out the requirements that must be complied with before a secondary strike can be embarked upon. Section 66(1) defines a secondary strike thus:

'In this section "secondary strike" means a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer, but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees employed within the registered scope of that council, have a material interest in that demand.'

The provisions of s 66(2)-(6) read thus:

'(2) No person may take part in a secondary strike unless -  
(a) the strike that is to be supported complies with the provisions of sections 64 and 65;

(b) the employer of the employees taking part in the secondary strike or, where appropriate, the employers' organisation of which that employer is a member, has received written notice of the proposed secondary strike at least seven days prior to its commencement; and

(c) the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.

(3) Subject to section 68(2) and (3), a secondary employer may apply to the Labour Court for an interdict to prohibit or limit a secondary strike that contravenes subsection (2).

(4) Any person who is a party to proceedings in terms of subsection (3), or the Labour Court, may request the Commission to conduct an urgent investigation to assist the Court to determine whether the requirements of subsection (2)(c) have been met.

(5) On receipt of a request made in terms of subsection (4), the Commission must appoint a suitably qualified person to conduct the investigation, and then submit, as soon as possible, a report to the Labour Court.

(6) The Labour Court must take account of the Commission's report in terms of subsection (5) before making an order.'

The reliance by the respondent on s 66 must have been because the appellant had referred in its notice to the intended strike as a secondary strike and had also alleged that the strike was in compliance with s 66.

The urgent application and the order of the Labour Court

[14] Attempts between the parties to reach agreement on whether the strike would be a protected strike or not failed. The respondent then brought an urgent application in the Labour Court. Leaving out prayers relating to urgency and further or alternative relief, the order sought by the respondent in the Labour Court was in the following terms:

2 Declaring the secondary alternatively primary strike action intended to be embarked upon by members of the respondent illegal and in contravention of s 64 alternatively s 66 of the Labour Relation Act 66 of 1995 (the Act).

3 Directing the respondent to pay the costs of the above application on an attorney and own client scale.'

[15] The urgent application came before Jammy AJ who granted an order declaring the intended 'secondary alternatively primary strike action' illegal. For reasons that I need not go into, Jammy AJ reserved the question of costs and directed that, if any party sought to pursue that issue, written submissions would have to be made within 14 days whereafter he would decide it. Within days thereafter leave to appeal to this court against the judgment of the Labour Court was sought and granted.

The appeal

[16] Before us on appeal Mr Brassey, who appeared for the appellant, submitted that the intended strike was a protected strike. He based this submission, firstly, on a contention that the strike was a secondary strike and, secondly, on the contention that, even if it was not a secondary strike, it, nevertheless, was simply a strike that complied with the requirements of s 64 of the Act. In arguing that the strike was a secondary strike, Mr Brassey contended that the strike complied with the requirements of s 66 of the Act.

[17] The first question that arises in relation to Mr Brassey's primary contention is whether the strike intended in this matter falls within the definition of a secondary strike in s 66(1). It is not necessary to quote s 66(1) as it has already been quoted. A fundamental element of the definition of a secondary strike in terms of s 66 is that the employees who seek to go on a secondary strike to support other employees must be employed by an employer other than the employer of those they seek to support. The two groups of employees cannot be employed by the same employer. In this case the appellant's members employed by Jaff & Co Ltd in Kimberley seek to support the appellant's members employed by Jaff & Co Ltd in Johannesburg. The members of the appellant employed by Newclo (Pty) Ltd in Kroonstad seek to support the appellant's members employed by Newclo (Pty) Ltd in Johannesburg. In each case the two groups are employed by the same employer.

[18] Mr Brassey sought to overcome this difficulty in his argument by submitting that in this case there is an employers' organization involved. That is no answer to the difficulty. The employers' organization employs neither group of employees. Its involvement in the matter is primarily as a representative of the employers involved in this matter, namely Jaff & Co Ltd and Newclo (Pty) Ltd.

Accordingly, the intended strike cannot be a secondary strike as defined in s 66(1). Mr Brassey's contention in this regard thus falls to be rejected.

[19] There was an argument presented on behalf of the respondent - not by Mr Buirski who led for the respondent but by Mr Hulley who assisted Mr Buirski - which it is convenient to dispose of at this stage of this judgment. The contention was that, insofar as the intended strike might be a secondary strike, it would not comply with the requirements of the Act because the strike notice that was sent to the respondent was sent before the strike notice for the Northern Areas strike was sent out and that a secondary strike notice must follow and not precede the primary strike notice. This argument is not open to the respondent to advance because it is not part of its case in the papers. In any event the need to deal with it has fallen away since this court has found that the intended strike would not be a secondary strike.

[20] Mr Brassey's alternative argument was that the intended strike is an ordinary strike which is governed by the provisions of s 64 as opposed to s 66 and that, as such, all the requirements of the Act had been complied with and the strike was protected. Mr Buirski accepted that the strike in the Northern Areas was a protected strike. It is convenient to deal with this argument with reference to the decision of the Labour Court in *Afrox Ltd v SACWU & others (1)* (1997) 18 ILJ 399 (LC) and that of this court in *Chemical Workers Industrial Union v Plascon Decorative Inland (Pty) Ltd* (1999) 20 ILJ 321 (LAC) as the facts of this matter and the facts of those two cases are very similar.

[21] In *Afrox* the employer operated its business from a number of branches throughout the country. One of its branches was in Pretoria West. A dispute arose between the employer and SACWU, the recognized union which had members in many, if not all, of the employer's branches. The employer wanted to introduce staggered shifts in the Pretoria West branch. SACWU and the employees in that branch were opposed to that move.

[22] After all the statutory requirements for a legal strike had been complied with, the employees employed in the Pretoria West branch went on strike over the issue of staggered shifts. The employer accepted that that strike was legal and, thus, protected. Subsequently and while the employees at the Pretoria West branch were still on strike, SACWU sought to call all its members employed by the employer in the other branches out on the strike to pursue its demands in respect of the Pretoria West branch. SACWU believed that such a strike would be a secondary strike and called it a secondary strike. The employer brought an urgent application in the Labour Court to interdict the strike by SACWU members employed in branches other than in the Pretoria West branch. The Labour Court had no hesitation in finding that the strike was not a secondary strike as there was only one employer involved and the definition of 'secondary strike' in s 66(1) contemplated at least two employers, one being the employer of the primary strikers and the other being the employer of the intended secondary strikers. The Labour Court held in effect that a label did not affect the true nature of a strike and that, accordingly, if a strike was a primary strike, it did not become a secondary strike simply because someone called it a secondary strike.

[23] Having found that the strike was not a secondary strike, the Labour Court went on to hold that the strike constituted a primary strike. At 403I-404C the Labour Court had this to say:

'In my judgment once a dispute exists between an employer and a union and the statutory requirements laid down in the Act to make a strike a protected strike have been complied with, the union acquires the right to call all its members who are employed by that employer out on strike and its members so employed acquire the right to strike. Once SACWU acquired the right to call a strike against the applicant in respect of that dispute, its members who are employed by the applicant acquired the right to strike if called upon by SACWU to strike. Once in that situation a union is under no obligation to call its members out on strike at the same time and it is free to commence the strike with a small group of members and increase the number of its members participating in the strike as and when it considers that to be appropriate unless it has waived such a right. In this case the union started by calling out on strike its members who are employed by the applicant in its Pretoria West branch. Now it has called its members in the other branches out on strike. The new Act does not require that, before members of a union can go on a protected strike, they should have been the ones who referred the issue in dispute to a council or to the Commission for Conciliation, Mediation & Arbitration. What is required is that the issue in dispute is ... which is ... the subject-matter of their strike [and] should have been referred to conciliation and the other statutory requirements should have been met.'

[24] The Labour Court therefore decided in the *Afrox* matter that employees based in one branch of an employer were entitled to engage in a strike in support of the demands of their colleagues employed by the same employer in another branch. The application for an interdict was accordingly dismissed with costs.

[25] In *Plascon Decorative*, Cameron JA, with Myburgh JP and Froneman DJP concurring, stated at 429I that the issue in that case was 'whether non-bargaining unit employees, whose conditions of service the strike demand did not directly affect, could embark on an otherwise protected strike'. He continued in the same passage and said:

'That parallels the question Zondo AJ dealt with in *Afrox Ltd v SA Chemical Workers Union & others* (1) above, where workers employed by the same employer at different plants embarked on strike action. Zondo AJ concluded at 403I that, "once a dispute exists between an employer and a union and the statutory requirements laid down in the Act to make a strike a protected strike have been complied with, the union acquires the right to call all its members who are employed by that employer out on strike and its members so employed acquire the right to strike'. It follows that in my view this conclusion was correct.'

[26] The decision of this court in *Plascon Decorative* was therefore that non-bargaining unit employees have a right to strike in support of demands made by or on behalf of their co-employees in another bargaining unit if all the requirements of the Act which are necessary for there to be a protected strike have been complied with in respect of the issue in dispute affecting such co-employees.

[27] The court a quo was referred to the *Afrox* and the *Plascon Decorative* cases. The court a quo appears to have taken the view that the employees employed by *Jaff & Co Ltd* in Kimberley and by *Newclo (Pty) Ltd* in Kroonstad were obliged to follow the dispute-resolution procedures prescribed in the main agreement of the Free State and Northern Cape Bargaining Council before they could embark on the intended strike. It is this that the court a quo viewed as a distinguishing factor between this matter, on the one hand, and, the *Afrox* and *Plascon Decorative* matters, on the other.

[28] At 4-5 of its judgment, the court a quo said:

'The dispute-resolution procedures, which are a prerequisite to protected strike action and must first be followed and exhausted by employees falling within the jurisdiction of the regional bargaining council in which they are employed are defined in the collective main agreement applicable to those regions. The fact that employees falling under different bargaining councils may be employed by the same employer cannot ipso facto remove those employees from the jurisdiction of the council, or exempt them from the provisions and operation of the collective agreement effective in the area of their employment. In each of those agreements the term "employee" is defined as meaning "those employees falling within the jurisdiction of the scope of the bargaining council concerned".'

[29] Later on the court a quo emphasized that 'no demand had been made, no dispute had been declared by the [appellant] within the ambit of the Free State and Northern Cape Bargaining Council'. It continued and said that 'no dispute resolution procedures have been invoked and pursued, on any basis which would clothe ensuing strike action with the protection afforded by ss 64 and 67 of the Act'.

[30] Before us Mr Buirski sought to defend the decision of the court a quo on the very basis on which the court a quo came to the conclusion that the intended strike would not be a protected strike, namely, that there was an obligation for compliance with the dispute procedure prescribed in the main agreement of the Free State and Northern Cape Bargaining Council. This is not the law. I deal with this below.

[31] The strike, which the employees of *Jaff & Co Ltd* in Kimberley and those of *Newclo (Pty) Ltd* in Kroonstad were to participate in, was to be in support of the issue in dispute which was the subject of the strike in the Northern Areas. It was not to be in support of any dispute or issue in dispute within the area of jurisdiction of the Free State and Northern Cape Bargaining Council. The demands or issue in dispute in the Northern Areas related to the amendment of the main agreement of the Northern Areas Bargaining Council. In the light of this it must be clear that the Free State and Northern Cape Bargaining Council, which is the council to which, on Mr Buirski submission, the 'Northern Areas dispute' would have had to be referred for conciliation, would not have had jurisdiction to deal with such dispute. This is so because both the dispute as well as the parties to that dispute fell outside that council's jurisdiction.

[32] More importantly, the dispute which the intended strike sought to bring an end, had already been referred to the bargaining council with the requisite jurisdiction for conciliation and such attempts had failed. All the statutory requirements required to be complied with before there could be a strike over that dispute had been complied with. The same dispute could not be referred to conciliation for the second time. The requirement in s 64 that the issue in dispute be referred to the Commission for Conciliation, Mediation & Arbitration or to a bargaining council with jurisdiction for conciliation is a requirement that the issue in dispute be referred to a bargaining council, where there is one with jurisdiction, which has jurisdiction in respect of such issue in dispute. A bargaining council cannot conciliate a dispute in respect of which it has no jurisdiction.

[33] In my view the fact that the employees seeking to go on strike in this matter are subject to a different bargaining council with a different main agreement is not material as the intended strike

relates to a dispute falling within the jurisdiction of another council. In the result I conclude that the ratio decidendi in *Afrox and Plascon Decorative* applies in this matter. In any event this court decided in *County Fair Foods (Pty) Ltd v FAWU & others (2001) 22 ILJ 1103 (LAC)* that, where there has been compliance with the statutory requirements necessary to make a strike a protected strike, the fact that there has been no compliance with the pre-strike procedures contained in a collective agreement does not render unprotected an otherwise protected strike. Once a strike is a protected strike in terms of the Act, there are certain legal consequences which flow from that. One of them is that such a strike cannot be interdicted.

[34] In the light of all the above the court a quo erred in concluding that the strike in this matter would be unprotected. It would be a protected strike.

NICHOLSON JA and PAGE AJA concurred.

Appellant's Attorneys: Cheadle Thompson & Haysom.

Respondent's Attorneys: Borman Snyman & Barnard.