IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

Case no. D 66/99

In the matter between:

CHEMICAL WORKERS INDUSTRIAL UNION	**Applicant**
D. D'SA & OTHERS	**Second to thirteenth Applicant**

AND

SASOL FIBRES (PTY) LTD	
(a division of the Sasol group)	**Respondent**

JUDGMENT

MLAMBO J.

1. This is an application for urgent interim relief. The first applicant ("the union") seeks to interdict the respondent from introducing certain alleged unilateral changes to the terms and conditions of employment of its members, the second to thirteenth applicants ("Union's members").

2. During May 1998 the respondent initiated meetings with the union's members and gave notice that it would introduce short time. Short time was introduced with effect from 8 June 1998 without consent of the union members. The union members disputed the implementation of the short time and, apparently, authorised the union to refer the dispute to the Commission for Conciliation Mediation and Arbitration ("the Commission"). The union described the nature of the dispute as:

"The company has notified the workers of its intention to change the terms and conditions of their employment without engaging in proper consultation on the issue. The change has therefore been done unilaterally."

3. The Commission declined to conciliate the dispute on jurisdictional grounds and referred the union to the South African Manufactured Fibres Bargaining Council ("the Council"). The union however did not heed that advice resulting in the dispute referral receiving no attention. In the meantime the union's members complied with the changed hours , though under protest. It is not disputed that during July and September 1998 the respondent's situation improved resulting in the respondent improving working hours. On both occasions the union's members accepted the change.

4. It is common cause that even though the respondent improved working hours, this did not result in a reversion of the working hours to normal hours i.e. the situation prevailing during before 8 June 1998. It appears that during December 1998 and part of January 1999 the respondent's situation deteriorated. As a result of the deteriorating situation the respondent held meetings with the union's members seeking their consent for another change to the working hours. I accept that the required consent was not forthcoming but nevertheless the respondent went ahead and introduced the change to the working hours, i.e. a further short time programme was implemented.

5. On 22 January 1999 i.e. two days before the change was to occur, the union referred a dispute to the Council regarding the change. In the letter under cover of which the referral was attached the union stated that:

"The company has notified workers that it intends implementing changes to their terms and conditions of employment with effect from 25 January 1999 viz that workers are to be placed on three weeks short time each and every month until further notice. We require the Sasol Fibres not to implement unilaterally the change to terms and conditions of employment.

In terms of section 64(5) Sasol Fibres must comply with this requirement within 48 hours of service of the referral. Should the company fail to comply with this the union will seek an interdict through the

Labour Court."

6. The respondent went ahead, with the implementation of the short time, despite the union's request to it not to do so. This prompted the union to launch the present proceedings. In its notice of motion the union seeks the following relief:

"That the implementation of the short- time programme in the Top Making Department of the respondent be suspended with immediate effect, until a certificate stating that the dispute between the parties remains unresolved has been issued."

7. The application is based on section 64(4) and (5). This section provides:

"(4) Any employee who or any trade union that refers a dispute about a unilateral change to terms and conditions of employment to a council or the Commission in terms of subsection (1)(a) may in the referral, and for the period referred in subsection (1)(a)-

(a) require the employer not to implement unilaterally the change to terms and conditions of employment; or

(b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.

(5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of service of the referral on the employer."

8. Mr Schoeman, counsel for the applicants, argued that the applicants needed to prove two issues to succeed in this application. These are that a unilateral change to terms and conditions took place without consent. A unilateral change is a change that occur at the behest of one party without the consent of the other party. Because of the consensual nature of the employment contract any change thereto must occur with consent. I therefore agree with Mr Schoeman's argument on this point. Clearly to come within the ambit of section 64(4) and (5) it must be shown that the change to terms and conditions of employment has occurred without consent from the other party i.e. unilaterally. Revelas J confirmed this view in **Staff Association for the Motor & Related Industries (SAMRI) v Toyota of South Africa Motors (Pty) Ltd (1997) 18 ILJ 374 (LC)** at p379A-B:

"To be successful under s 64(4), the employee has to show that firstly, unilateral changes were effected to the terms and conditions of employment contract, and secondly, that there was no consent to the unilateral changes."

I agree.

9. There is no dispute before me that a change to the working hour was implemented. I accept, further, that a change of working hours is a change of terms and conditions. Clearly the decrease of working hours affects income and on this basis it must be correct that terms and conditions of employment are at issue. Mr Farrell appearing for the respondent, sought to make out a case that the union's members accepted the change and had no knowledge of the union's challenge to such change. Attached to respondent's answering affidavit is a memorandum that purports to confirm this. This memorandum records that:

"On Friday 22 January 1999, at approximately 17h00, Sasol Fibres approached me, as per my name and signature on the list, enquiring into the knowledge and support of the referred dispute, by members of CWIU, to the Fibre Bargaining Council.

I, the undersigned, have not had any discussions with any CWIU representative, indicating my dissatisfaction or rejection of, and either have any knowledge of, or support the dispute that CWIU has declared. I acknowledge that I have been consulted, with regards the required implementation of the revised Short Time Programme, which has been a continued consultation process since June 1998.

I have committed myself to accepting the conditions, and will comply as required."

This memorandum is signed by four of the thirteen union members party to theses proceedings. Two of the four, namely A Jugdeep and S Moodley have subsequently filed affidavits distancing themselves from the memorandum's contents.

10. I am of the view that at most only two union members can be held to have consented to the change. This can however not be used against other union members who remain aggrieved by the change. In any event a change to terms and conditions of employment is a collective bargaining issue. Thus a decision of a majority of union members to challenge a change to terms and conditions has the same effect as a decision of a majority of union members who vote for strike action. Viewed in that light I am satisfied that the change to working hours was unilateral in that it occurred without consent of the majority of union members.

11. Mr Farrell also sought to make out a case that the respondent consulted, throughout, with the union's members regarding the change. He argued that after such consultation and negotiations the respondent was justified in implementing the change. Negotiations are necessary in the scheme of things as they provide the mechanism whereby consent can be obtained. Where negotiations fail to elicit consent, in my view, resort can then be had either to the provisions of a collective agreement governing the issue or section 64(1) . Du Toit et al in **"The Labour Relations Act of 1995" Butterworths 1998 (second edition)** at page 207 state:

"On this approach, it will not assist an employer that the changes were introduced following consultation or negotiation if, in the final analysis, **the employer was unable to gain the acceptance of the employees concerned. Of course, if the employer has exhausted an agreed disputes procedure, which provides for the exercise of unilateral power after following the agreed procedures, it would be able to introduce the changes with impunity by virtue of the provisions of the collective agreement."**

In my view Mr Schoeman was correct when he argued that the fact that consultations or negotiations have been held does not provide the employer with justification to implement changes unilaterally.

12. I have already stated that a change terms and conditions of employment is a collective bargaining matter. Once a party has failed to obtain consent for any desired changes it can refer a dispute for conciliation, in terms of section 64(1) whereafter industrial action will feature if the dispute remains unresolved. If the employer simply implements it runs the risk of industrial action in response or an interdict that will freeze the changes at least for the duration of the conciliation phase (section 64(3)(e)). Du Toit et al in **"The Labour Relations Act of 1995" Butterworths 1998 second edition** at page 206 state:

"If the employer fails to comply with the 48 hour period, the employees concerned may strike without observing the statutory conciliation and notice requirements (section 64(3)(e)), and they or their trade union, may seek an interdict in the Labour Court to enforce compliance with the notice (section 158(1)(b) read with section 64(5)."

w section 64(4) and (5) read with section 64(3)(e) mean that there is a bar to the unilateral implementation of a change to terms and conditions before compliance with section 64(1) or a collective agreement dealing with the issue. Just as the union is enjoined to comply with section 64(1) before embarking on protected strike

action to force better conditions an employer seeking to change those conditions must also comply with section 64(1). It follows that as far as I am concerned the respondent is barred from implementing any short time until it has complied with section 64(1). Failure to comply with section 64(1) in these circumstances exposes the employer to a strike or an interdict or an action for recovery of whatever is lost as a result of the unilateral action.

14. It remains for me to consider whether the requirements of an urgent interim interdict have been met. I accept that the latest introduction of short time is part of an ongoing process that started in June 1998. I say this for the following reasons:

1. Since the changes of June 1998 the employees have not, to date, reverted to normal working hours.
2. The changes introduced in July and September 1998, although resulting in an improvement from the June 1998 changes, did not result in a reversion to fulltime or normal hours.
3. The working hours presently introduced and sought to be interdicted are exactly the same as those introduced in June 1998.

15. In view of the fact that the changes sought to be interdicted presently are similar to those introduced in June 1998 it therefore begs the question: why were the June 1998 changes not interdicted? One assumes that if the present changes will result in irreparable harm the June 1998 changes must have had the same effect. That being the case it must therefore mean that the matter was not sufficiently desperate then to obtain an interdict. It therefore means that there is no sufficient urgency to warrant an interdict now. If indeed the matter is as pressing as is sought to be made out in the papers this application should have been made in June 1998.

16. As far as the element of irreparable harm is concerned the applicants state that they will suffer a substantial reduction of income. I accept that that is correct but the Court is not told what effect that situation will have on the union's members. It is simply not acceptable for parties to make bald allegations and leave it to the court to fathom consequences of the conduct complained of.

17. I am therefore satisfied that the requirements for an urgent interdict have not been met. The applicants failed to seek urgent relief in June 1998 with the result that the court cannot come to their assistance at this stage. Their remissness ha left them with a normal application as recourse and maybe a possible damages claim against the respondent. I therefore make the following order:

1. The application is dismissed.

2. There is no order at to costs.

MLAMBO J.

ent: 1 February 1999.

nt: Mr Schoeman instructed by Chennels Albertyn & Tanner.

dent: Mr Farrell of Shepstone Wylie.

This judgment is available on the INTERNET on website: http://www.law.wits.ac.za/labourcrt