THE JUDICIARY · REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J1984/18

In the matter between:

GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD.

TWEEFONTEIN COMPLEX **1st Applicant**

GOEDGEVONDEN COMPLEX **2nd Applicant**

IMPUNZI COMPLEX **3rd Applicant**

GROUP SERVICES **4th Applicant**

and

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA ("NUMSA") **Respondent**

Heard: **22 June 2018**

Delivered: **29 June 2018**

Summary: **Urgent interdict- strike alleged to be in contravention of the provisions of the LRA – in the midst of a referral of a dispute of mutual interest, the collective agreement was amended to include a peace clause. This effectively thwarted the *en route* strike action. Peace clauses do not trump the right to strike in an unconstitutional manner. Where a party alleges *mala fides*,**

capriciousness and arbitrariness in the extension, facts must be pleaded in support of such a conclusion. Absent pleaded facts, the court shall not simply conclude that there was *mala fides*, capriciousness and arbitrariness. Held: (1) The application for interdict is granted. (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an urgent application in terms of which the applicant is seeking to interdict and restrain an intended strike action following a notice to embark on a strike action issued by the respondent. The application is opposed by the respondent. The only basis upon which the application is opposed is that the applicants' collective agreement which prohibits the intended strike action is not binding on the respondent.

Background facts

[2] The applicants before me are members of the Minerals Council of South Africa (MICSA), formerly known as the Chamber of Mines of South Africa. In the coal sector, the National Union of Mineworkers (NUM), United Association of South Africa (UASA) and Solidarity are members of MICSA.

[3] In 2017, the respondent participated in wage negotiations for the first time. On or about 22 November 2017, an agreement on wages and conditions of employment was concluded with various Trade Unions, whose members are employees of employers represented in MICSA, through employers' organizations. This agreement was amended on 26 January 2018. The 22 November 2017 agreement did not contain a peace clause. The amended collective agreement contained a peace clause.

[4] In the meanwhile, on or about 13 December 2017, the respondent referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The dispute was simply that the respondent was excluded from the wage agreement. The dispute was enrolled on 10 January 2018. Parties agreed to extend the life of the conciliation process. At conciliation a number of jurisdictional points were raised. The appointed commissioner was to hand down a ruling on a particular time, but failed to do so. In the meanwhile, on 8 June 2018, the respondent issued a strike notice, intending to call its members to a strike action from 11 June 2018.

[5] On 8 June 2018, my sister Witcher J issued an interim order effectively interdicting participation in a strike action pending the outcome of this matter. The matter served before me on 22 June 2018. After hearing submissions on the narrow point on which the matter turned, I reserved judgment to carefully consider the submissions and the authorities relied upon.

Why should the intended strike be declared unprotected and accordingly curtailable?

[6] The only basis upon which the applicants contend that the strike action is to be limited is that section 65(1) (a)[1] of the Labour Relations Act[2] (LRA) finds application.

Evaluation

[7] In matters of this nature, the starting point is as always the Constitution of the Republic of South Africa[3] (the Constitution). Section 23(2) (c) of the Constitution, provides that '*every worker has the right to strike*'. The right to strike is an individual right guaranteed in the supreme law of this

[1] **65. Limitations on right to strike or recourse to lock-out**
(1) No person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or a lock out if –
(a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute.

[2] 66 of 1995, as amended.

[3] Act 108 of 1996.

country. Like many other rights guaranteed in the Bill of Rights, the right to strike is subject to limitations in terms of the law of general application. The law that seeks to limit the right to strike in this instance is the LRA.

Is the amended wage agreement a collective agreement?

[8] I did not understand Ms Edmonds for the respondent to be contending that the amended wage agreement is not a collective agreement. However, for good measure, section 213 of the LRA defines a collective agreement to mean *"a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions on the one hand and, on the other hand – one or more employers; or one or more registered employers' organisations or one or more employers and one or more registered employers' organizations."*[4]

[9] The clause upon which the applicant relies to limit the intended strike action is the new clause 17, the relevant portion reads thus:

> "17.3 No party to this agreement, or any other person or entity bound by it, will call for, encourage, or participate in any strike or lock-out in support or furtherance of any demand or proposal to amend wages and or other conditions of employment applicable during the period of operation of this agreement or in support or furtherance of any demand or proposal having cost implications for the employer during the period of operation of this agreement."

[10] I am satisfied that the amended wage agreement is a collective agreement and its binding effect are dealt with in section 23 of the LRA.

[11] In *AMCU v Chamber of Mines obo Harmony Gold Mining Co Pty Ltd*[5], the Labour Appeal Court (LAC) held thus:

> "[43] It is apparent from a reading of ss32 and 23, within their proper contexts within the LRA, that the two sections contemplate, essentially two different kinds of collective agreement. In s23,

[4] Own emphasis.

[5] [2016] 37 1333 (LAC)

> collective agreements outside bargaining councils are contemplated and provided for, whereas s32 contemplates collective agreements concluded on a broader basis and more particularly within bargaining councils."[6]

[12] The source of force or binding effect of this collective agreement is section 23 (1) (d)[7]. The contention of the respondent in its papers is simply that the section is not applicable to it. It does not seem to be the respondent's case as pleaded that the limitation is not reasonable and justifiable. It was only in argument that a submission to the following effect was made:

> "It is NUMSA's submission that it is impermissible for Glencore to bypass the rights of NUMSA members to strike through artificial means in the form of *ex post facto* "peace clause". What this amounts to is an attempt to usurp the right to strike which s23 (1) (a) of the Labour Relations Act, and s23 (2) (c) of the Constitution prohibits."

[13] The issue of reasonableness and justifiability of the limitations has been decisively resolved by the Constitutional Court in *AMCU and others v Chamber of Mines of SA and others*[8]. This court had an occasion to determine the rationale for the extension of a peace obligation to minorities in terms of section 23 (1) (d) of the LRA in *Chamber of Mines of SA acting on its own name and on behalf of Harmony Gold Mining Co Ltd and other v AMCU and others*.[9] In there, my brother Van Niekerk J suggested that functional collective bargaining requires that peace obligation clauses be extended to minority employees not belonging to any party unions. To this suggestion I agree. Might I add that this court is obligated to strike a balance between the right to bargain collectively and

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[6] Quoted with approval in NUMSA obo Members v Transnet SOC Ltd [2018] 5 BLLR 448 (LAC)

[7] **23. Legal effect of collective agreement**
(1) A collective agreement binds –
(d) employees who are not members of the registered trade union or trade unions party to the agreement if –
(i) the employees are identified in the agreement;
(ii) the agreement expressly bind the employees; and
(iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.

[8] [2017] 38 ILJ 831 (CC) at paragraph 58.

[9] [2014] 35 ILJ 3111 (LC) at paragraph 69.

the individual right to strike. Where collective bargaining protects the overarching right to fair labour practices, its gains should not be overturned by an individual right to strike. In my view section 23 (5)[10] of the Constitution buttresses this point. Of course the poignant question is always one that deals with the individual right to strike and its limitation through collective agreements. In other countries, peace obligations do not bind individual employees. For instance in Japan, the peace obligation only binds the parties to a collective agreement because it lacks normative effect. In Turkey, too, only signatories to a collective agreement are bound. In Finland, the peace obligation binds the trade union and employers' association as parties to the collective agreement, as well as affiliated associations and individual employees. However it does not bind individual employees not affiliated. In Germany individual employees are not bound. In Spain, employees and trade unions are bound by the peace obligation.

[14] The situation in South Africa is that only in instances set out in section 23 (1) (d) would individual employees be bound by the peace obligation. In *Numsa obo Members v Transnet SOC LTD and others*[11], I had an occasion to say the following:

> [16] It is common cause that the applicant is not a party to the collective agreement. On that simple proposition, the agreement will have no binding effect on it and its members unless the provisions of the law provides otherwise. Section 23 (1) (d) provides that a collective agreement binds employees who are not members of the registered trade union party to the agreement if the employees are identified in the agreement; the agreement expressly binds the employees and the trade union that have, as their members, the majority of employees employed by the employer in the workplace..."

[10] Every trade union, employers' organisation has the right to engage in collective bargaining...To the extent that the legislation may limit a right in this chapter, the limitation must comply with section 36(1).

[11] Case P88/16 delivered on 13 May 2016.

[15] Once the requirements of the section are met, the individual employees are bound. Accordingly, the individual employees cannot exercise their individual right to strike.

[16] My brother Lagrange J in *AMCU v Minister of Labour and others*[12] correctly held that a party seeking to challenge any extension must claim that the decision to extend the agreement was *mala fide*, capricious or arbitrary. In argument, Ms Edmonds submitted that such was the respondent's claim. The difficulty with such a submission is that the claim is not borne out in the respondent's opposing papers. It is trite by now that in motion proceedings, affidavits serve dual purpose. On the one hand, it is a pleading and on the other it is evidence. A party can only make a claim by presenting evidence in support of such a claim. It is not worth repeating to state that in motion proceedings, a party stands and fall by the allegations made in its affidavit.

[17] In the opposing papers an allegation was made that the respondent is not bound by the collective agreement within the contemplation of section 23 (1) (d) of the LRA. However, there is no evidence to gainsay an allegation that the employees are identified, that the agreement expressly binds the employees and that the Trade unions that concluded the agreement are in the majority. Those being the requirements of section 23(1) (d) of the LRA. In argument though, one of the two points pursued was that the peace clause was concluded *ex post facto*. Meaning that when the peace clause was added, the respondent had already referred a dispute.

[18] This submission seems to suggest that by a mere referral a strike action gains legitimacy and is then immune from any form of limitation. That cannot be the case. As I have already stated above, the right to strike is an individual right. In order for a strike to be protected, it must satisfy both the procedural and substantive requirements. Referral to the dispute resolution bodies only satisfies the procedural requirements. The issue whether a person is entitled to strike in the face of a peace obligation is a

[12] Case number JR46/16 delivered on 13 March 2018.

substantive requirement. Therefore, engaging in a strike action is not similar to running a relay. It does not mean that once a runner has left the starting line, then the relay run is in process. The fact that a dispute that is later to be prohibited by a peace clause is referred does not legitimize the strike action. Fact that a peace obligation agreement was entered into after the referral is neither here nor there. It is a red herring.

[19] Even in instances where a strike had commenced and it becomes apparent that the strike contravenes a peace obligation, this court is empowered to place a disjuncture. Therefore, what renders this strike unprotected is not the procedural requirements but the substantive requirements. To my mind, nothing turns on the fact that the collective agreement was entered into when the procedural requirements were being complied with. It may well be so that the intention of the applicants was to thwart the possible strike by the respondent and its members. To my mind doing so is not unlawful and is actually a part of power play. It must be remembered that in the peace obligation clause, the applicants equally limit their power flex their muscles, as in locking out. Similarly, the majority unions equally clipped their wings to call its members for a strike. As Van Niekerk J aptly puts it, the majoritarian principle underlies section 23 (1) (d) and it promotes orderly collective bargaining with a legitimate purpose of advancing labour peace.

Conclusions and summary

[20] For all the above reasons, I conclude that the peace obligation clause quoted above binds the respondent's members as required by section 23 (1) (d) of the LRA. Accordingly, I am inclined to adopt the draft order presented by the applicants' counsel barring the issue of costs, which the applicants' counsel wisely abandoned.

[21] In the results I make the following order:

Order

1. The provisions of the Rules relating to times and manner of service referred to therein are dispensed with and the matter is dealt with as one of urgency in terms of Rule 8 of the Rules of the Labour Court of South Africa;

2. The respondent is interdicted and restrained from calling or taking part in any strike or any conduct in contemplation or furtherance of a strike by the applicant's employees (the respondent's members at the applicant's work places pursuant to the strike notice issued on 08 June 2018 ("the strike notice");

3. The respondent and its officials must take all reasonable steps to encourage its members not to participate in any strike action pursuant to the strike notice and/or in the event that members have commenced strike action, to cease their participation in any strike forthwith;

4. The respondent is to withdraw the strike notice;

5. The service of the above final order is to be effected as follows:-

   5.1. Upon the respondent's offices by telefaxing a copy of the final order to its offices situated at 153 Bree Street, Newtown, at telefax number (011) 689 1701 and by email to Luckyn@numsa.co.za;

   5.2. By posting a copy of this final order at the entrances to all the applicant's premises, and on notice boards used to communicate with staff at the premises.

6. There is no order as to costs.

PP Moshoana

GN Moshoana

Judge of the Labour Court of South Africa.

Appearances

For the Applicant:	Advocate A Myburg SC.
Instructed by:	Mervyn Taback Inc, Parktown.
For the Respondent:	Ms R Edmonds of Ruth Edmonds Attorneys, Observatory