



**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN**

Reportable

Case no: DA08/2019

In the matter between:

**NATIONAL UNION OF METALWORKERS**

**Appellants**

**OF SOUTH AFRICA (NUMSA) AND OTHERS**

and

**MAHLE BEHR SA (PTY) LTD**

**Respondent**

**ASSOCIATION OF MINEWORKERS &**

**CONSTRUCTION UNION (AMCU)**

***Amicus Curiae***

Case no: DA09/2019

In the matter between:

**NATIONAL UNION OF METALWORKERS**

**Appellants**

**OF SOUTH AFRICA (NUMSA) AND OTHERS**

and

**FOSKOR (PTY) LTD**

**Respondent**

**ASSOCIATION OF MINEWORKERS &**

**CONSTRUCTION UNION (AMCU)**

***Amicus Curiae***

Heard: 27 May 2020

Delivered: 08 June 2020

**Summary: Trade union---Strike---Labour Relations Amendment Act of 2018 providing for the holding of secret ballot before resorting to strike---Labour Court interdicting strike---interpretation of s19-----s 19 envisages that Registrar of Labour Relations issues a directive after consultation with relevant unions or employers' organisation office bearers to amend their constitution within a certain timeframe---Absent such directive union under no obligation to hold secret ballot vote--- Labour Court's judgment set aside and appeal upheld.**

**Coram: Waglay JP, Phatshoane ADJP and Murphy AJA**

---

## JUDGMENT

---

MURPHY AJA

[1] On 19 March 2019, the respondents in two separate applications sought interdicts from the Labour Court to prevent the first appellant ("NUMSA") and its members from engaging in a strike. The Labour Court (Gush J) found that the strikes were unprotected and interdicted the appellants from engaging in the strikes on the ground (raised by the Labour Court *mero motu*) that no secret ballot as envisaged in section 19 of the Labour Relations Amendment Act of 2018<sup>1</sup> ("the LRAA") had been conducted. The appeal to this court is with the leave of the Labour Court. The respondents do not oppose the appeal. The issue in the appeals is whether the Labour Court's interpretation of section 19 of the LRAA is correct.

[2] Leave to intervene as *amicus curiae* was granted to the Association of Mineworkers & Construction Union ("AMCU") by this court on 4 May 2020,

---

<sup>1</sup> Act 8 of 2018 which came into operation on 1 January 2019.

and in accordance with the directive of the Judge President, AMCU was invited to present written argument in terms of Labour Appeal Court Rule 7(5), which it duly did and for which we are grateful.

- [3] Section 19 of the LRAA is aimed at empowering the Registrar to further provide for balloting requirements in the constitutions of trade unions and employer organisations. It falls to be interpreted in the context of section 95(5)(p) and (q) of the Labour Relations Act<sup>2</sup> ("the LRA") which provide:

'The constitution of any trade union or employers' organisation that intends to register must -

- (p) provide that the trade union or employers' organisation, before calling a strike or lock-out, must conduct a ballot of those of its members in respect of whom it intends to call the strike or lock-out;
- (q) provide that members of the trade union or employers' organisation may not be disciplined or have their membership terminated for failure or refusal to participate in a strike or lock-out if -
  - (i) no ballot was held about the strike or lock-out: or
  - (ii) a ballot was held but a majority of the members who voted did not vote in favour of the strike or lock-out.'

- [4] Section 95(5)(p) of the LRA requires trade unions or employers' organisations seeking registration to include a requirement for strike and lock-out ballots in their constitutions. Section 95(5)(q) of the LRA relates to the power of a trade union or employers' organisation to discipline members for a failure or refusal to participate in a strike or lock-out where no ballot has been held about the strike or lock-out or has been held, but a majority of members did not vote in favour of the strike or lock-out.

- [5] The failure by a registered trade union or employers' organisation to conduct a ballot in terms of its constitution does not have any impact on the protected nature of a strike or lock-out. Section 67(7) of the LRA provides:

---

<sup>2</sup> Act 66 of 1995.

'The failure by a registered trade union or a registered employers' organisation to comply with a provision in its constitution requiring it to conduct a ballot of those of its members in respect of whom it intends to call a strike or lock-out may not give rise to, or constitute a ground for, any litigation that will affect the legality of, and the protection conferred by this section on, the strike or lock-out.'

[6] Section 67(7) of the LRA applies only to trade unions or employers' organisations that have complied with the requirements of section 95(5) of the LRA by including balloting requirements in their constitutions.

[7] Section 19 of the LRAA was enacted to add to these provisions by empowering the Registrar to embark upon a process whereby trade unions and employers' organisations could amend their constitutions to provide for recorded and secret ballots. Section 19 is headed: "Transitional Provisions". It provides:

'(1) The Registrar must, within 180 days of the commencement of this Act, in respect of registered trade unions and employers' organisations that do not provide for a recorded and secret ballot in their constitutions-

(a) consult with the national office bearers of those unions or employers' organisations on the most appropriate means to amend the constitution to comply with section 95; and

(b) issue a directive to those unions and employers' organisations as to the period within which the amendment to their constitution is to be effected, in compliance with the procedures set out in amended constitution.

(2) Until a registered trade union or employers' organisation complies with the directive made in terms of subsection (1)(b) and the requirements of section 95(5)(p) and (q) of the Act, the trade union or employer organisation, before engaging in a strike or lockout, must conduct a secret ballot of members."

[8] Section 8 of the LRAA also amended section 95 of the LRA to introduce section 95(9) of the LRA which provides that for the purpose of section 95(5) of the LRA, a "ballot" includes any system of voting by members that is

recorded and in secret. It further amended section 95(8) of the LRA to confer on the Minister, after consultation with NEDLAC, an additional power to publish guidelines for the system of voting as contemplated in the newly inserted section 95(9) of the LRA. The preamble to the LRAA records that the purpose of these provisions was simply to extend the meaning of ballot to include any voting by members that is recorded in secret.

- [9] It is common cause that NUMSA's constitution does not provide for a "recorded and secret ballot" and did not comply with the requirements of section 95(5)(p) and (q) of the Labour Relations Act<sup>3</sup> ("the LRA").
- [10] This appeal, therefore, requires interpretation of the provisions of section 19 in order to ascertain their scope and application. The proper approach to interpretation is well settled in our law. Consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. A sensible meaning is to be preferred to one that leads to insensible results or undermines the apparent purpose.
- [11] Statutes must be construed consistently with the Constitution of the Republic of South Africa, 1996 (Constitution) and where reasonably possible to preserve their constitutional validity. Section 39(2) of the Constitution obliges courts to adopt an interpretation of a legislative provision which better promotes the spirit, purport and objects of the Bill of Rights and to adopt a meaning that does not unduly limit a right in the Bill of Rights. Legislative provisions that limit fundamental rights should be interpreted in a manner least intrusive of the right, if the text is reasonably capable of bearing that meaning.<sup>4</sup>
- [12] The trigger for the application of section 39(2) of the Constitution is whether the provision in question implicates or affects a right in the Bill of Rights. The present matter implicates the right to strike entrenched in section 23(2)(c) of the Constitution. Hence, section 19 of the LRAA must be read purposively in

---

<sup>3</sup> Act 66 of 1995.

<sup>4</sup> *SATAWU and Others v Moloto NNO and Another* 2012 (6) SA 249 (CC) at para 43.

the light of the relevant provisions of the Constitution, and if there is an interpretation of section 19 of the LRAA that better promotes the preservation of the right to strike, that interpretation ought to be preferred.

[13] Section 19(1) of the LRA imposes an obligation upon the Registrar to perform two tasks in respect of registered trade unions and employers' organisations that do not provide for recorded and secret ballots in their constitutions. Firstly, he is obliged to consult with the national office bearers of those unions and employers' organisations on the most appropriate means to amend their constitutions so as to comply with the requirement of section 95 of the LRA to provide for a recorded and secret ballot in its constitution.<sup>5</sup> And, secondly, once having held the consultations in question, to issue a directive to those unions and employers' organisations as to the period within which an appropriate amendment to their constitutions must be effected in compliance with the procedures set out in the amended constitution.<sup>6</sup> The directive must tell the union or employers' organisation how its constitution must be amended and must state the period within which the amendment must occur. In this regard, it is important to note that section 101 of the LRA imposes certain formalities in respect of changes to the constitution of trade unions and employers' organisations.<sup>7</sup>

[14] It is clear from the wording of section 19(1)(b) of the LRAA that until consultation has taken place with a trade union's national office bearers and a directive is issued no obligation arises on the part of unions or employers' organisations to amend its constitution in the manner contemplated. The duty cast upon the trade union is not to amend its constitution in a manner it deems fit in order to comply with the new definition of "ballot" in section 95(9) of the

---

<sup>5</sup> Section 19(1)(a) of the LRAA.

<sup>6</sup> Section 19(1)(b) of the LRAA.

<sup>7</sup> Section 101 provides *inter alia* that a registered trade union or a registered employers' organisation which has resolved to change or replace its constitution must send the Registrar a copy of the resolution and a certificate signed by its secretary stating that the resolution complies with its constitution. On receipt, the Registrar must register the changed or new constitution if it meets the requirements for registration and send the registered trade union or registered employers' organisation a copy of the resolution endorsed by the Registrar, certifying that the change or replacement has been registered. The changed or new constitution takes effect from the date of the Registrar's certification.

LRAA, but to comply with the Registrar's directive as to the appropriate means, period and procedures to amend the constitution.

- [15] Section 19(2) of the LRAA provides that until a registered trade union or employers' organisation complies with the directive made by the Registrar in terms of section 19(1)(b) of the LRAA and the requirements of section 95(5)(p) and (q) of the LRA, the trade union or employers' organisation must, before engaging in a strike or lockout, conduct a secret ballot of members. Hence, it is clear, the obligation to conduct a secret ballot of members in terms of section 19(2) of the LRAA arises only once a directive in terms of section 19(1)(b) of the LRAA has been issued by the Registrar, pursuant to consultations as envisaged in terms of section 19(1)(a) of the LRAA. In addition, and as the heading to the section indicates, section 19(2) of the LRAA is transitional in nature. It operates once the Registrar issues a directive to a union to make the necessary amendment regarding recorded and secret ballots and pending the adoption of the amendment.

- [16] The Labour Court in granting the interdict reasoned as follows:

‘As far as the first issue is concerned it appears clear from the transitional provisions that the right to strike is not limited. All that is required should a union not wish to be subject to the transitional provisions is for that union’s constitution to essentially comply with the requirements of section 95 (5)(p). This provision has been a requirement since the inception of the Labour Relations Act 66 of 95. It is inconceivable that a Trade Union would have been registered if its constitution at the time did not comply with the requirements of section 95(5). The section specifically provides that “the constitution of any Trade Union that intends to register must” comply inter alia with subsection 5.

It is simply so that in order to engage in a strike [all] that is required is for the union to conduct a secret ballot of members. That is the extent of the compliance the transitional provision requires.

Mr Purdon’s second argument was premised on what he suggested was an issue related to the interpretation of the section. He suggested that the section should be interpreted to mean that the transitional provisions would only apply

after the Registrar had issued the directive and before there was compliance with the directive. ....

The purpose of the legislation is clear in that its purpose *inter alia* is to provide that before a union may engage in a strike it should conduct a secret ballot of its members. In addition to this provision and to regulate the interim position the transitional provisions require the holding of a secret ballot by a union (and employers organisation in respect of a lock out) prior to engaging in a strike. The requirement is peremptory and applies only to registered trade unions that do not include in their constitution the requirement of a ballot.

To interpret the section as not applying to the respondents negates any suggestion that the transitional provisions will apply in the interim pending compliance.

That being so I am satisfied that the transitional requirements apply to those unions whose constitutions do not provide for a “recorded and secret ballot” and that in the interim prior to complying with the requirements relating to a secret ballot they “must conduct a secret ballot of members” before engaging in a strike.

This is a peremptory provision and until the respondents comply they may not engage in a strike.’

[17] Although mentioning counsel’s contention that a directive of the Registrar had to be issued before a secret ballot became mandatory, the Labour Court did not answer it and appears to have assumed that the provisions of section 19(1) of the LRAA had been met and that the Registrar had issued a valid directive despite the absence of any proof that such a directive had been issued. There is no evidence on record indicating that the Registrar has consulted with the national office bearers of NUMSA and other trade unions on the most appropriate means to amend their constitution and has issued a directive directing NUMSA and other trade unions to effect specified amendments within a stipulated time period in compliance with the procedures set out in the amendments.

[18] On the basis of its incorrect assumption, the Labour Court wrongly concluded that in order to engage in a strike, NUMSA was obliged to conduct a secret

ballot of members in order to comply with the transitional provisions of the LRAA. Its interpretation is inconsistent with the plain language of section 19(1) and unjustifiably limits the right to strike. NUMSA has not had an opportunity to engage with the Registrar on the content, form and timeframe of any amendment to its balloting procedures and requirements.

[19] In its submissions filed as *amicus curiae*, AMCU, drew our attention to a document issued by the Registrar on 1 March 2019, approximately three weeks before the application which is the subject of this appeal was heard by the Labour Court. The document does not form part of the appeal record before us. It is part of the record in a different review application before another court.

[20] The document cited in AMCU's written submissions reads as follows:

'On 1st January 2019, the amendments to the Labour Relations Act, 1995 came into operation whereby further measures were introduced to ensure that registered trade unions and employers' organisations comply with their constitutions and requirements of the Act.

In terms of section 95(5)(q) of the LRA, the constitution of every trade union or employers' organisation must provide that the trade union or employers' organisation, before calling a strike or lock-out, must conduct a ballot of members in respect of whom it intends to call the strike or lock-out...

Section 95(9) provides that a ballot includes any system of voting by members of a trade union or employers' organisation that is recorded and secret. The clarification of a ballot is to provide for new technologies of balloting while at the same time ensuring good governance and secrecy.

The Minister has also issued guidelines in terms of section 95(9) after consultation with NEDLAC in this regard.

Section 19 of the Labour Relations Amendment Act, 2018 requires the Registrar of Labour Relations within 180 days of the Act coming into effect, to consult with the national office bearers of trade unions and employers' organisations which have constitutions that do not provide for the conducting of a secret ballot before calling a strike or lockout and to issue a directive to those unions and employers' organisations as to the period within which their

constitutions must be amended to ensure compliance with the requirements for conducting a secret ballot.

It must also be noted that in terms of section 19(2) of the Labour Relations Amendment Act, 2018, until such time as a registered trade union or employers' organisation complies with the directive to change its constitution, a registered trade union or employers' organisation before engaging in a strike or lockout must conduct a secret ballot of its members.

Registered trade unions and employers' organisations are directed to work through their constitutions and amend the constitutions to comply with the new provisions of the Labour Relations Act, 1995 as amended or advise this office in instances where the registered trade union or employers' organisation is of the view that it complies, with these LRA Amendments by referring this office to such provision(s) in its constitution....

All organisations are expected to comply with the provisions of the Labour Relations Act, 1995 as amended."

[21] There is no evidence before this court explaining the purpose of this document. On the face of it, it aims at informing trade unions and employers' organisation of the relevant provisions of the LRAA and directs them to "work through their constitutions" and to come up with amendments that will give effect to the new requirements. The document seems to be a preliminary advice intended to precede the necessary consultations with the national office bearers of the relevant unions or employers' organisation on the most appropriate means to amend their constitutions. This interpretation is confirmed by the fact that the document does not indicate the form of the amendment or a period within which unions are to amend their constitutions, as required by section 19(1)(b) of the LRAA.

[22] Accepting for the purpose of argument that we may take judicial notice of this document, it is not possible to conclude on the limited evidence available that it constitutes a directive in terms of section 19 of the LRAA. As discussed, there is no evidence that the Registrar consulted with the national office bearers of NUMSA and other trade unions and employers' organisations or has issued a directive to them in accordance with section 19(1)(b) of the

LRAA. The respondents bore the onus of proving that such a directive had been issued to NUMSA and have failed to discharge it.

[23] The Labour Court thus erred in reaching the conclusion that NUMSA was legally obliged to conduct a secret ballot and accordingly there was no cause to interdict NUMSA and the individual appellants from engaging in the strike on that basis.

[24] NUMSA does not seek an order of costs.

[25] In the result, the appeal is upheld and the order of the Labour Court is set aside and substituted with an order dismissing the application.

---

JR Murphy

Acting Judge of Appeal

I agree

---

B Waglay

Judge President

I agree

---

M Phatshoane

Acting Deputy Judge President

APPEARANCES:

FOR THE APPELLANTS: Adv FA Boda SC

Instructed by Cheadle Thompson & Haysom

FOR THE AMICUS CURIAE: Adv C Loxton SC and Adv PJ Daniell

Instructed by LDA Attorneys

LABOUR APPEAL COURT