IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No. J 1337/23

In the matter between:

JCI MINING (PTY) LTD **Applicant**

and

NATIONAL UNION OF MINEWORKERS
(“NUM”) **First Respondent**

MEMBERS OF NUM PARTAKING IN STRIKE
ACTION AND LISTED IN ANNEXURE “A”
HERETO **Second to further Respondents**

Heard: 8 November 2023
Delivered: 28 February 2024

JUDGMENT

GOVENDER, AJ

<u>Introduction</u>

[1] The matter before the Court is a return date from a *rule nisi* issued on 29 September 2023 per Mahosi J.

[2] In terms of the *rule nisi* the following relief was granted per Mahosi J:

‘1. The provisions of the Rules of the above Honourable Court relating to the time and manner of service are dispensed with and this matter is disposed [of] as one of urgency in accordance with the provisions of Rule 8 and Section 68(2) of the

Labour Relations Act, No. 66 of 1995 (insofar as they may apply).

1.1 The work stoppage and strike action embarked upon by the respondents from 22 September 2023 is declared unprotected and the respondents are interdicted and prohibited from continuing with and/or participating in, promoting, encouraging or supporting such strike action.

1.2 The respondents are interdicted and prohibited from calling for, orchestrating, participating in or encouraging in any way the aforesaid strike action.

1.3 The respondents are interdicted and prohibited from harassing, intimidating and threatening the applicant, any other employees of the applicant and/or any other third parties.

1.4 The respondents are interdicted and prohibited from interfering with and/or attempting to interfere with the work of other employees, alternatively intimidating and/or inciting other employees not participating in the industrial action to stop working and to join in on the industrial action.

1.5 The respondents are interdicted and prohibited from interfering with the business of the applicant and/or Vele Aluwani Colliery.

1.6 The respondents are interdicted and prohibited from picketing in support of the illegal industrial action commenced with from 22 September 2023, pending the outcome of the dispute referred to the CCMA

1.7 Without derogating from the above, the respondents are interdicted and prohibited from:

1.7.1.Intimidating, harassing, assaulting or in any way interfering with:

1.7.1.1. Any employee of the Applicant and/or Vele Aluwani Colliery whether such employee is employed on a temporary, casual, fixed term, fixed purpose or permanent basis.

1.7.1.2. Any other person or persons involved or connected with the conduct of the Applicant's and/or Vele Aluwani Colliery's operations or the business of the Applicant and/or Vele Aluwani Colliery.

1.7.1.3.Any customers of, visitors to, suppliers and other business associates of the Applicant and/or Vele Aluwani Colliery wishing to visit any of its premises or do business with or support the Applicant and/or Vele Aluwani Colliery at any of its premises.

1.7.2.In any way preventing any of the persons referred to above from gaining access to the premises of the Applicant and/or Vele Aluwani Colliery.

1.7.3.In any way preventing any of the persons referred to above from leaving the premises of the Applicant and/or Vele Aluwani Colliery.

1.8 Each of the Respondents is directed to take steps as are necessary to ensure that each of the other Respondents adhere to the terms and conditions of the order and that they do not in any manner call for, orchestrate, participate in or encourage in any way the aforesaid work stoppage and strike action, or an [any] conducts in contemplation or in furtherance of the industrial action on [or] any other conduct in support of their demands.

2. The *rule nisi* in paragraph 1 to 1.8 hereinabove serves as an interim interdict with immediate effect prohibiting and preventing the Respondents from continuing with the work stoppage, strike action and picketing pending the return date, being 8 November 2023.

…

6. The issue of costs is to be determined on the return date.'

[3] The matter came before me on 8 November 2023.

[4] Mr Higgs for the applicant argued in favour of the confirmation of the *rule nisi* and asked that the Court award costs against the first respondent National Union of Mineworkers (NUM).

[5] Ms Moyo for NUM argued that the *rule nisi* ought never to have been granted to begin with and that in the event that the Court was satisfied that the *rule nisi* should be discharged, costs should be granted against the applicant.

[6] In order to determine the legal issues before the Court, it is necessary to set out a brief material background of the matter.

<u>Material background</u>

[7] The applicant provides open cast mining services, which include the loading and haul of all material types at his operations at Vele Aluwani Colliery in Musina.

[8] The applicant employs more than 475 employees across its operations.

[9] According to the applicant, its operations are largely non-unionised, with sixty percent of the workforce being unionised, more than twenty percent of the workforce being members of AMCU and fifteen percent of the workforce being members of NUM.

[10] On 27 July 2023, the applicant and AMCU concluded a substantive wage agreement.

[11] This agreement between the applicant and AMCU provides as follows concerning who it is applicable to:
'This agreement applies to and binds each and every waged employee of the Union and is extended to all waged employees who at the time of signing it are not members of the Union.'

[12] In essence, what the agreement between the applicant and AMCU sought to achieve was that the agreement extended to all waged employees who were not members of AMCU.

[13] In support of the extension of the agreement to non-members, the applicant pleaded that the non-unionised employees of the applicant had indicated to the applicant's representative, Mr Fritz Scholtz, that they would concur with the agreement reached between the applicant and AMCU and did not wish to make demands of their own.

[14] In support of the applicant's contentions in this regard, the applicant attached four purported wage agreements signed by two purported NUM members and two purported non-unionised employees.

[15] While the applicant had offered to make remaining copies of the

individual contracts available on request by the Court, the reality is that it is not for the Court to request information from the applicant to substantiate its case in the founding papers, but for the applicant to meet the requirements of the case it wishes to demonstrate.

[16] Given the extent of the workforce, and the assertion that contracts of this nature were entered into with all employees in the Musina operation, it would appear, it would at the very least be expected that agreements of this nature would be provided in respect of all of the said employees.

[17] The applicant states that since the non-unionised members and AMCU represented approximately eighty percent of the employees in the applicant's employ, the applicant considered this agreement to be a majority agreement and extended the terms thereof to members of NUM.

[18] On 17 July 2023 NUM referred a mutual interest dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) concerning an increase in wages. The dispute remained unresolved on 7 September 2023 and a certificate of outcome was issued.

[19] On 19 September 2023, default picketing rules were issued by the CCMA following the matter being unresolved.

[20] On 18 September 2023, the applicant circulated a letter to all its employees advising that those who had signed the wage agreement were prohibited from partaking in the intended strike, and if employees partook in the intended strike, the back pay and increases that they had received would be recovered.

[21] On 20 September 2023, NUM gave notice of its members' intention to embark on a strike within 48 hours, because they had not reached consensus on annual substantive issues, including wage increases.

[22] NUM and its members commenced strike action on 22 September

2023.

[23] The applicant claims that certain unlawful conduct ensued in the course of the strike, apart from contending that the strike itself was unlawful because of the substantive wage agreement concluded with AMCU.

[24] The applicant's main contention in this regard is that the strike was unlawful for non-compliance with section 65 of the Labour Relations Act[1] (LRA) because a wage agreement was in place at the applicant's operations with the majority union and non-union members, which had been signed and/or agreed to by the majority of NUM's members, and who had received the benefits of the agreement. The applicant further contends that the agreement binds NUM's members and contains a peace clause which prevents strikes concerning wages during the currency of the agreement.

[25] NUM contends that the strike action embarked upon by its members was in compliance with Chapter 5 of the LRA. Moreover, NUM disputes any contravention of the picketing rules and unlawful or criminal conduct by its members.

[26] NUM emphasizes that the majority of the employees employed by the applicant are not members of any union. Moreover, NUM contends that AMCU is not a majority trade union at the workplace and as such does not enjoy the right to extend its collective agreement to employees that are not its members, whether such employees are non-unionised or members of another union, particularly the members of NUM. NUM denies the existence of a binding collective agreement on anyone, beyond the members of AMCU.

[27] NUM admits giving notice to embark on strike action and its members having gone on strike.

[28] As stated above, NUM disputes any unlawful action, including the

[1] Act 66 of 1995, as amended.

barricading of roads, assault and employees being intercepted on route to work.

[29] NUM's main averment is that the wage agreement has not been extended to its members as they are not party thereto and the relevant provisions of section 23 of the LRA are not applicable because AMCU, as conceded in the applicant's own founding affidavit, is not a majority trade union at the workplace.

[30] Specific reference was made to paragraph 20 of the applicant's founding affidavit where the applicant states as follows:
'The applicant's operations are largely non-unionised, with 60% of the workforce not part of a union, more than 20% members of AMCU and 15% of the First Respondent.'

[31] According to NUM, the applicant has confirmed in its own words that AMCU is not a majority trade union as envisaged by section 23 of the LRA.

[32] NUM contends that section 65 is not applicable to the particular facts of the matter.

<u>Analysis</u>

[33] Section 23 of the LRA states as follows:
'23.Legal effect of collective agreement
(1)A collective agreement binds-
(a)the parties to the *collective agreement*;
(b)each party to the *collective agreement* and the members of every other party to the *collective agreement*, in so far as the provisions are applicable between them;
(c)the members of a registered *trade union* and the employers who are members of a registered *employers' organisation* that are party to the *collective agreement* if the *collective agreement* regulates-
(i)terms and conditions of employment; or
(ii)the conduct of the employers in relation to their *employees* or the conduct of the *employees* in relation to their employers;

(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 binds 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*.

(2)A *collective agreement* binds for the whole period of the *collective agreement* every person bound in terms of subsection (1)(c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered *trade union* or registered *employers' organisation* for the duration of the collective agreement.' (own emphasis)

[34] In *Johannesburg City Parks & Zoo SOC Limited v South African Municipal Workers Union (SAMWU) and Others*[2] the Court stated as follows:

'[14]To the extent that reliance is placed on the Collective Agreement in contending that the intended strike action is prohibited, the starting point is that Section 23(2)(c) of the Constitution of the Republic enshrines the fundamental right to strike, which right is given effect to by the provisions of sections 64 to 68 of the LRA, which in turn provide the substantive limitations and procedural pre-conditions for the exercise of the right to strike and the employer's recourse to lock out[3].

[15]Aligned to the limitations in the strike provisions is that in accordance with the provisions of section 23 of the LRA, a collective agreement has a binding effect on the parties to that agreement, each party to that agreement, and the members of every other party to that agreement, in so far as the provisions are applicable between them.

[16]That the sanctity and primacy of collective agreements is to be preserved for the sake of the maintenance of peace in the workplace was long emphasised in *CUSA v Tao Ying Metal Industries and Others*[4], where the Constitutional Court held that:

[2] [2018] ZALCJHB 424; [2019] JOL 41303 (LC).

[3] *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another* 2012 (6) SA 249 (CC); [2012] 12 BLLR 1193 (CC); (2012) 33 ILJ 2549 (CC) at para 14.

[4] [2008] ZACC 15; [2009] 1 BLLR 1 (CC) at paras 55 and 56; See also *Ekurhuleni Metropolitan Municipality v The SA Municipality Workers' Union on behalf of workers* (2015) 36 ILJ 624 (LAC) at paras 25 and 26, where it was held that;

"[55]The right of every trade union and every employers' organisation and employer to engage in collective bargaining is entrenched in section 23(5) of the Constitution. The concomitant of the right to engage in collective bargaining is the right to insist on compliance with the provisions of the collective agreement which is the product of the collective bargaining process.

[56]Compliance with a collective bargaining agreement is crucial not only to the right to bargain collectively through the forum constituted by the bargaining council, but it is also crucial to the sanctity of collective bargaining agreements. The right to engage in collective bargaining and to enforce the provisions of a collective agreement is an especially important right for the workers who are generally powerless to bargain individually over wages and conditions of employment. The enforcement of collective agreements is vital to industrial peace and it is indeed crucial to the achievement of fair labour practices which is constitutionally entrenched. The enforcement of these agreements is indeed crucial to a society which, like ours, is founded on the rule of law."

[17]This Court has restated that in the scheme of the LRA and section 23 of the Constitution, the right to strike is by its nature not absolute and may justifiably be limited in certain situations. This must be so because a strike is not an end in itself. Rather, a strike is primarily a means to the end of an effective collective bargaining system in which workers are able ultimately to exercise power in order to influence the terms and conditions of employment[5].

[18]To the extent that the applicant sought to rely on the collective/settlement agreement, which it contend had effectively resolved the issues and the dispute which precipitated the notice of intention to strike, the relevant provisions of section 65 of the LRA (Limitations on right to strike or recourse to lock-out) provides that;

(1)No person may take part in a *strike* or a *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 a *lock-out* in respect of the *issue in dispute*.

"… Collective agreements are to be accorded primacy. In National Bargaining Council for the Road Freight Industry and another v Carlbank Mining Contracts (Pty) Ltd and another, this Court held that the purpose of s199 of the LRA, read together with s23(3) of the LRA, is to advance the primary object of the LRA, namely the promotion of collective bargaining at sectoral level and giving primacy to the collective agreements above individual contracts of employment…"

[5] *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* [2017] ZACC 3; (2017) 38 ILJ 831 (CC) at para 50.

(b)that person is bound by an agreement that requires the *issue in dispute* to be referred to arbitration;

(c)the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law;

(d)(i)…

(ii)…

(2)…

(3)Subject to a *collective agreement*, no person may take part in a *strike* or a *lock-out* or in any conduct in contemplation or furtherance of a *strike* or *lock-out* -

(a)if that person is bound by-

(i)any arbitration award or collective agreement that regulates the issue in dispute; or

(ii)…'

[35] It is apparent from the applicant's own papers that it concedes that AMCU is not the majority trade union in the workplace.

[36] The applicant has failed to substantiate an extension of the agreement between itself and AMCU to non-unionised employees and those members of NUM which it contends have entered into agreements in support of the agreement with AMCU.

[37] While the applicant attached four of the individual agreements as set out above, the individual agreements are a concession that the collective agreement between AMCU and the applicant was not extended to non-parties.

[38] NUM has accordingly demonstrated that the *rule nisi* ought not to have been granted because the collective agreement between the applicant and AMCU was not binding on them.

[39] As to the unlawful conduct alleged, the Court makes no findings in that regard, and when such reprehensible conduct does arise, it is a matter for law enforcement agencies to deal with.

[40] NUM and its members were accordingly under no prohibition to embark on strike action because they were not bound by a collective agreement that prohibits a strike in terms of section 65(1)(a) of the LRA.

[41] In the circumstances, the *rule nisi* ought not to have been issued and NUM has demonstrated that the *rule nisi* should certainly not be confirmed.

Costs

[42] The final consideration is costs.

[43] It is trite that in labour matters, costs do not follow the result[6].

[44] In order for costs to be granted the Court's judicial exercise of its discretion to award costs must be engaged and there must be a justification for the departure from the ordinary rule that costs should not be ordered. The dictates of fairness in terms of section 162 of the LRA and the constitutional and statutory imperatives that underpin it, must be considered[7].

[45] While NUM was called upon to oppose an interdict concerning unlawful strike action where the strike itself was not unlawful when considering sections 23 and 65 of the LRA, given the ongoing relationship between the parties, this is not a matter which calls for the Court to deviate from the default position above.

[46] In the premises, the following order is made:

Order

1.

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[6] See: *MEC for Finance: Kwazulu-Natal and Another v Dorkin NO and Another* [2007] ZALAC 34; [2008] 6 BLLR 540 (LAC) and *Zungu v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 1(2018) 39 ILJ 523 (CC).

[7] *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd and Others* (2021) 42 ILJ 2371 (CC); [2021] ZACC 41, specifically at paragraph 35, read *with Goba v Rand West City Local Municipality and Another* [2021] ZALCJHB 301; [2021] JOL 51406 (LC) specifically at para 30 and 31.

he *rule nisi* is discharged.

2.

here is no order as to costs.

T. Govender

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: C Higgs of Higgs Attorneys

For the respondent: Ms S Moyo

Instructed by: Mashabela Attorneys