REPUBLIC OF SOUTH AFRICA

Not Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J2251/11

In the matter between:

BMW SOUTH AFRICA **Applicant**

and

NUMSA obo MEMBERS **Respondent**

Heard: **28 January 2011**

Delivered: **14 February 2011**

Summary: Urgent application – interdicting a strike- prohibited by the provisions of National Bargaining Forum of the Automobile National Bargaining Council. Certificate of non resolution issued before the expiry of the extended 30 days period.

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application in terms of which the applicant seeks to interdict the planned strike of NUMSA which was supposed to have commenced on 18 October 2011. The substantive aspect of the notice of motion of the applicant reads as follows:

'2.1 declaring the strike action NUMSA and its members intended to embark upon with effect 18 October 2011 and in terms of a Notice to Strike dated 11 October 2011 ("the notice") to be unlawful and unprotected:

2.2 declaring participation by NUMSA's members in the strike action referred to in this Strike Notice, with effect from 18 October 2011 and/or any date thereafter to be unlawful and unprotected:

2.3 interdicting and restraining NUMSA and its members from participating in the strike action from 18 October 2011 and/or any date thereafter:

2.4 interdicting and restraining NUMSA and the members from promoting, or taking any action to promote, the strike action as envisaged in the Strike Notice;

2.5 declaring the Certificate of Outcome, issued by the CCMA on 11 October 2011 (under case number G a TW 10780 – 11) to be invalid;

2.6 alternatively to the relief in paragraph 25 above, interdicting and refraining NUMSA and its members from participating in the protest action, pending a Review Application to be filed to have the Certificate declared invalid.'

[2] Subsequent to the postponement of the matter on the first day of the hearing, the parties have now filed all their respective papers. It was thus agreed that in light of that, the issue of urgency would not arise. It is for that reason also that whilst the applicant sought an interim order the matter was to be considered on the basis of a final determination.

<u>Background facts</u>

[3] It is common cause that the parties are bound by the National Bargaining Forum agreement ("the NBF agreement") concluded at the Automotive National Bargaining Council which is binding on both parties for a period of three years ending, 30 June 2013. The relevant clause of the NBF for the purpose of this judgment is clause 8.3 which reads as follows:

'NO FURTHER CLAINS UNDERTAKING

1. *The parties undertake that they will make no further claims/demands, either at industry or company/plant level, for the duration of this agreement in respect of substantive wage and/or benefit on – cause I term covered by this Agreement.*

The parties are, however, entitled to raise proposals, either at the industry or at company/plant level on substantive and/or benefit items, which will result in further on – cost and which are not covered by disagreement, for discussions and/or consultation and/or negotiation, subject to the following:

8.3.1 The party on whom the proposal is served is obliged to engage in bona fide discussion, consultation and/or negotiation on the proposal.

8.3.2 The parties will, in the event of the into action becoming deadlocked, referred the issue to expedited third party facilitation in an endeavour to reach agreement.

8.3.3 These interactions will take place in a collaborating manner without any corporation being embark upon a either party.

Should the parties serving the proposal believe that the other party is not engaging in good faith, then the first party is entitled to demand that the second party is alleged that the conduct is subject the arbitration. The arbitrator will be empowered to, if he/she find they said they'd allegation to be true, compared the second party to engage in good faith in terms of the provisions of this clause.'

[4] It is also common cause that on 11 July 2011, NUMSA submitted a demand requiring payment by BMW of the following: "*A transport allowance of R3500.00 per employee per month for all of the hourly employees employed at the BMW South Africa (Pty) Ltd-Rosslyn plant.*"

[5] BMW rejected the demand and contended that it was unlawful because it was in breach of the provisions of clause 8.3 of the NBF agreement. The essence of rejecting the demand was that it was a claim for an additional remuneration and thus a demand in wage increase.

[6] On August 2011, NUMSA, addressed a letter to BMW, informing it that it was, 'formally declaring a dispute' concerning its demand. In light of this,

NUMSA required that a mediator be appointed in terms of clause 8.2.2.1 of the NPF agreement.

[7] During August 2011, the parties engaged in discussions and shared their different views about the matter, including picketing which members of NUMSA wanted to embark upon. In this regard, BMW expressed its view in a letter dated 30 August 2011, which reads as follows:

> "Dear Mike
>
> We refer to a demand for payment of a "transport allowance" of 3,500, per employee per month, for all hourly rated associates engaged by the company at it Rosslyn facility.
>
> In addition, you have indicated that it is your intention to pursue your demand on the basis that it constitutes a dispute of interest, in accordance with the process provided for in Clause 8.2.2 of the NBF Agreement. You have called for the appointment of a mediator for this purpose.
>
> In this regard the company records the following:
>
> 1. "The demand to have made, upon a proper construction, is in fact one for an increase in the remuneration of hourly rated employees.
>
> 2. As such, it is prohibited in terms of clause 8.3 of the NBF Agreement.
>
> 3. In addition, and in any event, and even if the demand does not constitute a "patient substantive wage and/or benefit on cost term" covered by the NBF agreement (which is denied) your union is precluded, in terms of clause 8.3 of the NBF Agreement, from embarking on a course of action designed to coerce the Company to accede to the demand. As this is clearly the intended consequence of your seeking to pursue the mediation process provided for in clause 8.2.2 of the NBF Agreement, recourse to such procedure is equally prohibited in terms of the clause in question.
>
> 4. The Company is therefore satisfied that you are precluded from pursuing the cause of action which you have proposed, and is equally satisfied, for this reason, that not purpose is to be served by participating in the mediation process you have suggested.

5. It is the Company understanding of your position, that you do not accept the Company's stance as outlined above.

6. A dispute therefore exists pertaining to the interpretation and application of clause 8.3 of the NBF Agreement.

7. This communication is intended:

7.1 To record the existence of this dispute; and

7.2 To propose that the meeting, which was scheduled for tomorrow (31 August 2011) be utilised for the purples sits contemplated in clause 8.2.1 of the NBF Agreement

8. The Company will submit its proposals to you at the meeting regarding the matters dealt with in Clause 8.2.1, with a view to progressing the proposed arbitration process in relation to the dispute."

[8] Following the above letter, a meeting was held on 31 August 2011, where BMW affirmed its position as stated in the letter. NUMSA on the other hand, indicated that it required an opportunity to respond formally to the above letter. It was then agreed that NUMSA would be afforded the opportunity to respond to the letter and further that the time frames for the referring the matter to arbitration in terms of the provisions of clause 8.2.1 of the NBF agreement would be waived.

[9] On 1 September 2011, NUMSA referred the dispute to the CCMA categorising it in the referral form as follows: 'Refusal by the employer to agree on (sic) the union's demand- transport allowance*.'*

[10] On 9 September 2011, BMW filed an application seeking a ruling that the CCMA did not have jurisdiction to conciliate the dispute. It is apparent that the CCMA never made any ruling regarding the issue of jurisdiction. A conciliation meeting was however held on 16 September 2011. At that meeting, the parties agreed as follows:

1. The life of the conciliation will be extended by 30 days in terms of section 135(2) of the Labour Relations Act, 66 of 1995 with effect from 16 September 2011.

2. The Applicant's Representative will participate in facilitation in accordance with clause 8.3 of the NBF agreement.

3. In the event that the parties do not settle the matter through facilitation conciliation, the Applicant will request the CCMA to issue a certificate of non- resolution.

4. Should the Applicant's endeavour upon a strike action over the dispute, the Applicant will give the Respondent five working days written notice.

5. Should the Respondent attempt to interdict such strike action it will provide the Applicant's attorneys of record with two working days notice . . ."

[11] Thereafter, NUMSA addressed a letter to BMW wherein it proposed a meeting for 23 September 2011 to discuss the appointment of a mediator. NUMSA further complained in the same letter that BMW was obstructing the process, which was denied.

[12] The parties held a meeting on 29 September 2011, which had been requested by BMW. The discussion during that meeting centred on whether NUMSA in its demand wanted its members to be treated the same way as salaried employees.

[13] According to BMW, the meeting ended again without any clarity as to the nature of the demand made by NUMSA. BMW further says that it communicated in writing with NUMSA regarding how the matter had unfolded at that stage and further suggested that the discussions between the parties should resume on 11 October 2011.

[14] BMW followed up the possibility of a meeting on 11 October 2011 by telephone contact to NUMSA on 7 October 2011. On the same day, 11 October 2011 NUMSA issued a notice to BMW, which reads as follows:

"NUMSA DEMAND

1. That the employer makes payment of a transport allowance to hourly paid employees on the same basis as that applied to transport (car and fuel allowance) provided by the employer to salaried employees entitled to such allowances."

[15] In terms of the submission and argument, BMW contends that NUMSA is not entitled to embark on a strike action because the true nature of the dispute raised is one, centring on the proper interpretation and application of clause 8 of the NBF agreement. It was further submitted that the dispute as raised by NUMSA is one governed by the NBF agreement and should for that reason be resolved through the mechanisms of the NBF agreement. In its heads of argument BMW summarises its contention as follows:

60.1 The demand for the "transport allowance" is one relating to an increase in the wages of the hourly rated employees on whose behalf, the demand is made, and as such, constitute a "substantive wage and/or benefit on-cost item" covered by the NBF agreement;

60.2 NUMSA cannot escape this consequence by conveniently in seeking to refrain to it as "transport allowance." It is plainly nothing other than a wage increase.

60.3 NUMSA is accordingly precluded by the provisions of clause 8.3 of the NBF agreement from (pursuing) this demand.

60.4 Even if the demand for "transport allowance" is not a "substantive wage and/or benefit on- cost item", covered by the agreement (which is denied):

60.4.1 NUMSA, fully aware of the provisions of the NBF agreement regulating disputes of this nature, has embarked upon a deliberate forum shopping exercise, designed to place NUMSA in possession of a certificate of non resolution issued by the CCMA, which may be utilised by NUMSA for the purpose of coercing BMW to (accede) to its demand;

60.4.1 This conduct is equally prohibited by the provisions of clause 8.3 of the NBF agreement."

[16] It was further argued on behalf of BMW that the demand of NUMSA was in essence the same as the original demand. In other words the reformulated demand was an on–cost item and therefore NUMSA was prohibited from striking based on that demand.

Evaluation and analysis

[17] As far as I can understand it, the following are common cause facts:

17.1 The agreement concluded at the CCMA is a binding collective agreement.

17.2 NUMSA approached the CCMA and obtained the certificate of outcome prior to the expiry of the 30 days as stipulated in the collective agreement.

17.3 The initial dispute as was presented by NUMSA was impermissible in terms of the NBF agreement.

17.4 NUMSA through its attorneys of record clarified the nature of its dispute.

[18] The first issue to consider in this matter is whether NUMSA has in the process leading to issuing BMW with the notice of intention to strike complied with the provisions of section 64 of the LRA. Section 64 of the LRA provides for the procedure to be followed if the strike is to be lawful and protected. The first requirement in seeking to ensure that the strike action is protected is that the dispute of interest must have been referred to the CCMA or a bargaining Council with the necessary jurisdiction. The dispute must have been conciliated and a certificate of non-resolution issued or 30 days having lapsed since the date of the referral whichever occurs first.[1]

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[1] The relevant part of section 64 for the purposes of this judgment reads as follows:

"**64. Right to strike and recourse to lock out**

(1) Every employee has the right to strike and every employer has recourse to lock out if-

[19] The issue that always arises in matters of this nature usually turns around the status of the certificate of non resolution. A similar situation arose in *South African Post Office Ltd v Moloi N.O and others.*[2] In that case, the applicant sought to review and set aside on an urgent basis the certificate of non resolution that had been issued by the CCMA. The court in refusing to review the certificate aligned itself and quoted with approval what Van Niekerk J said in *Bombadier Transportation (Pty) Ltd v Mtiya NO and Others*[3] when he said:

> "In other words, a certificate of outcome is no more than a document issued by a commissioner stating that on a particular date, a dispute referred to the CCMA for conciliation remained unresolved. It does not confer jurisdiction on the CCMA to do anything that the CCMA is not empowered to do, nor does it preclude the CCMA from exercising any of its statutory powers. In short, a certificate of outcome has nothing to do with jurisdiction. If a party wishes to challenge the CCMA's jurisdiction to deal with an unfair dismissal dispute, it may do so, whether or not a certificate of outcome has been issued. Jurisdiction is not granted or afforded by a CCMA commissioner issuing a certificate of outcome. Jurisdiction either exists as a fact or it does not.'

(a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and-

(i) a certificate stating that the dispute remains unresolved has been issued; or

(ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that-

(b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless-

(i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or

(ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or

[2] unreported case number J142/11..
[3] (2010) 8 BLLR 840 (LC) at paragraph 15.

[20] In the present instance, there is no dispute that the applicant referred the dispute to the CCMA for conciliation. The conciliation process was extended for a further 30 days period for the parties to engage in a facilitation process. In my view, there is nothing in the agreement concluded at the CCMA that says that any of the parties could not approach the CCMA for the certificate of outcome until the expiry of the extended 30 days period. In fact the agreement makes reference to sections 65 of the LRA. The facts before this Court shows clearly that the conditions precedent for approaching the CCMA and requesting the certificate of non resolution were satisfied.

[21] The parties had in this regard agreed to extend the life of the conciliation process for a further 30 day period. They further agreed that that is the way to settle the matter by means of a third-party facilitation and NUMSA would be entitled to approach the CCMA for the certificate of non resolution.

[22] The applicant also seeks to interdict the strike on the basis of non-compliance with the provisions of section 65 of the LRA. Section 65 of the LRA reads as follows:

65. Limitations on right to strike or recourse to lock-out

‘(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 lock-out in respect of the issue in dispute;

(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;

(d) that person is engaged in-

(i) an essential service; or

(ii) a maintenance service. [13]

(2) (a) Despite section 65(l)(c), a person may take part in a strike or a lock-out or in any conduct in contemplation or in furtherance of a strike or lock out if the issue in dispute is about any matter dealt with in sections 12 to 15.

(b) If the registered trade union has given notice of the proposed strike in terms of section 64(l) in respect of an issue in dispute referred to in paragraph (a), it may not exercise the right to refer the dispute to arbitration in terms of section 21 for a period of 12 months from the date of the notice.

(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) any determination made in terms of section 44 by the Minister that regulates the issue in dispute; or

(b) any determination made in terms of the Wage Act and that regulates the issue in dispute, during the first year of that determination.'

[23] In my view, the question of whether there has been compliance with the provisions of section 65 of the LRA or otherwise by NUMSA has to be determined in the context of the collective agreement concluded by the parties at the CCMA conciliation meeting. It is further my view that the true nature of the dispute as subsequently clarified does not fall foul of the provisions of section 65 of the LRA. The true nature of the dispute is that which was explained after 16 September 2011.

[24] I am also of the view that in the true nature of the dispute is not in conflict with the provisions of clause 8.3.3 of the NBF agreement. It does not subject itself to the issue of interpretation and application as contended by BMW. It is apparent from the reading of that clause that it could never have been their

intention to take away the right to strike by means of that clause. What is clear in my view is that coercion is only prohibited whilst the parties are still engaged in the facilitation process and not once the facilitation had failed or where a deadlock has been reached. In other words, the question envisaged under that clause applies during the facilitation process prior to failure of the facilitation. It does not in other words, apply where there is a deadlock or where facilitation had for whatever reason failed. In short, for BMW to succeed, it has to show that it has a right not to be faced with an unprotected or unlawful strike by the members of the NUMSA. BMW has to do that by showing that the intended strike does not comply with both the procedural and/or substantive requirements for a protected strike as set out in as set out in sections 64 and 65 of the LRA. BMW has failed in my view to show that the planned strike action by NUMSA does not comply with the requirements of sections 64 and 65 of the LRA.

[25] In light of the above, I am of the view that the applicant has failed to make out a case warranting the issuance of an interdict against the strike planned by NUMSA. I do not, however, believe that it would in the circumstances of this case allow costs to follow the results.

[26] In the premises, the applicant's application is dismissed with no order as to costs.

Molahlehi J

Judge of the Labour Court.

APPEARANCES

For the APPLICANT: Gideon van der Westhuizen from MacRoberts Attorneys

FOR THE RESPONDENT: R Edmonds of Edmonds Attorneys