REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Case no:P470/11

In the matter between:

GENERAL MOTORS OF

SOUTH AFRICA (PTY) LTD Applicant

and

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA obo MEMBERS

EMPLOYED BY THE APPLICANT **First Respondent**

THE PERSONS REFERRED TO IN SCHEDULE "1"

TO THE NOTICE OF APPLICATION Further **Respondents**

Heard: **15 November 2011**

Delivered: 18 November 2011

JUDGMENT

BHOOLA J

Introduction

[1] The applicant seeks confirmation of a *rule nisi* granted by Cele J on 28 September 2011 in the following terms :

1.1. Declaring that the first respondent's members are not entitled to embark upon strike action in respect of the dispute which formed the subject matter of the first respondent's referral to conciliation under Case No. ECPE4345-10.

1.2. Interdicting and restraining the first and further respondents from embarking upon strike action, or any conduct in furtherance or contemplation of such strike action in respect of the dispute concerning the payment of a transport allowance.

Background to the dispute

[2] It is common cause that the first respondent ("NUMSA") has issued a strike notice in respect of the following demand: "the employer to increase transport allowance from R40 to R200 a week for members/operators". The demand is for an across the board increase lor all the further respondents ("the members"), irrespective of whether they use public or private transport or whether they incur transport costs at all.

[3] it is further common cause that the respondents' entitlement to strike is contingent on the interpretation of Clause A.8.3 of the National Bargaining Forum ("NBF") agreement, which is a collective agreement as contemplated by section 213 of the Labour Relations Act 66 of 1995 ("the Act"). The NBF was concluded between the parties in August 2010 and is operative until 30 June 2013. Clause A.8.3 reads as follows :

"8.3 NO FURTHER CLAIMS UNDERTAKING

The parties undertake that they will make no further claims/demands, either at industry or at company/plant level, for the duration of this Agreement, in respect of substantive wage and or benefit on-cost items covered by this Agreement.

The parties are however, entitled to raise proposals, either at 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 this Agreement, for discussion and/or consultation and/or negotiation, subject to the following :

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

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

8.3.3. These interactions will take place in a collaborative manner without any coercion being embarked upon by either party.

Should the party 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's alleged bad faith conduct be subjected to arbitration. The arbitrator will be empowered to, if he/she finds the bad faith allegation to be true, compel the second party to engage in good faith in terms of the provisions of this clause.

The costs of each facilitation will be shared equally between the parties unless otherwise agreed".

[4] During 2009 the parties were forced to consider a change to the previous arrangement in respect of the transport allowance. The previous arrangement was one between the applicant and the Algoa Bus Company in terms of which employees utilising public transport were entitled to purchase subsidised bus tickets. The bus company had provided a dedicated bus service at the end of each shift for the members who relied on public transport (about 50 to 60% of the members). However, when the Department of Transport discontinued the subsidies it provided to the Algoa Bus Company, the arrangement between the bus company and the applicant came to an end. NUMSA and the applicant then agreed on a system in which ail employees received a wage increase of R40.00 per week. The specific terms of the agreement between the parties was as follows :

*Record **of Agreement** - introduction of **Transport** Allowance for*

Hourly employees level 1to4 :

Background:

As a result of changes required by the Department of transport relative to the provision of transport through the services of Algoa Bus Company, GMSA is no longer in a position to continue with the current transport arrangement.

Proposal:

In an effort to alleviate the negative consequences that this may impose on hourly employees skill levels 1-4, the company proposes the introduction of a Travel Allowance of R40.00(forty rand) which will be payable to all eligible hourly employees on a weekly basis as part of their normal wages.

Implementation:

Following discussions held between the company and the Shop Steward Council it has been agreed that:

1. *Effective Monday 6 April 2009, all hourly employees level 1 to 4 will receive*

a weekly travel allowance of R40.00 (this allowance will be taxed at the marginal tax rates as prescribed by SARS).

As a gesture of goodwill the company will affect an advance payment of R30.00 (thirty) payable to eligible employees on Tuesday 7 April 2009. This is to assist with week of 6th-9th April 2009. This amount will be deducted from the following week's payroll.

[5] During April 2010 NUMSA indicated an intention to demand that this R40.00 travel allowance should be increased to R200.00 per week. The applicant, relying on the "no claims" clause of the NBF, disputed NUMSA's entitlement to raise this demand but expressed a willingness to apply the agreed annual wage increase to the travel allowance component. This proposal was rejected by NUMSA. Whilst these discussions were continuing the 2010 NBF Agreement was concluded.

[6] Towards the end of 2010 NUMSA gave notice of its termination of the

[7] On 23 September 2011 NUMSA referred its demand for the increased travel allowance to increase to the Commission for Conciliation, Mediation and Arbitration ("CCMA") as a mutual interest dispute. Over the course of the meetings which followed NUMSA confirmed that its members were not prepared to consider the reintroduction of any form of bus coupon arrangement to replace the travel allowance component of their weekly wages. It further confirmed that all the further respondents <u>regardless of whether they utilised public transport or not</u>,[1] insisted on the increased travel allowance.

<u>Is the strike protected?</u>

[8] The only issue for determination is whether the strike is protected by sections 64 and 65 of the Act. This is contingent on determining whether the demand for an increased travel allowance is in substance a wage demand. If so, the applicant would have shown a clear right to the protection sought, on the authority of the recent *BMW* decision of the LAC cited by the applicant as discussed below.

[9] Turning to the provisions of the Act it is clear that section 65(1)(a) provides that "no person may take part in a strike or a lockout...if..that person is bound by a collective agreement that prohibits a strike...in respect of the issue in dispute...". Mr Wade, appearing for the applicant, relied on *Gillett Exhaust Technology (Pty) Ltd t/a Tenneco v National Union of Metalworkers of South Africa on behalf of Members and another* (2010) 31 *ILJ* (LAC)

[1] Counsel's emphasis.

which makes it clear that "[s]ection 65(1)(a) of the Act is clear : if there is a collective agreement between the parties that specifically provides that neither of the parties may participate in a strike or lock-out or any conduct in contemplation or furtherance therein in respect of a specified issue in dispute, then there can be no strike or lock-out about that issue".[2] Section 65(3) (a) (i) also prohibits strike action by a person who is bound by a collective agreement that regulates the issue in dispute. Mr Wade submitted that both provisions serve to prohibit the strike action contemplated. Firstly, a proper reading of the

"no claims" clause prohibits a strike in relation to an employee's remuneration, and secondly the collective agreement plainly regulates the issue of remuneration within the meaning of section 65(3) (a) (i).

[10] Mr Wade submitted that on a proper assessment of the respondents' demand it is no more nor less a demand for increased remuneration. It is common cause that the amount of R800.00 per month is sought for ail NUMSA members without any qualifying criteria in respect of transport needs, and it is an arbitrarily determined amount not linked to actual transport costs. Its implementation will mean that every single hourly paid employee will have their monthly income increased by this amount. For those who do not incur transport expenses it represents a pure remuneration increase. It is in substance a wage demand.

[11] Mr Le Roux submitted that the only issue for determination is whether it is a genuine demand for a travel allowance. In this regard he submitted that the demand must be understood in the historical context as it did not arise in a vacuum. The present demand for an increase mirrors the structure of the past transport allowance in that it was (a) a weekly amount (b) paid across the board to all hourly paid employees (c) over and above their hourly remuneration. The respondents do not seek therefore to introduce a series of negotiations outside the ambit of the NBF but simply to increase the amount involved to ensure that it is more realistic. Moreover, the applicant cannot now contend that the label is spurious or obtuse in that it labelled the R40.00 historically as a "travel allowance." It does not by any means represent payment for services rendered and cannot therefore be considered to be remuneration. It is an amount paid to offset travel costs and its distribution across the board (as has always been the case) does not render it a pure wage demand. Lastly, the amount was pitched at a realistic level and it cannot be argued on this basis that it was not a genuine amount to ameliorate the costs incurred by employees in travelling to work.

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2 At para [13],

[12] Mr Le Roux did not dispute that not all of the NUMSA members actually incur transport costs. He submitted however that limiting the allowance to those employees who incur transport costs prevents all the employeesfrom having an option to secure better and alternative means of travel (for instance by forming a car pool with other employees or buying a second hand car). In his words, the denial of the demand amounts to sentencing the members to remain pedestrians in perpetuity (it appears to be common cause that a number of the members live in close proximity to the applicant and choose to walk to work). The respondents are moreover not amenable to reverting to a coupon arrangement or subsidised transport as this would not afford them the opportunity to improve the quality of their lives. The demand therefore is an across the board demand and the respondents do not seek to differentiate between the members on the basis of those who need or use transport, public or otherwise.

[13] It is trite that irrespective of the form in which it is articulated (i.e. a travel allowance) this court is empowered to determine what the substance of the demand is. [3] The LAC has further cautioned against allowing parties to 'convert' justiciable issues into disputes in respect of which strike action is permissible by changing the nature of the demand as this would allow "the tail to wag the dog" : *Ceramic Industries Ltd t/a Betta Sanitary Ware v NCBAWU (2)* (1997) 18 *ILJ* 671 (LAC) at 678. It does not avail the respondents to argue that because the term "transport allowance" is not referred to in the NBF it is something in respect of which they can make a demand. The NBF does not expressly refer to a range of entitlements that can potentially be claimed. The tail cannot wag the dog. If the demand, properly construed, amounts to a claim for increased remuneration, a strike is prohibited by reason of the provisions of both sections 65(1) (a) and 65(3) (a) (i) of the Act.

[14] In the recent *BMW*[4] decision the LAC reflected on the interpretation of Clause A.8.3 in the context of an almost identical demand. NUMSA had initially demanded a "transport allowance of R3500 per employee per month for all hourly paid employees employed by BMW South Africa (Pty) Ltd - Rosslyn plant". The LAC, as per Landman AJA noted, albeit in an *obiter* remark, that it was "common cause that this demand was an impermissible one by virtue of the undertaking in the opening paragraph of Clause A.8.3 and could not found a protected strike".

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3 See *inter alia Coin Security Group (Pty) Ltd v Adam & others* [2000] 4 BLLR 371 (LAC).
4*BMW South Africa (Pty) Ltd v NUMSA oho Members,* unreported decision of the LAC under case number JA71/2011.

[14] NUMSA's demand in present matter is formulated in similar terms. However in *BMW* the initial demand was amended and on the basis of the amended demand the strike was held to be protected. The LAC approached the matter as follows:

> "The first question to be considered is whether the initial demand and the demand as clarified on 14 September 2011 amounts to one and the same thing. To my mind there is a substantial difference between the two. The initial demand was that every hourly paid employee be paid a transport allowance regardless of whether the employee used transport, and if so, the nature of the transport. The clarified demand makes it clear that a transport allowance is not demanded for every hourly paid employee but only those hourly paid employees who would be entitled to such an allowance had they been salaried employees, it is recorded in the founding affidavit that many salaried employees do not qualify for a car allowance". [5] The LAC held that the strike was protected on the basis of the clarified demand, which was as follows : "[t]hat the employer make payment of a transport allowance to hourly paid employees on the same basis as that applied to transport (car and fuel allowances) provided by the employer to salaried employees entitled to such allowances".

[15] This judgment is on all fours with the present matter except for the clarified or amended demand. The key difference between the two demands, Mr Wade submitted, is that what was being demanded in *BMW was* an actual transport allowance for those NUMSA members who had transport needs and who would have qualified for such an allowance in accordance with the policy applied to salaried employees. This was the demand that was referred to conciliation and on the basis of which the employees were permitted to strike. This is in my view a critical distinction, in the present case although the respondents draw an analogy with team leaders, they have not formulated their demand to claim the same or similar benefits as afforded to team leaders. The respondents moreover do not seek to be placed in the same position as team leaders but appear to have cited them as a point of comparison during the negotiations. In any event, as was submitted by Mr Wade and was stated in the founding affidavit, team leaders are in fact dealt with differently - they do not receive a travel allowance but have the option of participating in a motor vehicle lease scheme or increasing their monthly remuneration to an equivalent value

[16] It is trite that in order to obtain a final order the applicant must establish: a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy. The applicant must establish the

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5 Counsel's emphasis.

existence of a clear right as a matter of substantive law and must do so on a balance of probabilities. The respondents do not appear to oppose the matter on the basis of any other ground other than whether the applicant has a clear right to the relief sought.

[17] Having terminated the travel allowance policy, the respondents currently have no entitlement to the R40 00 and hence a demand for an <u>increase</u> is in my view misplaced. However, this is not the issue before me nor am I required to determine whether on the basis of the quantum sought it can be presumed to be a genuine travel allowance demand. It is trite that to qualify for a transport allowance at the very least certain qualifying criteria must exist, least of all that the members do incur transport costs or have transport needs. For those members who do not require or have transport, the demand as currently formulated constitutes in substance a demand for additional remuneration and is therefore impermissible. The intended strike on this demand would, in respect of those members therefore, offend the provisions of 65(1) (a) and 65(3) (a) (i).

[18] Since none of the other grounds for relief were seriously in issue it is appropriate on this basis to confirm the *rule nisi.* There were no submissions that this is an instance where the interests of fairness would not justify the award of costs. However I do not consider an order of costs to be appropriate given the continuing relationship between the parties as it will serve merely to exacerbate existing tensions.

<u>Order</u>

[19] Therefore, I make the following order:

1. The *rule nisi* is confirmed.
2. There is no order as to costs.

BHOOLA J
Judge of the Labour Court

APPEARANCES
APPLICANT: R B Wade SC

Instructed by Chris Baker and Associates.

FIRST and FURTHER RESPONDENTS:F Le Roux, Francois le Roux attorneys