



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO J 658 /14

In the matter between:

VANACHEM VANADIUM PRODUCTS (PTY) LTD

APPLICANT

and

NATIONAL UNION OF METALWORKERS OF SA

1ST RESPONDENT

THE EMPLOYEES LISTED IN ANNEXURE A

**2ND TO FURTHER
RESPONDENTS**

Date heard: 9 May 2014

Judgment delivered: 12 May 2014

Summary: Application to interdict strike on basis *inter alia* that union's demands do not concern matters of mutual interest. Meaning of phrase 'matters of mutual interest' in definition of 'strike' in s 213 of LRA. Role of court in assessment of what are contended to be demands that do not concern matters of mutual interest.

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an urgent application in which the applicant seeks to interdict a strike called by the first respondent (the union). The matter initially served before this court on 27 March 2014 when by agreement, the application was postponed to 9 May 2014 in order to permit an exchange of affidavits. In essence, the applicant contends that the demands made by the union on behalf of its members are not demands in support of which a protected strike can be called and that the intended strike action is accordingly and protected. The application raises an issue of importance and some complexity. It has been difficult within the time constraints dictated by urgency to prepare as complete a judgment as I would have liked, but these are my brief reasons for the conclusion to which I have come.

The facts

- [2] The material facts are not in dispute. The union represents the majority of the applicant's employees. On 5 December 2012, the applicant and the union concluded what has been referred to as the strike settlement agreement. In clause 1, the parties agreed that all conditions of employment contained in annexure A to the agreement would be determined and based on the terms and conditions of the MEIBC main agreement. (The MEIBC is the bargaining council for the metal and engineering industry, and serves generally to regulate terms and conditions of employment in the industry.)
- [3] Clause 37 (1) of the main agreement in effect establishes the bargaining council as *'the sole forum for negotiating matters contained in the Main Agreement'*. In *CBI Electrical African Cables (Pty) Ltd v NUMSA & others* (J336/14) Lagrange J

recently held that the exclusivity of central bargaining reflected in clause 37 (1) extends only to those matters contained in the main agreement; it is not a general prohibition against collective bargaining at that level, nor is it a bar to union demands to negotiate matters not contained in the main agreement at plant level. What matters is whether the demand in question is sufficiently closely related to an issue regulated by the main agreement to preclude plant level bargaining over it. In other words, the main agreement does not provide that the bargaining council is a single forum for bargaining all matters affecting terms and conditions of employment – the exclusivity of bargaining at central level is specifically limited to those matters “contained in the main agreement”.

- [4] The strike settlement agreement concluded between the parties in December 2012 provides amongst other things, the following:

‘1.1 Linkage with the Main Agreement

The parties agree that variation of all conditions of employment contained in Annexure A shall be determined and be based on the terms and conditions of the signed MEIBC Main Agreement Settlement Agreement.

The above linkages shall binding on the parties and remain in force until such time that the parties to the MEIBC have concluded the process of establishing the House Agreement Chamber which shall facilitate the incorporation of the House Agreements into the Main Agreement. ’

It is common cause that the bargaining council has not yet established a House Agreement Chamber.

- [5] In May 2013, the union submitted a number of demands to the applicant. The applicant’s refusal to accede to these demands became the subject of a referral of a dispute to the bargaining council. On 30 January 2014, the bargaining council issued a certificate of outcome to the effect that the dispute remained unresolved.

[6] There are five demands that the applicant seeks to impugn in these proceedings. (There does not appear to be any dispute in relation to a sixth demand referred to in the papers, in terms of which the union seeks preference for retrenched employees in the event of future employment opportunities.) The demands are as follows:

- (a). The 'insourcing' of jobs previously outsourced (The demand is expressed in the following terms: 'We propose the employer in source or permanent jobs in the company e.g. HRM, House Keeping, Security and others')
- (b). That the employer 'should provide transport from and to work or home and pay it 100%'.
- (c). The appointment of full-time shop stewards (one full-time shop steward, one full-time health and safety shop steward and 30 days' time off per shop steward per annum with unlimited time off for trade union office bearers).
- (d). Payment of a risk allowances, being a heat allowance, chemical allowance and dust allowance.
- (e). That the employer should train not less than five artisans per term.

[7] The basis on which the interdict sought can be simply stated. Although the founding affidavit seeks to make out a case that the demands are unfair and unreasonable, the applicant submitted that the disputes were regulated by the main agreement and strike settlement agreement and thus not capable of being the subject of protected strike action, and/or that the subject of the demands did not constitute 'matters of mutual interest' for the purposes of the definition of a 'strike' in the LRA. The definition of "strike" in section 213 of the LRA reads as follows:

'strike' means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same

employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee ...’

[8] Section 65 (1) of the Act provides:

‘No person may take part in a strike or a lockout or in any conduct in contemplation or furtherance of a strike or lockout if –

(a) that person is bound by a collective agreement to that prohibits a strike or lockout in respect of the issue in dispute’

[9] The founding affidavit foreshadowed a case to the effect that the union’s demands were unfair, unreasonable and not conducive to functional collective bargaining. In argument, the focus was somewhat different. In broad terms, the applicant contends that the demands reflected in (a) and (c) in paragraph 6 above do not concern matters of mutual interest, and that those reflected in (b), (d) and (e) are matters that are regulated by collective agreement, in particular, the main agreement read together with the strike settlement agreement.

Analysis

[10] The phrase ‘matters of mutual interest’ is not defined in the LRA. In the 1956 Act, the same phrase appeared in s 24(1), which listed those matters which could lawfully be included in an industrial council agreement. The phrase appeared as a catch-all at the end of a list of some 27 specified topics, and provided that industrial council agreements could include ‘*any other matter whatsoever of mutual interest to employers and employees*’. But the phrase has a much longer pedigree. An interpretation adopted more than 70 years ago under the 1937 Industrial Conciliation Act remains influential, and is of particular significance to the present matter. In *Rand Tyres & Accessories v Industrial Council for the Motor Industry (Transvaal)* 1941 TPD 108 at 115, the court held:

‘Whatever can be fairly and reasonably regarded as calculated to promote the well-being of the trade concerned, must be of mutual interest to them; and

there can be no justification for restricting in any way the powers which the Legislature has been the greatest pains to frame in the widest possible language (own emphasis).'

- [11] This interpretation, and especially the reference to the well-being of the trade, must necessarily be viewed in its context, i.e. a definition of competent bargaining topics for industrial councils. In terms of the labour legislation that applied in South Africa for most of the 20th century, industries were conceived of as a class of productive work or manufacture; a collective enterprise in which employers and employees were associated (see *R v Sidersky* 1928 TPD 109). In this sense, 'matters of mutual interest' means no more than what is of mutual advantage or benefit to employers and employees, and therefore for the industry as a whole.
- [12] Unlike all of its predecessors, the LRA does not employ the term 'matters of mutual interest' in relation to the competencies of sectoral level councils (renamed 'bargaining councils'). It is employed in a very different context, ultimately to define the scope of collective bargaining under the Act, the statutory dispute resolution system, and the scope of legitimate industrial action. This much is apparent from the use of the term in the statute. 'Collective agreements' are defined in s 213 to mean written agreements '*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 ...*'. In s 134, the Act provides generally that disputes about matters of mutual interest may be referred to the CCMA. The same formulation is to be found in s 51, in relation to disputes about matters of mutual interest that arise with the registered scope of the bargaining council. I have already mentioned the definition of 'strike' in s 213, which refers to concerted refusals to work for the purpose of remedying a dispute in respect of any matter of mutual interest.
- [13] Initially at least, this court afforded a wide definition to the term 'matters of mutual interest.' In *De Beers Consolidated Mines Ltd v CCMA & others* [200] 5 BLLR

578 (LC), Pillay J noted that the term ‘matters of mutual interest’ is not defined in the Act and must therefore be interpreted literally to mean any issue concerning employment. In *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building and Allied Workers Union & others* (1997) 18 ILJ 716 (LC), the court referred to the interpretation in the *Rand Tyres* judgment and appeared to place some emphasis on matters of mutual interest as matters calculated to promote the well-being of the trade concerned. The notion of mutual interest as relating to the well-being of the enterprise found its strongest expression in *Itumele Bus Lines (Pty) Ltd t/a Interstate Bus Lines v Transport & Allied Workers Union of SA & others* (2009) 30 ILJ 1099 (LC). In that case, Nel AJ held that a demand by a trade union for an equity shareholding in the applicant concerned the matter of mutual interest as contemplated by the LRA. The court stated, at paragraph 45 of the judgment:

‘I believe a more appropriate approach to this particular question would be to consider whether a demand is one which may create new employment conditions or conditions of employment... I believe that in determining whether the matter is one of mutual interest between employer and employee, one will consider whether a demand may possibly create new rights and obligations as between employer and employee. Will these new rights be in the interests of both parties and for the common good of the enterprise?’

[14] It is largely on this basis that the applicant contends in these proceedings that in order for a matter to be a matter of mutual interest, it must necessarily have the following characteristics:

- (a) it must relate to the employment relationship between the employer and employee
- (b) it must create new, or destroy existing rights in the employment relationship; and
- (c) it must be a matter in the interest of both employer and employee, and must concern the common good of the enterprise.

- [15] The applicant submits that this approach and in particular, the application of (c) above, places the interests of the enterprise as separate (though contingent) and additional to the interests of both employer and employee. 'Mutual interest' on this basis must necessarily account for the well-being of the enterprise.
- [16] In my view, this approach is fundamentally flawed. First, as far as the proposition contained in (b) in paragraph 14 is concerned, the applicant confuses disputes about matters of mutual interest and interest disputes. (As did the court, with respect, in the *Itumele Bus Lines* decision.) It is clear from the statutory framework that all interest disputes (broadly, disputes about the creation of new rights) and rights disputes (broadly, disputes about the interpretation and application of existing rights) are subsets in the broader category of disputes about matters of mutual interest. In other words, all interest disputes constitute disputes about matters of mutual interest, but not all disputes about matters of mutual interest are interest disputes.
- [17] The proposition in (c), that is relating to the common good of the enterprise is drawn ultimately from the *Rand Tyres* judgment. It should be recalled that that judgment concerned no more than a list of legitimate bargaining topics for industrial councils, with 'matters of mutual interest' being a catch-all, thus serving an expansive rather than a restrictive purpose. 'Mutual interest' in this sense may well refer to the well-being of the industry, given the purpose for which the term was employed. But the use of the term 'mutual interest' in the LRA is very different – it ultimately serves to define the legitimate scope of matters that may form the subject of collective agreements, matters which may be referred to the statutory dispute resolution mechanisms, and matters which may legitimately form the subject of a strike or lock-out. In this sense, 'matters of mutual interest' serves to distinguish those disputes that concern the socio-economic interests of workers (see s 77, which permits protest action in support of such disputes) and what might be termed purely political disputes, for which the LRA does not afford any right to strike or lock-out. It is not necessary for present purposes to define the term 'matters of mutual interest' with any precision, but it seems to me that it

requires, in broad terms, no more than that the issue that is the subject of any term of any collective agreement, referral for conciliation or the subject of any strike or lock-out be work-related, or as the court put it in the *De Beers* decision (*supra*), it must concern the employment relationship.

- [18] This interpretation is sustained by statutory imperatives in relation to the interpretation of the LRA and in particular, those of its provisions that concern fundamental rights. The interpretation of 'matters of mutual interest' for which the applicant contends ignores entirely the provisions of the Constitution and the statutory injunction contained in section 3 of the LRA that any person applying the Act must interpret its provisions to give effect to its primary objects, in compliance with the Constitution and in compliance with public international law obligations. The Constitutional Court has held on a number of occasions (see, for example, *NUMSA v Bader Bop (Pty) Ltd* [2003] 2 BLLR 103 (CC)) that where the Act is capable of an interpretation does not limit fundamental rights, that interpretation should be preferred. The right to strike is a fundamental right. In *Bader Bop*, the court said the following, at paragraph 13 of the judgment:

'This case concerns the right to strike. That right is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. In interpreting the right in s 23, therefore, the importance of those rights in promoting a fair working environment must be understood.'

It is well-established that the provisions of the Act (and in particular, sections 64 and 65, which impose limitations on the right to strike) must be interpreted and applied in a manner which gives best effect to the primary objects of the LRA and its defined purposes. It is equally well-established that where any provision of the LRA is capable of mutually contradictory interpretations, the court should adopt an interpretation that promotes the purposes of the Act, in this instance, orderly

collective bargaining and the effective resolution of labour disputes. Given that a necessary element of any strike must be the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, the definition afforded to the term 'mutual interest', in effect, defines the scope of the right to strike. The broader the interpretation, the broader the scope of legitimate strike action. Conversely, were a narrow interpretation to be afforded the term, the scope of right to strike would be accordingly attenuated. For present purposes, an interpretation that gives effect to the Bill of Rights and to the purposes of the LRA requires that 'matters of mutual interest' would serve to exclude those matters that are purely political in nature, or which more properly concern the socio- economic interests of workers.

- [19] But there is a more fundamental reason why the interpretation of the term 'matters of mutual interest' proffered by the applicant cannot be sustained. What the applicant seeks to do, by extrapolating the reference to the common good in the *Rand Tyres* decision into the term 'matters of mutual interest,' is to subject every demand made in the collective bargaining process by trade union (and indeed, by any employer or employers' organisation) to utilitarian analysis. It would require the court to apply a form of Bentham's felicific calculus, to determine what might constitute the greatest good for the greatest number. What this approach overlooks, at a basic level, is that the LRA acknowledges that the interests of parties to an employment relationship more often than not stand in conflict, and that the preferred mechanism to reconcile competing interests is the process of collective bargaining. In a voluntarist system such as that established by the LRA, the courts have no role in determining the merits of any demand made during the bargaining process, nor are they empowered to make any value judgment as to whether a demand promotes or secures the common good of the enterprise. The court is empowered to intervene if and only if a demand made in support of a strike or lock-out if any industrial action does not comply with the substantive and procedural limitations established by the Act. In other words, the court is concerned only with the lawfulness of demands in a strict sense, and can make no judgment as to their merits or consequences.

- [20] With that background, I turn to each of the demands made by the union. The demand for insourcing, as I understand it, is directed at various functions that the applicant's contract without and which are currently performed by subcontractors. The demand made by the union simply seeks to reverse the process of outsourcing and to reinstate those services previously provided on an in-house basis, on that basis. What the union seeks in effect is that those jobs that have been the subject of outsourcing arrangements be reincorporated into the applicant's establishment. I fail to appreciate on what basis the applicant contends that this is an issue that is no material bearing on the applicant and its employees, or that it is a drastic and unjustifiable intrusion into the applicant's managerial prerogative to operate by the most cost-effective means. It is clearly a matter that is work-related, and therefore a matter of mutual interest. There is accordingly no basis on which the union's demand may be declared unlawful and struck out.
- [21] The demand for transport costs is one that would require the applicant to meet the actual costs of travelling incurred by employees to and from work on a daily basis. It is not disputed that in 2002, the union and the applicant's predecessor agreed to include an amount of R350 per month in all employers remuneration include of transport costs. As a consequence, the bus service then provided was terminated. Since then, the allowance has been increased and remains an element of the employees' remuneration packages. In these circumstances, in my view, the union is precluded in terms of the provisions of clause 1 of the strike settlement agreement from raising the issue of payment for transport costs at plant level. Further, the main agreement provides in clause 17 (1) for the payment of an allowance to employees who "by reason of their employment are normally required to work in various sites but are not required to live away from their usual place in of residence.' Since the main agreement regulates the payment of a travelling and subsistence allowance, in my view, the demand in question is sufficiently closely related to an issue regulated by the main agreement. The union is therefore precluded from striking in support of its demand for the payment of travelling costs.

- [22] In so far as the demand for the appointment of shop stewards is concerned, the applicant contends that the demand is unreasonable, financially unsustainable and not functional to collective bargaining. For the reasons stated above, these are not relevant considerations. The applicant also contends that the demand is one that is required in terms of the Act to be referred to the CCMA, and ultimately to be resolved in terms of s 22 of the LRA. The appointment of full-time shop stewards and health and safety stewards and increased time off is not a matter contained in the main agreement. This court has previously recognised the legitimacy of a strike called in support of a demand for the appointment of full-time shop stewards. In *Digistics (Pty) Ltd v SA Transport and Allied Workers Union & others* (2010) 31 ILJ 2896 (LC), this court held that those provisions of the LRA regulating organisational rights (sections 12 to 16) do not provide for the appointment of paid full-time shop stewards and that this is therefore not a matter in respect of which part A of chapter III of the Act applies. This approach was recently upheld by Prinsloo AJ in *Scaw South Africa (Pty) Ltd v NUMSA & others* (J911/2013, 28 May 2013). I see no reason to depart from these decisions. In short, s 65 does not preclude the union from raising a demand for the appointment of full-time shop stewards or from striking in support of a demand.
- [23] The demand for the payment of risk allowances in the form of heat, chemical and dust allowances does not relate to any matters that are dealt with either in the main agreement or the strike settlement agreement. While the main agreement makes provision for certain allowances, including travel and subsistence allowances and allowances for abnormally dirty work, there is no specific provision relating to the allowances that are the subject of the union's demand, nor are these allowances reflected in annexure A to the strike settlement agreement. The demands clearly concern a matter of mutual interest and in these circumstances there is no bar to the union raising these demands or calling a strike in support of them.
- [24] In relation to the union's demand for the training of artisans, this is similarly not a matter that is regulated by the main agreement or the strike settlement

agreement. It is clearly a matter of mutual interest and therefore a matter that may form the subject of a protected strike.

[25] I now turn to that part of the notice of motion in which the applicant seeks to interdict unlawful conduct in support of strike action by the second to further respondents and in particular, the blocking of entrance and exit gates at the applicant's premises, preventing employees who wish to continue work from tendering their services, damaging and destroying property, and the like. In the founding affidavit, the deponent expresses the view that it is anticipated that any strike would involve violence, misconduct and intimidation, and that the second to further respondents will block the roads leading to the applicant's premises. There is no evidence in the affidavit to the effect that such misconduct has occurred, or has been threatened. That it has occurred in the past is to be deplored, and the union must take responsibility for its own conduct and omissions, and for the actions of its members. But the submissions regarding violence are ultimately speculative. In my view, there is an insufficient factual basis laid in respect of any actual or anticipated acts of misconduct by the second further respondents to warrant an order at this point.

[26] Finally, in relation to costs, this court has a broad discretion in terms of s 162 of the Act to make orders for costs according to the requirements of the law and fairness. This court's has customarily declined to make orders for costs in circumstances where the parties to a collective bargaining relationship are before the court, and where an order for costs has the potential to prejudice that relationship. I see no reason in the present instance to depart from that approach and I therefore do not intend to make any order as to costs.

For the above reasons, I make the following order:

1. The first respondent is not entitled to call for strike action in support of its demand for the payment of transport costs, and any strike action in support of that demand by the second to further respondents would constitute an unprotected strike.
2. In respect of the balance of the relief sought in the notice of motion, the application is dismissed.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

FOR THE APPLICANT: Adv L Hollander, with him Adv D Lundström, instructed by
Cowen Harper Attorneys

FOR THE RESPONDENTS: Ms Ruth Edmonds, Ruth Edmonds Attorneys