Of interest to other Judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: J 1948/17

In the matter between:

WHOLESALE HOUSING SUPPLIES (PTY) LTD	**Applicant**
and	
NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	**First Respondent**
THE PERSONS WHOSE NAMES ARE LISTED ON ANNEXURE "A" TO THE NOTICE OF MOTION	**Second Respondent**

Heard: 25 August 2017

Delivered: 29 August 2017

Summary: (Urgent – s 68(2) requirements of the LRA met - strike interdict – nature of strike – collective bargaining rights – no agreement binding employees in respect of striking for bargaining rights – three year wage agreement nonetheless binding – one purpose permissible the other not)

JUDGMENT

LAGRANGE J

Background

[1] This application was initially launched on 21 August 2017 for a hearing the following day. By agreement, the matter was postponed to permit the filing of additional affidavits and was heard on 25 August 2017. Pending the decision in this matter, the respondents undertook not to embark on strike action.

[2] Presently, the applicant ('WHS') has four distribution centres situated in Germiston, Pinetown, Port Elizabeth and Cape Town. In the Durban and Germiston centres, the first respondent, NUMSA, currently represents less than half the permanent workforce of 540, but represent SACCAWU 9 % of the workforce nationally, whereas SACCAWU represents 50,7 % of employees nationally. In terms of a so-called "relationship agreement", SACCAWU is recognised as the collective bargaining representative in the four distribution centres as long as it represents 30% of employees in each of the four centres. A wage agreement was concluded with SACCAWU for the period 1 July 2016 to 30 June 2019.

[3] In June 2016, NUMSA referred a dispute to the CCMA in which it claimed that the applicant was "refusing to bargain with NUMSA for wage demands". It is sort as a resolution of the dispute that "(t)he employer must bargain with NUMSA also in the wage negotiations." Ultimately, this dispute led to a verification exercise being conducted by the CCMA in November 2016 and an advisory award was issued to which the result of the verification exercise was attached.

[4] According to the advisory award, NUMSA's representative had contended that SACCAWU did not have a majority and that WHS should have dealt with the situation in 2016 by "consolidating all the wage demands and inviting interested unions to negotiate with them." WHS contended that only SACCAWU satisfied the 30% threshold requirement in the relationship agreement and accordingly were entitled to collective bargaining rights. The arbitrator found that in terms of the verification exercise, NUMSA had representation of 17.13% nationally. Although he

did not refer to the specific figure for SACCAWU, he noted that in terms of the verification report, SACCAWU did not meet the 30% threshold itself. The global figure for SACCAWU in the verification report was determined as 23.64%. The arbitrator also noted pertinently that section 18 (2) of the Labour Relations Act, 66 of 1995 ('the LRA') provides that:

> "A collective agreement concluded in terms of subsection (1) is not binding unless the thresholds of representativeness in the collective agreement are applied equally to any registered union seeking any of the organisational rights referred to in that subsection."

The essence of the advisory award was that, WHS was under no legal obligation to negotiate with NUMSA and that the union could exercise power to force the employer to the negotiating table following the principle established in *Bader Bop (Pty) Ltd v NUMSA and Others*.[1] The arbitrator urged the parties to engage with each other on the matter in a way that would promote labour peace and good workplace relations, and suggested that WHS should "allow NUMSA the opportunity to negotiate and advance the interest of their members." The advisory award concluded by recommending that the parties should meet within 14 days to try and agree on a compromise on a way forward.

[5] Since the advisory award was issued in December 2016, nothing further was heard until 28 June 2017 when a strike notice was sent to the respondent, which was withdrawn on 30 June, but reissued on 18 August. On 3 July, just after the first notice was withdrawn, the three year 2016 wage agreement with SACCAWU was purportedly extended to other employees under s 23(1)(d) based on a claim by WHS that SACCAWU now represented 50% of the employees in the workplace.

[6] The strike notice of 28 June 2017 notified WHS that NUMSA's members would be embarking on strike action "as per the advisory award". On 28 July, WHS advised NUMSA under a letter headed "Re - refusal to bargain

[1] [2002] 2 BLLR 139 (L AC). Though the arbitrator cited the LAC decision in the matter, in all likelihood the arbitrator had the Constitutional Court decision in mind namely, *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another* 2003 (2003) 24 *ILJ* 305 (CC) especially at 326-8, paras [39] to [43] where the right of a minority union to institute a protected strike to obtain collective bargaining or other organisational rights was affirmed.

dispute", that the wage agreement with SACCAWU had been in full and final settlement of wage demands for the three-year period and accused NUMSA of trying to bypass the agreement and strike as a minority union on the basis of the membership it had in the Germiston branch of WHS. WHS acknowledged NUMSA's "right not to be in agreement with the said agreement and to seek to reopen the wage negotiations", but warned that NUMSA was bound to wait until the next wage negotiations in June 2019 if by that stage it was sufficiently representative to warrant bargaining rights. The letter mentioned that the wage agreement had been extended in terms of section 23 (1) (d) of the LRA to "all non-parties", but without mentioning that this had only been done in July 2017 and not when the agreement was concluded in June 2016. WHS also warned that if NUMSA persisted with the intended action, it would seek urgent relief from the court "as <u>current matters that you have raised in your wage demands</u> are regulated by the current wage agreement and as a result any contemplated strike action by your members is prohibited in terms of Sec 65 of the LRA"(emphasis added).

[7] NUMSA did not respond to this letter, but on Friday 18 August a strike notice was issued after normal business hours notifying the company of its intention to strike on 21 August. In this notice the union stated inter-alia:

> "As NUMSA, we hereby serving your company with the 48 on notice for the industrial action <u>related to refusal to bargain in terms of wage negotiations which was held in the 2016</u> and as the results of the matter was referred to the third-party which is the CCMA.
>
> Kindly take notice further that the said <u>strike is related to refusal to bargain dispute as per the attached CCM advisory</u> award including the CCMA non-resolution certificate (strike certificate)."

(Emphasis added)

[8] Apart from its prior notification on 28 July that it would bring an urgent application if NUMSA persisted with its strike action, on Sunday 20 August WHS notified NUMSA by fax of its intention to bring this application.

<u>Evaluation</u>

[9] There was no real dispute about the urgency of the application as such, but the Court must still be satisfied that the peremptory requirements of s 68(2) of the LRA were met. I am satisfied that in the circumstances, the applicant gave the union adequate notice of the application bearing in mind that the union deliberately waited until after normal business hours on Friday before serving the strike notice and that WHS did notify NUMSA of its intention to bring the application on Sunday. Under normal circumstances, a notice serve on Sunday might not be considered enough warning of the opportunity to be heard before the Court took a decision, but where notice of the strike is given after hours on a weekend in circumstances where there was no reason for WHS to anticipate the strike would be revived after the previous withdrawal and given the lack of response to its notification of NUMSA that the wage agreement had been extended and that it believed the strike would be unprotected, I think the opportunity afforded to NUMSA to be heard was reasonable. Consequently, the requirements of s 68(2) warranting a notice period of less than 48 hours of this application were met.

[10] In response to NUMSA's claim that by virtue of the outcome of the verification exercise, SACCAWU and WHS could not extend the wage agreement to other employees under section 23 (1) (d) of the LRA, WHS attached schedules of union membership deductions for SACCAWU and NUMSA for July 2017, which is the same month the wage agreement was extended. Those schedules showed that at the four distribution centres which employed 514 permanent employees, 274 of those were members of SACCAWU and 104 were members of NUMSA. WHS further claimed that even at the time of the conclusion of the wage agreement in 2016, when it had eight distribution centres, SACCAWU represented a majority of employees at that stage too. In addition to the permanent employees, there are 144 employees working at the centres, who are employed by temporary employment services. It was argued by NUMSA that these employees should also have been taken into account when determining if SACCAWU was representative of the majority of employees in the workplace. WHS contended that because the decision of the Labour

Appeal Court in *NUMSA v Assign Services and Others*[2] is itself now the subject matter of a pending appeal to the Constitutional Court, the LAC's decision that the client of the temporary employment service is deemed to be the sole employer of the labour broker's employees after three months under SACCAWU 98A (3)(b) of the LRA, is suspended pending the outcome of that application. Although NUMSA raised this point as an issue in its answering affidavit, its attorney, *Mr Daniels* did not pursue the point further after the current status of the LAC decision had been mentioned by applicant's counsel, *Mr Van As*.

[11] On the evidence before me, I am satisfied that at the time that the three-year wage agreement was extended in July 2017, that SACCAWU was a majority union in the workplace comprised now of the four distribution centres and that NUMSA did not meet the threshold of 30% union membership in the same workplace. It may be so that at the time of the verification exercise figures were different, but the most natural interpretation of section 23 (1) (d) is that, it is the union membership at the time the agreement is extended which matters, even though in this case the extension took place a year after it was concluded. Consequently, it means that NUMSA's members employed by WHS are bound by that wage agreement and any strike instituted with a view to amending or renegotiating the terms of that agreement would be contrary to the provisions of section 65 (3)(a)(i) and therefore unprotected.

[12] However, NUMSA contends that the strike is only to achieve bargaining rights and has nothing to do with negotiations of a substantive agreement. On this issue, the parties are at odds. The applicant naturally prefers to characterise the dispute as a dispute which originated in NUMSA not being a party to the June 2016 negotiations and that the real object of NUMSA and its members is to try and reopen those negotiations. By contrast, NUMSA claims that it is merely seeking to assert its members' constitutional right to strike in support of their demand to engage in collective bargaining with WHS. On the evidence, it is clear that the demands are intertwined, but that does not mean to say that they are not

[22] (JA96/15) [2017] ZALAC 44 (10 July 2017)

distinguishable. What is clear is that, even though the ultimate object of NUMSA and its members might have been to renegotiate the three-year agreement, NUMSA was also distinctly pursuing the demand to be recognised as a bargaining partner, even if that was to be a precursor to pursuing the substantive demands. Such a demand is one that minority unions have been entitled to try and achieve through protected strike action since the Constitutional Court decision in *Bader Bop*. On the other hand, that decision did not nullify binding power of agreements concluded by majority unions. In *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others*[3] the Constitutional Court recently emphatically underscored the principle that the extension of collective agreements concluded with majority unions under section 23 (1) (d) do not unreasonably limit the right to freedom of association or collective bargaining.[4] Thus, a minority union's entitlement to engage in protected strike action to get a seat at the bargaining table does not mean it is entitled to strike to upset a bargain which has been concluded with the majority union. That may be a source of frustration to that union and its members while they remain a minority in the workplace, but it is a logical consequence of the majoritarian principle which the Constitutional Court has reaffirmed as a constitutionally permissible policy.

[13] On the facts of this case, in my view, it would be artificial to interpret the nature of the demands underlying the intended strike as being exclusively either a demand for collective bargaining rights or alternatively a set of specific wage demands relating to the wage agreement concluded in 2016 with SACCAWU. However, what is clear is that, in so far as the intended strike is pursued with the object of undoing the agreement concluded with the majority union, a strike in pursuit of that demand would be unprotected. To the extent that the demand pursued is purely to try and persuade WHS to accept that a different membership threshold is sufficient to participate in future collective bargaining, then a strike in support of that demand is unobjectionable given that the other statutory requirements for embarking on protected strike action have been met. In

[3] (2017) 38 ILJ 831 (CC)

[4] At paragraphs [41] to [58].

conclusion, the order made should recognise the different strands in the strike demand.

Order

[1] The forms and service provided for in the Labour Court rules are dispensed with and the matter is treated as one of urgency in terms of Rule 8.

[2] A *rule nisi* is issued calling upon the respondent is to show cause, on 10 November 2017, why an order should not be made in the following terms:

2.1 declaring that the strike called by the first respondent in terms of the strike notice issued by it on 18 August 2017, which was due to commence at 06H00 on 21 August 2017 ("the strike"), in so far as the strike is in support of any demand other than a demand for the applicant to recognise NUMSA as a collective bargaining representative, to be an unprotected strike as contemplated in section 65 of the Labour Relations Act 66 of 1995 ("the LRA");

2.2 interdicting and restraining the individual respondents from participating in the strike in support of any demand other than a demand for the applicant to recognise NUMSA as a collective bargaining representative;

2.3 interdicting and restraining the first respondent ("NUMSA") from encouraging and/or inciting the individual respondents to participate in the strike in support of any demand other than a demand for the applicant to recognise NUMSA as a collective bargaining representative .

[3] Directing that the relief set out in orders 2.1, 2.2 and 2.3 above shall operate as an interim order with immediate effect pending the finalisation of this application.

[4] Each party must pay their own costs for this interim application.

[5] Service of the interim order above shall be effected:

5.1 on NUMSA per telefax on telefax number (011) 689-1701;

5.2 on the individual respondents by the sheriff of the High Court, alternatively a duly authorised employee of the applicant reading out the interim order to those of the individual respondents present at the applicant's premises situated at Barlow Road and Cavaleros Drive , Jupiter Extension, Germiston ("the applicant's premises") and by affixing copies of the interim order to notice boards at the applicant's premises and at the main entrance to the applicant's premises and by handing copies of the interim order to such of the individual respondents who may request a copy of the order.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	M Van As instructed by Van Veijeren Inc.
RESPONDENTS:	R Daniels of Cheadle Thompson & Haysom Inc.