



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: J 2892/17

In the matter between:

YORK TIMBERS LIMITED

Applicant

and

**NATIONAL UNION OF METAL WORKERS OF
SOUTH AFRICA**

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

COMMISSIONER G KHOZA N.O

Third Respondent

CEPPWAWU

Fourth Respondent

Heard: 13 November 2017

Delivered: 15 November 2017

JUDGMENT

TLHOTLHALEMAJE, J:

- [1] The applicant approached this Court on an urgent basis on 6 November 2017 to seek interim relief. In summary, the applicant sought an order that;

- a) The effect of the certificate of outcome issued by the second respondent (Commissioner) be stayed pending the finalisation of a review application to set aside the certificate;
- b) That NUMSA and its members be prohibited from engaging or proceeding with industrial action after the strike notice was issued on 31 November 2017, pending the finalisation of the review proceedings;
- c) In the alternative, that the suggested picketing rules annexed to the founding affidavit be enforced by way of an interdict pending the agreement on the rules.

[2] The unopposed application came before La Grange J on 9 November 2017, who had issued a *rule nisi* returnable on 14 December 2017 in the following terms;

'2.1 The first respondent and its members are prohibited from engaging and/or proceeding with the strike of which it gave notice on 31 October 2017 on the basis that it is unprotected strike action in terms of the Labour Relations Act, 66 of 1996.'

[3] The National Union of Metalworkers of South South Africa (NUMSA) anticipated the return date on 13 November 2017 by filing a notice of opposition together with an answering affidavit. The opposition does not address a variety of factual issues raised in the founding affidavit, and chose instead to focus on the protected nature of the strike.

[4] The dispute between the parties relates to a demand that NUMSA be given organisational rights in terms of the provisions of sections 12, 13, 14, 15 and 16 of the Labour Relations Act (LRA).¹ NUMSA had referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) on 22 July 2017, and conciliation proceedings held on 13 October 2017 failed to resolve the dispute.

¹ Act 66 of 1995, as amended

- [5] The Commissioner issued a certificate of outcome, indicating that NUMSA could either refer the dispute for arbitration, or that it could embark on strike action. NUMSA issued a strike notice on 31 October 2017, with the strike to commence on 6 November 2017. The nub of NUMSA's case is that its strike is protected.
- [6] The applicant's contention on the other hand is that NUMSA and its members are not entitled to embark on strike action as it remains unprotected. The applicant relies solely on the principles set out in *NUMSA & others v Bader Bop (Pty) Ltd and another*² in contending that the strike action is unprotected. The essence of the applicant's case in line with its interpretation of that judgment is that once NUMSA persisted with its claim that it was representative, it was duty bound to refer the dispute for arbitration after the certificate of outcome was issued. Thus, the argument went, the right of NUMSA or its members to engage in strike action was only available to them if they had admitted that they were not representative for the purposes of triggering the provisions of section 21 of the LRA.

The legal principles and evaluation:

- [7] The starting point in determining whether the applicant is entitled to the relief it seeks is section 23 of the Constitution of the Republic³, which *inter alia* guarantees every employee the right to strike⁴, to form and join a trade union; and to participate in the activities and programmes of a trade union. These rights are in turn regulated by the provisions of Parts A and B of Chapter III of the Labour Relations Act and the accompanying right to strike in Chapter IV of that Act.

² 2003 (2) BLLR 103 CC

³ Act 108 of 1996

⁴ See *Bader Bop* at para 67 where it was held that;

'...The right to strike is essential to the process of collective bargaining. It is what makes collective bargaining work. It is to the process of bargaining what an engine is to a motor vehicle. Section 64(1) of the LRA confers this right upon every worker. The Constitution guarantees this right to every worker in s 23(2)(c). Once it is accepted that an unrepresentative union has a right to bargain collectively to obtain organizational rights, as it must be, it must follow that it has the right to resort to strike action in the pursuit of those rights...'

- [8] To the extent that the applicant placed emphasis on the principles enunciated in *Bader Bop*, the central issue before the Court in that matter was whether, because of the statutory regulation of organisational rights in Part A of Chapter III of the LRA, the right to strike of a minority trade union in support of a demand for organisational rights, where such trade union would not ordinarily qualify for these statutory rights, would be excluded. The Court's stance was that a representative trade union had two options available to in securing organisational rights. The first was to utilise the statutory enforcement provisions in Section 21 of the LRA, which entailed an attempt to reach a collective agreement followed by a referral to the CCMA where, if the dispute remains unresolved, the trade union could either request that the dispute be arbitrated or embark on strike action⁵.
- [9] To the extent that NUMSA had not responded to the factual disputes raised in the founding affidavit, the applicant contends that NUMSA regards itself as having sufficient representation at the workplace to be recognised by it in accordance with the provisions of section 21 of the LRA, and it had referred its dispute within the ambit of that provision.
- [10] In summary, section 21 of the LRA provides that that any registered trade union may notify an employer in writing that it seeks to exercise one or more of the organisational rights conferred on it by Chapter III of the LRA in a workplace. Within 30 days of receiving the notice, the employer must meet with the trade union and endeavour to enter into a collective agreement which regulates the trade union's exercise of organisational rights in the workplace.
- [11] Under section 21(4), if a collective agreement is not concluded, either the registered trade union or the employer may refer the dispute in writing to the Commission, and in terms section 21 (7), If the dispute remains unresolved, either party to the dispute may request that the dispute may request that the dispute be resolved through arbitration. Section 21 (8) then proceeds to provide Commissioners with guidelines as to what to do in instances where the unresolved dispute is about whether or not the registered trade union is a representative.

⁵ Under section 21 (7) and 65 (2) (a) of the LRA

[12] It was submitted on behalf of the applicant that to the extent that NUMSA had referred the dispute in the manner it had, and where there was no agreement on the issue of representivity, either on the basis of majority or sufficient representation, NUMSA's level of representivity had to be determined at arbitration. Furthermore, since NUMSA had not admitted that it was not sufficiently representative, by engaging in a dispute in terms of section 21, it was prevented by virtue of the provisions of section 65 (1) (c)⁶ of the LRA from embarking on strike. Thus, the argument went, the right to strike was only available to a union which admitted or conceded that it did not have the necessary representative capacity⁷.

[13] In terms of section 64 of the LRA, every employee has the right to strike if certain prerequisites are met. These are that the issue in dispute must have been referred to the CCMA, and a certificate stating that the dispute remains unresolved has been issued; or a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral. Thereafter, 48 hours' notice of the commencement of the strike must have been given in writing to the employer. NUMSA in this case had complied with these prerequisites. The question then is whether NUMSA on the grounds that it had alleged that it was sufficiently representative is deprived of the right to strike on account that it had pursued the dispute in terms of the provisions of section 21 of the LRA?

⁶ Which 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 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 or any other employment law'

⁷ In reliance to *Bader Bop* at para 71 where Ncgobo J held that;

'Relying on the phrase "any registered trade union" in section 21, Du Plessis AJA concludes that all registered trade unions that seek to exercise organisational rights must use the procedure in section 21. This requires some qualification. A registered trade union that claims that it has the majority or sufficient representation must use this procedure. However, a union that accepts that it is not a representative union as defined in the LRA, cannot use section 21. The section is only available to enforce the rights conferred by Part A and those rights are conferred on representative unions – they are not conferred upon unrepresentative unions and they cannot therefore be enforced by such unions through section 21'

[14] This Court *Bidvest Food Services (Pty) Ltd v NUMSA and Others*⁸ in dealing with a similar matter within the context of whether a union was entitled to organisational rights outside the scope of its own constitution held that if an organisational rights dispute is not resolved at conciliation, the union has an election: it may either refer the dispute to arbitration or its members may strike⁹. This conclusion was reached on the basis of the interpretation of the provisions of section 65 (1) (c) and the exception in section 65 (2)(a) of the LRA by O'Reagan J in *Bader Bop*, where it was held that;

'Accordingly, a trade union or employer still dissatisfied after the failure of the section 21 conciliation proceedings may opt for industrial action or for arbitration. If a union opts for strike action, however, it may not then refer the matter to arbitration for a period of 12 months from the date on which it gives notice of the strike in terms of section 64(1) of the Act'

And,

'So far, the scheme of the Act is clear. Sufficiently representative trade unions, and those unions that claim to be sufficiently representative, may seek to enforce those organisational rights which they claim the Act confers upon them by adjudication (mediation and arbitration) or by industrial action. It is not clear what options (if any) those unions that are not sufficiently representative to be the beneficiaries of the rights conferred by Chapter III, Part A of the Act have to obtain organisational rights. There is no express provision of the Act regulating their position. The question that arises is whether the Act must necessarily be interpreted to preclude non-representative unions from obtaining organisational rights, either through agreement with the employer, or through industrial action.'¹⁰

[15] The difficulty with the applicant's case is that section 23(2)(c) of the Constitution guarantees, for every worker, the right to strike, and as already indicated, that right is only constrained by the provisions of sections 64, which NUMSA had complied with, and those of section 65. NUMSA seeks

⁸ (2015) 36 ILJ 1292 (LC)

⁹ At para 17

¹⁰ At para 24 - 25

organisational rights envisaged in sections 12 to 15 of the LRA, and the strike is therefore protected under the provisions of section 65 (2) (a) of the LRA.

[16] Accordingly, NUMSA had on the strength of the interpretation of section 21 of the LRA read with those of section 65 (2) (a) by O'Reagan J in *Bader Bop* acquired the right to strike. In my view, the provisions of section 21(7) of the LRA, by virtue of its reference to 'may' further accords a party an election. The right to strike cannot in my view be limited by an incorrect reading into Ncgobo J's approach in *Bader Bop*¹¹ that once a registered trade union claims to be representative, it must utilise the provisions of section 21, and therefore of necessity, ought to refer the dispute for arbitration if it remains unresolved. This limitation is not expressed in the provisions of section 21 of the LRA¹². To the extent that Ncgobo J nonetheless stated that a union that claimed to be representative must utilise the provisions of section 21, and on the strength of O'Reagan's interpretation that the union in such an instance has an election, it follows that by electing to embark on strike action, that strike would be lawful and protected.

[17] It therefore follows from the above that the applicant has not demonstrated a clear right to the relief that it seeks, and it would not be necessary to consider other requirements relating to the relief sought. The applicant sought ancillary relief in the form of the enforcement of picketing rules contained in a draft agreement attached to the founding affidavit¹³ in view of the violent conduct that has characterised the strike embarked upon by NUMSA members, pending agreement on new rules to be concluded with NUMSA. I am satisfied that a case has been made out in this regard in the founding and supplementary affidavits submitted on behalf of the applicant in this regard. It would be remiss of the Court not to appreciate that violent conduct invariably

¹¹ At para 71

¹² See *SATAWU v Moloto NO 2012] 12 BLLR 1193 (CC)* para [52] (as referred to in *Bidvest*) where it was held that;

"...the right to strike is protected in the Constitution as a fundamental right without express limitation. Also, constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least intrusive of the right, if the text is reasonably capable of bearing that meaning. These are general interpretative principles that are also applicable to the interpretation of provisions of the Act, as explicitly affirmed in section 1(a) of the Act."

¹³ Annexure 'YT7' to the founding affidavit

accompanies strike actions in workplaces. I have further had regard to requirements of law and fairness in regard to the issue of costs, and hold the view that the circumstances and facts of this case do not call for any cost order.

Order:

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

1. The *rule nisi* granted on 9 November 2017 is discharged.
2. The applicant is granted leave to implement and enforce the draft Picketing Rules as contained in a draft agreement attached to the founding affidavit marked 'YT7', pending the finalisation of an agreement on Picketing Rules with NUMSA.
3. There is no order as to costs.

E Tlhotlhemaje
Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Adv. GJ Scheepers with Adv. J van den Bergh

Instructed by: Coetzee Attorneys

On behalf of the First Respondent: Ms. R. Edmond of Ruth Edmonds Attorneys

LABOUR COURT