



Reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case No: J 2876/17

In the matter between:

VECTOR LOGISTICS (PTY) LTD

Applicant

and

**NATIONAL TRANSPORT
MOVEMENT ('NTM')**

First Respondent

M L KGAABI AND OTHERS

Second and Further Respondent

**(Those persons mentioned in
Annexure "A" to the founding
affidavit)**

Heard: 03 March 2018

Delivered: 06 March 2018

Summary: (Strike interdict – return day – strike unprotected by virtue of provision in relationship collective agreement – strike also unprotected because complying with the demand would be in breach of s 14(1) of the BCEA and/or alternatively is a dispute capable of adjudication - interpretation of s 14(1) of BCEA)

JUDGMENT

LAGRANGE J

Background

- [1] An interim order was issued on 3 November 2017 and subsequently extended on 13 December 2017. The rule was extended again at the hearing of argument on the return day on 2 March 2018 until the date of today's judgment.
- [2] On 26 June 2017, NTM referred a mutual interest dispute to the CCMA in which the facts of the dispute were summarised as: "Employer refuses to pay the employees than 10 hours that they are work for" (*sic*). The conciliation of the dispute was unsuccessful.
- [3] The matter was referred to arbitration but the arbitrator issued a ruling that the CCMA had no jurisdiction to arbitrate the dispute which had been described in the certificate of outcome as a matter of mutual interest.

Grounds for claiming the strike is unprotected.

- [4] The applicant relies on a number of grounds for its claim the strike would be unprotected. Most of these relate to the effect of two collective agreements, one allegedly concluded with the majority union and the other relating to the lawfulness of the demand and a related question of whether the dispute is one that can be referred to adjudication or arbitration.

The collective agreements

- [5] In September 2015, the applicant company ('Vector') and another union NUFBWSAWU had concluded a wage agreement for three years which terminates on 30 June 2018 ('the substantive agreement'). In terms of that agreement ordinary hours of work were 45 hours per week with an additional unpaid lunch break of one hour, which is excluded from the calculation of wages. This is in conformity with the provisions of sections 9 and 14 of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA') dealing with working hours and meal intervals respectively.

- [6] The scope of the substantive agreement described in clause 2.1 "... covers permanent, hourly rate, warehouse and transport interest group employees in top grades A 1 to B 3 Vector Logistics National..." and clause 2.2 states it would also apply on a pro rata basis to permanent employees. The final provision of the agreement reads:

"SETTLEMENT

This is the whole agreement on wages and substantive conditions of employment for permanent employees in the bargaining unit for the period 01 July 2015-30 June 2018. No amendments will be made unless agreed to in recorded in writing by both parties. Representatives of parties of signatories to this agreement confirm that there are mandated to find their principles in terms of the agreement. The agreement entered into in full and final settlement for the demands and proposals relating to this agreement on the annual wage increases and substantive as well as in full and final settlement on any other additional issues raised during negotiation process."

- [7] Vector contends that the employees who are members of NTM are identified in this agreement and are expressly bound by it because the union which concluded the agreement was the majority union in the workplace in conformity with the provisions of s 23(1)(d) of the Labour Relations Act, 66 of 1995 ('the LRA'). S 23 states:

23 (1) A collective agreement binds-

(a) the parties to the collective agreement;

(b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them;

(c) the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates-

(i) terms and conditions of employment; or

(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;

(d) employees who are not members of the registered trade union or trade unions party to the agreement if-

- (i) the employees are identified in the agreement;
- (ii) the agreement expressly binds the employees; and
- (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.

[8] On 3 May 2017, Vector and NTM concluded a collective agreement termed a “Relationship agreement”. Clause 3.2 of the relationship agreement states:

“The parties agree that Vector is entitled to establish a representivity threshold for (i) participation in the national bargaining forum and (ii) for purposes of granting organisational rights. It is recorded that the representivity threshold for participation in the national bargaining forum is 50% +1 in the Vector Workplace (that is, on a national basis). Consequently, the company recognises the majority union as the sole bargaining representative in the Bargaining Unit on matters concerning terms and conditions of employment (including benefits) and/or wages and/or remuneration of employee. (*sic*).”

Accordingly, it is contended that NTM accepts that unless it is a member of the bargaining forum by virtue of being a majority union, it cannot pursue collective bargaining demands.

[9] Clause 11.2 of the relationship agreement also committed NTM and its members not to engage in any industrial action concerning a matter which is “the subject matter of a collective agreement” (emphasis added) during the period of such collective agreement. This provision does not state that the collective agreement is one concluded with a majority union. Vector claims that clause 11.2 on its own bars NTM from striking, irrespective of the binding force of the substantive agreement with NUFBWSAWU, because the issue of lunch intervals, ordinary hours and remuneration are part of the subject matter of that agreement.

The lawfulness of the demand

[10] Another reason Vector contends that the demand for payment of 10 hours per day could not be the lawful basis for a strike is that, it would entail the company working ordinary hours in excess of section 9 (1)(a) and (b) of the BCEA which limits weekly working hours to 45 hours and daily ordinary hours to 9 hours per day and requires employees to receive a lunch break of no less than one hour. Indeed, it appears to be part of the respondents' claim that in fact their members do not enjoy lunch breaks and work during their lunch breaks and this is what prompted them to demand payment for the hour which was supposed to be lunch break. However, whether or not they actually take break or are practically unable to as a matter that is not resolvable on the papers.

Evaluation

Effect of collective agreements

[11] I am not persuaded that the terms of the substantive agreement alone are sufficient to bind the members of NTM. In ***Concor Projects (Pty) Ltd t/a Concor Opencast Mining v Commission for Conciliation, Mediation and Arbitration and others***¹, the LAC held that the agreement must expressly bind non-members, viz:

“Members of AMCU are not identified in the agreement. The agreement does not state that it binds employees who are not members of the trade unions that are signatories to the agreement. The reliance on section 23(1)(d) is, therefore, misplaced.”²

[12] I am also not persuaded on the papers that Vector established that NUFBWSAWU was in fact a majority union. Accordingly, it cannot be said in this application that the substantive agreement was one that could lawfully be extended to non-members in terms of section 23(1)(d).

[13] A more difficult question is the effect of the relationship agreement concluded with NTM. It is arguable that clause 11.2 of that agreement

¹ [2014] 6 BLLR 534 (LAC)

² At 540.

precludes NTM and its members from embarking on industrial action in respect of any issue which is the subject matter of an existing collective agreement, even if that agreement itself had not been extended to non-members. Whether that is the case or not, by signing the relationship agreement NTM also agreed in terms of clause 3.2 of the agreement that collective bargaining would take place in the national collective bargaining forum. It was further bound by the applicable threshold for admission to the bargaining forum which currently is union membership comprising of 50 % +1 of the workforce. Although NUFBWSAWU's majority union status is in dispute, consequently its right to sit in that bargaining forum may be questionable, it was never contended that NTM itself is entitled to sit in that forum because it meets the majority threshold requirement. Having accepted the threshold for attaining bargaining rights, and thereby curtailing its right to bargain collectively until it is a majority union it is difficult to see how NTM can insist on negotiating a term and condition of employment, or pursue such demands by means of strike action, which is incidental to its bargaining status. As such, NTM is bound by its own the relationship agreement which curtails its rights to bargain and a strike in pursuit of a demand would breach that agreement to curtail its bargaining rights under s65(3)(a)(i) of the LRA.

The lawfulness of the demand and the nature of the demand

[14] It appears that the demand emanates from a dispute about whether drivers and crews actually do take the unpaid one hour meal interval. The fact that it is provided for in the collective agreement with NUFBWSAWU does not mean that it is actually complied with. NTM argues that it is a failure to resolve this issue with Vector which led workers to demand to be paid for that hour if they were not able to actually take their lunch breaks.

[15] S14 of the BCEA states:

“14 Meal intervals

(1) An employer must give an employee who works continuously for more than five hours a meal interval of at least one continuous hour.

(2) During a meal interval the employee may be required or permitted to perform only duties that cannot be left unattended and cannot be performed by another employee.

(3) An employee must be remunerated-

(a) for a meal interval in which the employee is required to work or is required to be available for work; and

(b) for any portion of a meal interval that is in excess of 75 minutes, unless the employee lives on the premises at which the workplace is situated.

(4) For the purposes of subsection (1), work is continuous unless it is interrupted by an interval of at least 60 minutes.

(5) An agreement in writing may-

(a) reduce the meal interval to not less than 30 minutes;

(b) dispense with a meal interval for an employee who works fewer than six hours on a day.”

(emphasis added)

[16] The effect of these provisions is that it is only in circumstances where the work performed by an employee cannot be left unattended and nobody else can perform those duties that an employer is entitled to require the employee to remain available for work or to perform the duties, in which case the employee must be paid for those duties. An example which springs to mind would be a medical specialist in a clinic who is the only person qualified to perform certain procedures. However, where such exceptional circumstances do not apply, then the lunch break is peremptory and is unpaid. The demand for payment of the lunch break by the respondents is based on a claim that they do not get the opportunity to take the break, which they expressed as follows: “...the second to further respondents have their respective meals, whilst driving the trucks and/or whilst they are working.” Vector disputes this and claims they do take the lunch breaks.

[17] To the extent that NTM’s demand is a demand that the affected workers must simply be paid for the lunch hours they claim they do not take because they work without a break, then if Vector accedes to this demand

it would be acceding to a 9 hour working day without a lunch break in circumstances where the exceptional circumstances in sub-sections 14(2) and (3) do not apply. This would amount to a breach of s 14(1) of the BCEA and would be unlawful. Protected strike action cannot be undertaken in pursuit of an unlawful demand.³

- [18] Further, there is another difficulty the demand presents for the legal status of the strike. The aggrieved workers have a remedy under the BCEA. If they are compelled to forego lunch breaks in circumstances where sub-sections 14(2) and (3) are not applicable, then Vector is obliged by law to allow them to take the unpaid one hour lunch break and if it makes it practically impossible for them to do so, it is in breach of the s 14(1) and it is a dispute of right which may be resolved by using the enforcement mechanisms available under the BCEA including adjudication by the Labour Court. Vector would also be in breach of the provisions of 9 (1)(a) and (b) of the BCEA which limit ordinary working hours. The amended provision of 65(1)(c) of the LRA now states:

“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-

...

(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; ...”

In terms of s 4(1) of the BCEA a basic condition of employment constitutes a term of any contract of employment except to the extent that it has been varied in terms of the BCEA or replaced by more favourable terms in a contract. The aggrieved employees' entitlements to lunch breaks are part of their contracts of employment. Under s 77(3) of the BCEA, the Labour Court has concurrent jurisdiction with the civil courts concerning contracts of employment. The employees would consequently be able to refer their dispute over the non-compliance with the provisions of s 14(1) to the Labour Court for adjudication as a breach of a condition of employment,

³ See *TSI Holdings (Pty) Ltd & others v NUMSA & others* [2006] 7 BLLR 631 (LAC) at 646, para [48].

quite apart from being entitled to report the matter to the Department of Labour for enforcement as the simpler alternative. For present purposes, what matter is that the dispute is one that may be referred to the Labour Court for adjudication and accordingly, the issue in dispute falls within the ambit of the protected strike prohibition contained in s 65(1)(c). For this reason too, the strike would be unprotected.

Costs

[19] Even though the strike may be unprotected for the reasons above, I accept that there appears to be a genuine underlying problem with the lunch intervals of drivers which needs to be addressed and the union was not unreasonable in believing it was an issue over which a protected strike might be called. In the circumstances, an award of costs would not be in accordance with the principles of law and fairness.

Order

- [1] The rule issued on 3 November 2017, and subsequently extended, is confirmed
- [2] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

P Govender of Macgregor
Erasmus Attorneys

RESPONDENT:

M Gumede of NTM

LABOUR COURT