



Of interest to other Judges

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

Case no: J1746/18

In the matter between:

**JOHANNESBURG METROPOLITAN BUS
SERVICES SOC LTD**

Applicant

and

**DEMOCRATIC MUNICIPAL AND ALLIED
WORKERS UNION**

First Respondent

**SOUTH AFRICAN MUNICIPAL WORKERS
UNION**

Second Respondent

**INDEPENDENT MUNICIPAL AND ALLIED
TRADE UNION**

Third Respondent

**PERSONS LISTED IN ANNEXURE "A" TO
THE NOTICE OF MOTION**

**Fourth and further
Respondents**

Heard: 24 May 2018

Delivered: 04 June 2018

Summary: (s 68(3) of the LRA – curtailment of proceedings by agreement – salutary cost order nonetheless appropriate – final strike interdict – respondents not bound by collective agreements on grievances or collective bargaining –

council agreement not yet applicable to applicant – strike demands not rendering strike unprotected – application dismissed)

JUDGMENT

LAGRANGE J

Background

- [1] This is an urgent application for a final interdict to prevent a strike which was due to commence on 28 May 2017. The applicant, Metrobus, applies for two alternative forms of relief. It is opposed by the first respondent, the union DEMAWUSA.
- [2] Firstly, Metrobus seeks to interdict a strike on the basis that the dispute was prematurely referred to conciliation in breach of a grievance procedure forming part of the main agreement of the SALGBC, which it claims is applicable to the members of DEMAWUSA who intend to strike. In the alternative, it seeks a final order preventing them from embarking on the strike until a dispute regarding the application of the Main Agreement and the Salary and Wage Agreement of the bargaining council has been determined. Ordinarily, such an order is sought on an interim basis pending the outcome of the dispute referred to the bargaining council, but Metrobus has chosen to frame it as final relief.
- [3] When the matter was heard and after it had been fully argued, it became apparent that the matter might be dismissed on account of insufficient notice of the interdict being given in terms of section 68 (3) of the Labour Relations Act 66 of 1995 ('the LRA'). The effect of that provision is that where a trade union has given ten or more days' notice of its intention to strike, the employer must give at least five days' notice of application to interdict the strike is an unprotected one, which had not been done in this case. The practical effect of dismissing the application on that basis would have in all probability led to the court issuing an order which would have permitted Metrobus to return to court on sufficient notice as in the case of

Automobile Manufacturers Employers' Organisation v NUMSA¹. The consequence of that would have been that the parties would in all probability have been back in court again the following week to argue the same matter again before another judge, with all the unnecessary additional legal costs that would have entailed, apart from two judges having to read and consider the same matter. In the circumstances, the parties agreed that the court could determine the application on its merits and the commencement of the strike would be held in abeyance pending judgement being handed down on the application on 4 June 2018.

Background

The origins of the strike lie in a dispute of mutual interest referred to the SALGBC on 6 April 2018. The strike demands arose from a grievance lodged by union members on 26 March 2018, which contained wide ranging demands relating to collective bargaining, discipline, staff movements, suspensions and alleged discrimination against DEMAWUSA members. The grievance form listed the grievances and each of the respective grievances was then set out in the same document in more detail. The list of grievances was attached to the referral to the bargaining council.

- [4] It was only on 20 April 2018, nearly a month after the grievance had been lodged, and after the union had referred the matter to the SALGBC that a written response to the grievance was forthcoming from Metrobus.
- [5] When the dispute was conciliated on 4 May 2018, Metrobus raised a preliminary point that the grievance procedure had not been exhausted and that accordingly, the referral of a dispute for conciliation to the bargaining council was premature. This was not merely a point about completing internal procedures but arose because the grievance procedure was part of the main agreement of the bargaining council and an unresolved grievance could only be referred to the bargaining council dispute procedures after step three of the grievance procedure had been completed. Clause 13.4.5 of the main agreement reads:

¹ [1998] 11 BLLR 1116 (LC)

“If a grievance has not been resolved to the satisfaction of the aggrieved party, that party may refer the grievance to the Council for adjudication provided that a dispute has been declared and the party is entitled to declare such a dispute.”

The SALGBC panellist who conciliated the dispute did not make a ruling on the jurisdictional point at that stage, but only did so on 11 May 2018. The panellist upheld the preliminary objection of Metrobus and concluded his jurisdictional ruling as follows:

“11. The grievance procedure embodied in the collective agreement concluded during August 2008 is binding on all of the respondent’s employees, and that procedure is, consequently, applicable to the grievance lodged by the applicant on 26 March 2018.

12. The agreed grievance procedure, being a condition of employment, is peremptory, and the applicant ought to have complied with the secrecy prior to referring and mutual interest dispute to the SALGBC. The applicant failed to comply with the agreed grievance procedure before referring the dispute to the SALGBC.

13. In the circumstances, it is plain that the applicants mutual interest and was prematurely referred to the SALGBC, and the SALGBC, consequently, has no jurisdiction to conciliate the dispute.”

[6] By then, the union had already given notice of its intention to strike on 7 May 2018, on the basis that 30 days had elapsed since the dispute was referred to the bargaining council. The strike notice largely reiterated the contents of the list of grievances in the form of demands that Metrobus agree:

1. To pay a salary progression in terms of the number of use of an employee in the employer of the employer
 - (a) 0 to 03 years
 - (b) ...
 - ...
 - (h) 21 to 24 years
2. To adjust salaries of all new employees to the Metrobus salary scale.

3. To pay all employees long service bonus equivalent to one month's salary multiplied by the number of years which the employee was working for the employer when resigning, retiring or death.
4. To remove all people who have been acting for more than three months and positions to be filled within three months.
5. To allow employees to accumulate annual leave, to the value of 60 days and to allowed to sell them when the need arises.
6. To withdraw the circular 1/2017 as it replaced the disciplinary code collective agreement.
7. To remove all scrap tickets issuing machine and replace them with cashless machines.
8. To suspend [and] charge Mr P Lebelo and Mr Z Mheyanwa for contriving the disciplinary code collective agreement by changing the verdict of the presiding officer to dismissal. If they are charged the presiding officer be appointed by the Johannesburg Bar Council.
9. To suspend [and] charge Mr Fani Maluleke and Mr Ndimma for failing to charge a female employee who assaulted a DEMAWUSA member.
10. To suspend and charge Mr J Gamede for suspending employees in the terms which were not allowed by the disciplinary code collective agreement.
12. To review all cases of DEMAWUSA members , investigate union bashing by Metrobus managers and executives and investigate ill-treatment of DEMAWUSA mem by managers. The investigation to be done by the judge appointed by the Johannesburg Bar Council.
13. To release Mr Lebelo to go back to the City of Johannesburg as the GM human resource has been appointed."

[7] Subsequently, there was correspondence between Metrobus and the union mainly dealing with Metrobus's contentions that, for one reason or another, the strike would be unprotected. On 10 May 2018 the union sent a letter to Metrobus, qualifying some of the demands. These qualifications were:

- 7.1 In so far as Metrobus was in the process of removing all the scrap ticket machines and replacing them with cashless ones, Metrobus

should confirm that all machines would be played replaced and undertake that that would be done within 60 days.

7.2 The demand for the suspension of various individuals was modified to include a prior investigation to determine if there was sufficient basis for instituting disciplinary action conducted by an independent advocate agreed upon by the parties or selected by the Johannesburg bar Council, to whom the union could make representations. In the event that possible misconduct was by the investigation the individuals implicated should be charged with misconduct and pre-suspension hearing was held, again subject to various procedural safeguards. At any subsequent disciplinary enquiries these again should be chaired by an independent chairperson and the employer would be required to call witnesses from the union having knowledge of the misconduct. Further, Metrobus would have to agree to be bound by the outcome of the pre-suspension and disciplinary hearings.

7.3 The demand for Mr Lebelo to be sent back to the City of Johannesburg was modified to a demand for a detailed explanation relating to his continued deployment that Metrobus.

[8] A further point that needs to be mentioned is that, because the union disputed Metrobus's claim that the main collective agreement and salary and wage agreement were binding on its members, and that this was a bar to them embarking on a protected strike in respect of the various demands, Metrobus referred an interpretation dispute to the bargaining council on 15 May 2018. This was

[9] a day before it launched this application. It described the dispute thus:

"DEMAWUSA acting on behalf of the employees in Annexure "A" contends that the Main Collective Agreement and the Salary and Wage Collective Agreement ("the Agreements") do not apply to the employees in Annexure "A". The applicant contends that the Agreements apply to the parties and that they are therefore bound by the provisions of the agreements."

Substantive merits

[10] In order to obtain final relief, the applicant must prove that there is a clear right, which the respondent is unlawfully interfering with or which it reasonably apprehends will be interfered with, and that there is no other satisfactory remedy.²

Existence of a clear right?

[11] Metrobus alleges that the strike will be unprotected on a number of grounds. A dominant consideration in the application is whether or not the union's members are bound by the main agreement of the bargaining council, both in respect of the grievance procedure and in respect of collective bargaining issues. Metrobus further contends that, since this dispute has been referred to the bargaining council, the lawfulness of the impending strike cannot be determined until that dispute has been decided and it is not for the court to rule on that issue.

Are DEMAWUSA's members bound by the SALGBC Main Agreement (including the grievance procedure) and the Wage Agreement and does the Labour Court have the power to determine this issue in the context of a strike interdict?

[12] Metrobus referred the dispute about the binding nature of the agreements to the bargaining council as an interpretation dispute. The union contends that essentially that dispute concerns whether or not a particular category of employees fall under the respective agreements, which is a dispute that can only be determined in terms of section 62 (1) (b) of by the LRA, which states:

62. Disputes about demarcation between sectors and areas

(1) Any registered trade union, employer, employee, registered employers' organisation or council that has a direct or indirect interest in the application contemplated in this section may apply to the Commission in the prescribed form and manner for a determination as to-

² See *Setlogelo v Setlogelo* 1914 AD 221 at 227 and *V & A Waterfront Properties (Pty) Ltd & another v Helicopter & Marine Services (Pty) Ltd & others* 2006 (1) SA 252 (SCA) para [20].

(a) whether any employee, employer, class of employees or class of employers, is or was employed or engaged in a sector or area;

(b) whether any provision in any arbitration award, collective agreement or wage determination made in terms of the Wage Act is or was binding on any employee, employer, class of employees or class of employers.

[13] The reason why a dispute of this nature could not be determined by the bargaining council probably reflects a concern of the legislative drafters that, it is not the kind of arbitration that could be conducted under the auspices of a potentially interested party, one of which could be a bargaining council itself. I agree with the respondents that Metrobus has used the wrong procedure to determine the dispute. Accordingly, the determination of the applicability of the agreements is not pending before any forum having jurisdiction to determine it. In consequence of having referred the matter to the SALGBC instead of the CCMA, the alleged dispute cannot be determined by it, and interdicting a strike pending the finalisation of a dispute by a body without the power to do so would be a meaningless order.

[14] Even if I construe the relief sought in the alternative as essentially one of the urgent interim relief despite it being cast in a final form, the same difficulty confronts the applicant. Accordingly, there is no basis for granting the alternative relief contingent on the outcome of the referral of the dispute to the SALGBC.

[15] In terms of 65(3)(a)(i) of the LRA, subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out if that person is bound *inter alia* by a collective agreement that regulates the issue in dispute. Whether there has been compliance with the provisions of s 64 and s 65 of the LRA is a matter for the court to determine in the exercise of its power to determine the protected status or otherwise of a strike, irrespective that another forum having the power to determine one of those issues as a primary dispute might be seized of it.³ If a ruling under s

³ See *Cape Gate (Pty) Ltd v National Union of Metalworkers of SA & others* (2007) 28 ILJ 871 (LC) at 877, para [29].

62(1)(b) had already been made on the issue by the CCMA under 62(1)(b), the situation would no doubt be different. Under circumstances, where no referral has been made for such a determination and no ruling has been made, the applicant must at least demonstrate that in all probabilities it would be entitled to such a determination in its favour. In short, in the absence of a proper referral to the appropriate body, there is no determination pending and Metrobus must demonstrate a clear right to the relief sought in the absence of being able to rely on a determination.

- *The demarcation dispute settlement*

- [16] By early 2014, a settlement agreement was reached between the parties to a demarcation dispute ('the settlement agreement'). That dispute concerned whether or not the Johannesburg municipal entities, including Metrobus, fell under the scope of the Council. SAMWU and IMATU were the only union parties to that agreement.
- [17] In terms of clause 3 of the settlement agreement, each municipal entity was entitled to be represented in its own right in the Johannesburg division of the SALGBC subject to the allocation of representatives in terms of the SALGBC constitution. Clause 4.1 of the agreement provided that subject to clauses 4.2 and 4.3 the "Municipal Entities are exempt from the provisions of all collective agreements, concluded in the SALGBC ...". This was subject to certain exceptions which are not relevant here. Clause 4.2 of the settlement agreement did bind the municipal entities only to the following sections of the Main agreement: Organisational Rights (part C section 2); Agency Shop (Part C section 3); Bargaining Council Levy (Part C section 6) and Rules of the Council (Part D). Lastly, clause 4.3 did require the municipal entities to provide conditions of service that 'on the whole' were 'not less favourable' than those prescribed by SALGBC agreements which applied to City of Johannesburg employees.
- [18] As far as disputes were concerned, the parties agreed in clause 6 that disputes arising which the LRA required to be referred to a bargaining council would be resolved through SALGBC dispute procedures and if

those procedures were established by collective agreements, those collective agreements would apply.

[19] It is pertinent to note that the settlement agreement contained no extension of the agreement to employees who were not members of IMATU or SAMWU in terms of s 23(1)(d) of the LRA. The CCMA declined to make the settlement agreement an arbitration award, so the demarcation dispute effectively was withdrawn without a demarcation ruling being issued.

- *The 2015 Main Agreement*

[20] In any event, the settlement agreement pre-dated the 2015 Main Agreement, and it is the application of that main agreement which is in contention here. Further, the issue of whether or not municipal entities like Metrobus fell within the scope of the SALGBC and the main agreement was resolved by the amendment of the council's scope in December 2016, so the relevance of the settlement agreement is at best limited only to the fact that in so far as the settlement agreement can be read to have been intended to apply to any successive main agreement while the settlement agreement remained in force, the grievance procedures and bargaining arrangements in the main agreement are still not applicable to Metrobus. In any event, as discussed below, even if the settlement agreement is of no current relevance, the 2015 Main Agreement is still currently inapplicable to Metrobus.

[21] The scope of application of the Main Agreement of the SALGBC concluded on 9 September 2015, but effective from 1 July 2015, states that:

The terms of this agreement shall be observed in the Local Government Undertaking in the Republic of South Africa by all employers and by all employees who fall within the scope of the Council.

(emphasis added)

It is common cause that Metrobus and its employees fell within the registered scope of the SALGBC since December 2016, which is when the council's scope was extended.⁴

[22] The central issue is whom, if any, of Metrobus's employees the Main Agreement applies to.

[23] Collective agreements are binding on employees in terms of these provisions of s 23 of the LRA:

23. Legal effect of collective agreement

(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.

(2) A collective agreement binds for the whole period of the collective agreement every person bound in terms of subsection (1)(c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of

⁴ Notice No 1525, GG 40480, dd 09/12/16.

the registered trade union or registered employers' organisation for the duration of the collective agreement.

(emphasis added)

- [24] The parties to the main agreement were SALGA (the employers' organisation) and the unions SAMWU and IMATU. In terms of clause 22.1 the 2015 Main Agreement replaced the previous Main Agreement of 18 August 2007, which presumably would have applied when the demarcation settlement was concluded. Clause 3.2 of the agreement states:

This Agreement shall come into operation in respect of non-parties (which includes but is not limited to Municipal Entities as defined in the Municipal Systems Act, 32 of 2000), on a date to be determined by the Minister of Labour and shall remain in force until 30 June 2022; and after 30 June 2020 or such further period as determined by the Minister of Labour as requested by the Parties.

It is common cause that at the time of this application, the agreement has not been extended by the Minister to non-parties falling within the scope of the agreement. Further, neither Metrobus nor DEMAWUSA are parties to the main agreement nor any existing wage agreement. There was no allegation that Metrobus itself was bound by any agreement by virtue of being a member of the employer's organisation either, even though it and its employees fall within the scope of agreement since the council's scope was extended to include municipal entities with effect from 29 November 2016. By virtue of this extension the scope of the main agreement was also extended but that did not necessarily make it binding on all who fell within that scope.

- [25] Consequently, from that date employees of Metrobus fell within the *scope* of the Main Agreement. However, that is not the same as being bound by it. Metrobus bases its argument that the agreement is binding on it and its employees merely by virtue of falling within the scope of the agreement. However, that is simply insufficient in the absence of showing that the agreement is binding by virtue of the provisions of s 23 or 32 of the LRA. No facts were pleaded, nor was argument advanced by Metrobus on these grounds.

[26] As the grievance procedure as part of the main agreement is also not binding, the failure to follow all its steps before a dispute was referred to the bargaining council does not mean the referral was premature.

Do the strike demands render the strike unprotected ?

- *Collective bargaining demands*

[27] Since the Main Agreement is not applicable, the provisions of clause 10 of the main agreement do not apply to Metrobus and as far as the collective bargaining demands mentioned in paragraphs 1, 2, 3 and 5 of the strike demands are concerned, there is nothing which would render a strike in respect of these demands by Metrobus employees unprotected, on the grounds advanced by Metrobus.

- *Suspension and disciplinary action in respect of certain employees.*

[28] Metrobus relies principally on its contention that these demands cannot be the subject matter of a protected strike to argue that the strike will be unprotected. These demands were set out in paragraphs 8 to 10 of the strike demands and subsequently replaced by more compromising ones. It might have been argued in relation to the original demands in this respect that they could not have been met without breaching the affected employees' rights to fair labour practices. However, on reflection DEMAWUSA has been careful to tailor these demands so that they do not demand that the employer does anything that could be construed as procedurally improper and calls for independent adjudication throughout any suspension or disciplinary process that might be initiated. A demand for a dismissal is not an illegitimate strike demand provided it does not require the employer to dismiss a person unfairly.⁵ The safeguards provided for in the toned down version of these demands adequately satisfies this test. Accordingly, these demands do not make the strike unprotected.

⁵ See *National Union of Public Service & Allied Workers on behalf of Mani & others v National Lotteries Board* (2014) 35 ILJ 1885 (CC) at 1940-1, para [199].

- *Demands on issues in progress*

[29] In terms of the founding affidavit, no basis was laid out claiming that these demands could not be the subject matter of a protected strike. These issues concern the removal of persons from acting positions and removal of so-called scrap ticket machines and their replacement by cashless ones. Once again, there was some modification of these demands. The demand regarding ticket machine replacement was changed to a demand for an undertaking this would be completed in 60 days. On the face of it, there is nothing which makes this modified demand or its predecessor an issue which cannot form the basis of a protected strike demand. Similarly, there was considerable modification of the demand in respect of Mr Lebelo, to the point where DEMAWUSA is essentially demanding responses to a series of questions about his posting at Metrobus. There is nothing inherently unlawful that Metrobus will be required to do to satisfy this demand and it is a matter of mutual interest.

[30] In relation to other acting arrangements, the demand articulated was that, acting posts in existence for three months should be abolished and open positions filled within the same time frame. Metrobus responded by saying it was complying with its policy in respect of time limits on acting appointments and filling vacancies. Once again no basis was laid in the founding papers that these demands could not, as such underpin protected strike action. Similarly, no case was laid why the demand to withdraw a memorandum could not be legitimate.

[31] In conclusion, I am not satisfied that Metrobus has demonstrated that the demands as articulated by the time the application was heard could not be legitimate grounds for protected strike action.

Summation

[32] In summary, I am not satisfied that Metrobus has demonstrated a clear right to interdict the strike as it has failed to provide clear grounds that would render the strike unprotected.

Costs

[33] As there was no good reason for the applicant to have launched these proceedings without complying with the provisions of s 68(3), even though by agreement, the matter was dealt with in a way that would avoid repetitive and costly proceedings, a salutary cost award is appropriate to discourage non-compliance with the section.

Order

- [1] The application is dealt with as one of urgency and the applicant's failure to comply with the Rules of the Labour Court relating to time periods is condoned.
- [2] The application is dismissed.
- [3] The applicant must pay the respondents costs of opposing the application.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

M Sibanda instructed by
Cliffe, Dekker Hofmeyr Inc.

RESPONDENT:

R Daniels of Cheadle,
Thompson & Haysom Inc.