IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: J3472/18

In the matter between:

LANXESS CHROME MINING (PTY) LTD	**Applicant**
and	
NATIONAL UNION OF MINE WORKERS (“NUM”)	**First Respondent**
THE MINISTER OF POLICE	**Second Respondent**
NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA (“NUMSA”)	**Third Respondent**
M.B. RAMOTSEMENG AND OTHER INDIVIDUAL MEMBERS OF NUMSA	**Fourth to Hundred and**
(AS INDENTIFIED IN ANNEXURE “A” TO THE FOUNDING AFFIDAVIT)	**Ninety Seventh Respondent**

Heard: 20 November 2018

Delivered: 11 December 2018

JUDGMENT

MAHOSI. J

Introduction

[1] This is an application in terms of which the third and further respondents (respondents) seek an order in the following terms:

> '1. That it be declared that the strike action which the third to further respondents had commenced with on 26 September 2018 as the applicant's premises constituted protected industrial action;
>
> 2. That paragraphs 21., 2.2 and 2.7 of Rule issued by Honourable PrinslooJ, 0n 28 September 2018, accordingly be discharged.
>
> 3. That the applicant is to pay the 32 further respondents costs.'

[2] The respondents elected to confine their opposition to the issue of a clear right only. The key question is whether the strike action is prohibited in terms of section 65(3)(a)(i) of the Labour Relations Act[1] (LRA).

[3] Prior to outlining the applicants' case in detail and considering the issues that gave rise to the claim, it is necessary to summarise the facts that form relevant background to the dispute between the parties.

Background

[4] The applicant concluded a recognition agreement with the first respondent, during or about 2013. The applicant and the representatives of the first respondent commenced with its annual wage negotiations on 13 April 2018. Negotiations were then continued on 18 April 2018, 1 June 2018, 6 June 2018, 13 June 2018. On 14 June 2018, a wage agreement was concluded between the applicant and the first respondent for employees employed in grades 8-11.

[5] In respect of grades 12-17, the first respondent on 15 June 2018, referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). A conciliation meeting in respect of the last category of employees was conducted on 11 July 2018. On 18 July, the wage dispute between the applicant and the first respondent in respect of the grade 12-17 employees was settled and the settlement terms included in a formal written agreement.

[1] Act 66 of 1995 as amended.

The aforementioned wage negotiations were conducted in terms of clause 2.2 of the aforementioned recognition agreement (Annexure B).

[6] On 6 July 2018, the third respondent, on behalf of its members, referred a dispute to the CCMA in Rustenburg for conciliation (including con-arb). It appears from paragraphs 3 and 4 of the referral document that the dispute declared, concerns the alleged refusal by the applicant to grant organisational rights to the third respondent. The organisational rights dispute between the applicant and the third respondent was settled at a conciliation meeting at the CCMA on 8 August 2018.

[7] On July 2018, the Rustenburg branch of the third respondent, represented by one Violet Magatsela, forwarded a written demand for 2018/2019 to the applicant by email. The demand concerns the duration of the period of a wage agreement, a living allowance, a home ownership allowance, a 20% increase of the basic wages across the board, a shift allowance, a transport allowance, maternity benefits, family responsibility leave, medical aid, subsidy for transport of members' children attending school, a standby allowance, a 20% service increment and shares of 10%.

[8] On 28 July 2018, the third respondent referred a mutual interest dispute to the CCMA Rustenburg for conciliation. The conciliation meeting was held on 27 August 2018 before Commissioner Shimmy Kgantse. The parties were unable to resolve the dispute which served before Commissioner Kgantse. According to the certificate of outcome, if the dispute remains unresolved, a strike is permitted.

[9] On 23 September 2018, NUMSA served a strike notice on the applicant. In terms of the strike notice, the third respondent and its members intended to commence with a strike on 26 September 2018. On 25 September 218, Mr Wiseman Dladla, employed in the human resources department of the applicant, forwarded a request (LRA Form 4.1) to establish picketing rules to the CCMA Rustenburg and to the third respondent. No such picketing rules have yet been established.

[10] The applicant's first shift commenced on the morning of 26 September 2018 at 06h00. Members of the third respondent congregated at the applicant's main entrance. A public road giving access to the mine's premises, situated on private property, leads to the main entrance of the applicant's premises.

Members of the third respondent prevented fellow employees and members of NUMSA to enter the mine premises.

[11] Members of the third respondent also obstructed access to the applicant's mining area by placing rocks and tyres in the public road that leads to the applicant's main entrance. The aforementioned actions by the members of the third respondent obstructing the entrance are of course unlawful and constitute serious misconduct.

[12] On 27 September 2018, the applicant filed an urgent application to interdict the strike action. On 28 September 2018, this Court granted a *rule nisi* in terms of the applicant's notice of motion. It is parts of this *rule nisi* that the respondents seek to discharge.

Applicable law and analysis

[13] It is trite that the workers must comply with the procedural requirements set out in section 64 of the LRA to engage in a protected strike. Section 65 of the LRA provides for the substantive limitations on the right to strike or recourse to lockout, and it states as follows:

> '(3) 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 -
>
> (a) if that person is bound by -
>
> (i) any arbitration award or collective agreement that regulates the issue in dispute.'

[14] The crisp question for determination is whether the respondents are prohibited from striking in respect of the demands as recorded in the strike notice. The applicant submitted that it operates as a mine and it employs approximately 520 employees, approximately 179 of the aforementioned employees are members of the third respondent and the majority of the employees, approximately 341 employees, are members of the first respondent. The applicant further submitted that the third respondent is not a majority trade union at applicant's aforementioned mining premises and that on 15 June 2018, the third respondent had only recruited 25 members.

[15] The applicant's contention is that the respondents are by virtue of section 23(1)(d) of the LRA bound by the terms of the collective agreements entered into between the applicant and the first respondent on 14 June 2018 and 18 July 2018 respectively. Further that as a consequence of the aforesaid purported extension, the dispute in question is regulated by the terms of collective agreements binding upon the respondent, as a further consequence of which the strike action is prohibited in terms of section 65(3)(a)(i) of the LRA.

[16] Section 65(3)(a)(i) provides as follows:

> '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 -
>
> (a) if that person is bound by -
>
> (i) any arbitration award or collective agreement that regulates the issue in dispute.'

[17] It is well established and settled in our law that minority unions may be bound by collective agreements entered into with majority unions on matters of mutual interest and minority unions need not be consulted in those instances. This is so despite the fact that the subject matter of the collective agreements affects individual employees and their unions. In *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others*,[2] the Labour Appeal Court stated as follows:

> 'Section 23(1)(d) of the LRA is but one instance in the LRA where the legislature had chosen to apply the principle of majoritarianism. There is nothing unconstitutional about the principle itself. It is a useful and essential principle applied in all modern democracies, including the Republic of South Africa. It has been recognised as an essential and reasonable policy choice for the achievement of orderly collective bargaining and for democratisation of the workplace and the different sectors.'

[2] [2016] 9 BLLR 872 (LAC) at para 105

[18] In *Association of Mineworkers and Construction Union (AMCU) and Others Bafokeng Rasimone Management Services (Pty) Ltd and Others*[3] the Court observed that the subject matter of the collective agreement is irrelevant to its extension to non-parties:

> 'In my view there is merit in this submission and it matters not what the subject matter of the collective agreement is. If a collective agreement had been concluded, the effect and consequences should be the same, irrespective of the subject matter of the agreement and it would be inappropriate to treat some matters of mutual interest different from others.'

[19] The Constitutional Court recently dealt with the validity of the extension of a collective agreement to members of a union who are not a party to the collective agreement in *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others*[4] where it held as follows:

> '…The decision by private parties to invoke the power of section 23(1)(d) affords them to extend their collective agreement to parties entirely alien to it has a coercive effect: it binds nonparties to the agreement willy-nilly. And, as AMCU rightly points out here, the statutes empower contracting parties to do this with just about industry wide effects. The extension of the agreement also has extensive implications for members of the public. For its duration, non-members employees are bound. Even more, they forfeit the right to strike if the collective agreement regulates the issue in dispute.'[5]

[20] Therefore, in circumstances where the majority trade unions had concluded a collective agreement with the employer which prohibited strike action over the issue in dispute (as it is in this case), the strike by the minority union would be unprotected.

[21] In this case, the respondents' contention is that the applicant has failed to prove its claim that the first respondent had represented the majority of its workforce as at the time of the conclusion of the two agreements. It submitted that as at 14 June 2018, it had in fact recruited in excess of 300 members, continued to increase that number up to the conclusion of the second

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[3] (2017) 38 ILJ 931 (LC) at para 133

[4] 2017 (6) BCLR 700 (CC).

[5] At para 78.

agreement and further continued to do so up to date. In support of this allegation, the respondents submitted that as from 5 June 2018 to 14 June 2018, it had presented the applicant physically with an excess of 300 signed membership and that the applicant confirmed in writing that as at 14 June 2018, the third respondent had claimed that it had recruited 339 employees in the applicant's workplace.

[22] The respondent's further contention is that against the backdrop of the aforesaid indisputable facts and with the full knowledge that the first respondent could no longer claim majority status and that it was not longer mandated to conclude agreements on behalf of the workforce, the applicant and the first respondent in a most cynical manner entered into the two collective agreements in question. Accordingly, the respondents argued that these agreements were entered into in extreme bad faith and its right remained reserved to challenge their validity to the extent that this may be required in future.

[23] Whilst the respondents are of the firm view that in the absence of the applicant showing a clear right, its application should be dismissed out of hand, it is also acutely aware of the serious consequence a finding to the contrary by this Court will have for them given the content and ambit of the two collective agreements. Accordingly, the respondents requested the Court, only to the extent that the Court may have concerns relevant to the extent of factual dispute on the papers and be disinclined to dismiss the applicant's application, to refer the matter for oral evidence on the basis that the parties may amplify their papers.

[24] In its replying affidavit, the applicant submitted that it is apparent that there are factual disputes, which it could not have foreseen at the launching of this application. Further that in the premise, the factual dispute should be referred for oral hearing alternatively the matter be postponed until after the CCMA's completion of the verification process.

[25] In order to assess the parties conflicting contentions, the Court has to have regard to the disputed facts. Rule 7(7)(b) of the Rules of this Court makes provision for exactly this scenario. It provides that the Court must deal with an application in any manner it deems fit, which may include referring a dispute

for the hearing of oral evidence. This is a case where the court should invoke the sub-rule. The dispute in this case can only be decided by reference to oral evidence

[26] Accordingly, I make the following order:

Order

1. This matter is referred for hearing of the oral evidence. The affidavits filed in this application may serve as pleadings in the trial and may be amplified.
2. The costs are to be determined at the end of the trial.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate. ESJ van Graan SC
Instructed by:	De Swardt Vogel Myambo Attorneys
For the First Respondent:	Mr M Niehaus of Minnaar Niehaus Attorneys