IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 4552/18

In the matter between:

SIBANYE GOLD LIMITED t/a

SIBANYE STILL WATER **Applicant**

and

ASSOCIATION OF MINEWORKERS AND

CONSTRUCTION UNION **First Respondent**

MEMBERS OF THE FIRST RESPONDENT EMPLOYED

BY THE APPLICANT **Second Respondent**

Heard: **18 December 2018**

Delivered: **21 December 2018**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] This urgent application represents the sixth round in an on-going battle between the parties before this Court, since the first respondent (AMCU) and its members commenced protected industrial action at the applicant on 21 November 2018.

[2] Immediately upon the commencement of the strike, the applicant approached this Court on 22 November 2018 under case number J4217/18 and obtained a *rule nisi* interdicting the respondents and NUM from *inter alia*, inciting/engaging in any unlawful conduct, violence and intimidation. Upon the issuing of picketing rules by the CCMA, the applicant again approached this Court on an urgent basis under case number J4390/18 to vary the picketing rules after alleged breaches. On 12 December 2018, the applicant yet again approached this Court on an urgent basis under case number J4518/18 for an order calling upon AMCU and its members to appear before the Court to show cause why they should not be found to be in contempt of court for failing to comply with its orders under case numbers J4217/18 and J4390/18.

[3] AMCU for good measure, also brought their own application under section 69(12) of the Labour Relations Act (LRA)[1] under case number J4522/18 to vary the picketing rules, which matter has since by agreement been removed from the roll. A further application followed on 28 November 2018 when AMCU sought an order that the applicant comply with its common law duty to provide a safe working environment to all the employees at the applicant's workplace.

[4] With the current urgent application, the applicant seeks a *rule nisi,* for an order declaring the continuing strike that commenced on 21 November 2018 to be unprotected as contemplated in sections 65(1)(a) and 65(3)(i) of the LRA with effect from 13 December 2018; interdicting and restraining AMCU and its members from participating in and promoting the strike; and interdicting and restraining AMCU from calling its members out or inviting them to participate in the strike or conduct in furtherance of the strike. The application is as expected, vehemently opposed.

<u>Brief history:</u>

[5] The applicant operates a number of gold mines which are divided into three separate business units, *viz*, Driefontein and Kloof in Gauteng, and Beatrix in

[1] Act 66 of 1995 (as amended)

the Free State. These individual mines consists of various shafts and plants. The applicant also has various divisions which constitutes its workplace.

[6] NUM, Solidarity, UASA and AMCU are all recognised for collective bargaining purposes by the applicant. AMCU has a majority representation at Driefontein mine. It however disputed that NUM has majority representation at Kloof, and from the answering affidavit, it does not appear that it disputes that NUM also has majority representation at Beatrix. It is common cause however that there is intense rivalry between AMCU and NUM, which is exacerbated by the close proximity of the Driefontein and Kloof mines.

[7] AMCU alleges that its members have been subjected to violence by members of NUM, that the applicant has failed to prevent such attacks and had instead displayed a propensity to favour NUM by seeking to entice or pressurise its members to change allegiances, thus worsening the inter-union rivalry and tensions.

[8] Negotiations in regards to wages, terms and conditions of employment for the period 1 July 2018 to 30 June 2021 between the recognised unions, the applicant and other companies in the business of gold mining commenced on 11 July 2018 at the Mines Council of South Africa (previously known as Chamber of Mines). A collective agreement was concluded on 14 November 2018 between the Council on behalf of the applicant and other companies, and NUM, UASA and Solidarity. AMCU was however not party to the collective agreement, and despite further negotiations with it, an agreement remains elusive.

[9] Following a strike notice issued on 19 November 2018 by AMCU, industrial action commenced on 21 November 2018. It is common cause that as at 14 November 2018 when the collective agreement was concluded, NUM, UASA and Solidarity acting together, did not have as their members, a majority of the employees employed at the workplace. Collectively, they enjoyed 48% (out of 30245 employees) representation at the workplace.

[10] The applicant's contention is that between 22 November 2018 and 13 December 2018, the membership figures have since changed due to

normal attrition and movement of employees between the unions during that period. It contends that as at 13 December 2018, NUM, UASA and Solidarity acting jointly now have 51.2% of the membership. The figures as obtained from the applicant's 'Symplexity HR System' are to be gleaned from a spread sheet compiled by the applicant's Human Resources Superintendent: HR Management Information Systems, Mr. Wayne Brits.

[11] According to the figures, there was a total of 1591 movements of employee membership into and out of the recognised unions and non-unionised category, showing a losses of 134 by AMCU and 802 in the non-trade union category; gains of 602 by NUM, 119 by Solidarity, and 215 by UASA. These figures took into account 86 employees who left the applicant's employ, and the recruitment of 25 new ones during the period. To confirm these figures, the applicant then engaged the services of Sekela Xabiso Inc to verify trade union membership movements during 23 November 2018 and 13 December 2018.

[12] On 13 December 2018, NUM, UASA, Solidarity and the applicant concluded an agreement to amend the Main Wage Agreement (Extension Agreement), and thus by virtue of the provisions of section 23(1)(d) of the LRA, extending that agreement to all employees employed by the employers, whether or not they are members of the Unions, who are employed in the category 4-8 miners, artisans and official recognition units in the workplace of each representative employer.

[13] On the same date that the extension agreement was concluded, the Council addressed a letter to AMCU advising it of that agreement, and that its effect was to extent the Wage Agreement to its members by virtue of the provisions of section 23(1)(d) of the LRA. AMCU was further advised that the strike action embarked upon by its members was unprotected, and that it was required to cease the strike, and that its members were to report for duty by Saturday 15 December 2018, failing which they may be dismissed. The applicant on the same date also addressed a letter to AMCU referring to the letter of Council, and also informed it of the extension of the wage agreement

and its consequences. AMCU's response in its letter of 14 December 2018 was to deny that its strike was unprotected.

Evaluation:

[14] The Notice of Motion was brought before the Court on 18 December 2018 and the matter was set down for a hearing on the same day. It appears that the application was served on AMCU on or about 15 or 16 December 2018, it being a long weekend. AMCU had promptly filed its notice of opposition on 16 December 2018, and an extensive answering affidavit was filed and served on 18 December 2018. The applicant did not file a replying affidavit and elected to proceed on its founding papers.

[15] The urgency of the matter cannot for all intents and purposes be placed in dispute. The strike action had been on-going since 21 November 2018 with devastating consequences for both parties, and the fact that this is the sixth application before this Court related to that strike can only underscore that urgency.

[16] To the extent that the applicant seeks a *rule nisi,* the requirements to be met are known. These are that the applicant must establish a *prima facie right;* a reasonable apprehension of irreparable harm if the *interim* interdict is not granted; that it has no alternative satisfactory remedy available to it; and further that the balance of convenience is in favour of granting the *interim* relief[2].

[17] It has been repeatedly stated that the Court would be prepared to grant the interdict upon a lesser degree of proof than that required for a final interdict[3]. The applicant is thus only required to establish a *prima facie* right, *albeit* open to doubt[4].

[2] *Setlogelo v Setlogelo* 1914 AD 221
[3] See Van Loggerenberg, DE, *Erasmus- Superior Court Practice* (Service 41, Juta & Co. Ltd, 2013) at E8-10).
[4] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189, where it was held that;

> '…the right to be set up by an applicant for a temporary interdict need not be shown by a balance of probabilities. If it is "*prima facie* established though open to some doubt" that is enough…

[18] Whether that *prima facie* right, even if open to doubt has been established requires a determination of whether the provisions or requirements of section 23(1)(d) of the LRA[5] have been met in this case, for the purposes of declaring that the strike action that commenced as protected, has since become unprotected, for the purposes of the application of sections 65(1)(a) and 65(3)(a) (i) of the LRA.

[19] The constitutional validity of the principle of extensions in terms of section 23(1)(d) of the LRA having been upheld in *AMCU and others v Chamber of Mines of South Africa and others*[6], Mr Kennedy SC for the respondents was correct in pointing out that because of the impact that these provisions have on the concomitant constitutional right to strike[7], it is of importance that the Court is satisfied that indeed the requirements set out in that section are met. In essence, the extension of a collective agreement in terms of section 23(1)(d) LRA cannot escape judicial scrutiny.

[20] From the operative words in the provisions section 23(1)(d) of the LRA, the implications in this case are that NUM, UASA and Solidarity must have as their members, the majority of *employees* employed by the applicant in the *workplace.* The most natural interpretation of section 23(1)(d) is that, it is the union membership figures at the time the agreement is extended which

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The proper manner of approach I consider is to take the facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicant he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to "some doubt". But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.'

[5] **23. Legal effect of collective agreement**

(1) A *collective agreement* binds-

(a) …

(b) …

(c) …

(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*.

[6] 2017 (3) SA 242 (CC)

[7] Section 23(2)(c) of the Constitution of the Republic of South Africa (Act 108 of 1996, as amended)

matters. It cannot therefore be correct for Mr Masher on behalf of the applicant, to argue that the figures as disputed by AMCU are not relevant for the purposes of granting *interim* relief. Those figures are the very basis upon which AMCU's constitutional right to strike is sought to be curtailed by virtue of the extension of the wage agreement in accordance with the provisions of section 23(1)(d) of the LRA.

[21] What then are the facts that were placed before the Court to justify the extension of the wage agreement? From the onset, it needs to be stated that the figures relied upon by the applicant in claiming majority on behalf of the other three unions were vigorously contested by AMCU. Whilst the figures up to 22 November 2018 were common cause, the figures between that date and 13 December 2018 when the agreement was extended are placed in dispute.

[22] It has already been stated as to how the applicant arrived at its trade union membership figures between 22 November 2018 and 13 December 2018. The figures come from the applicant's own system and as further verified by Sekela Xabiso Inc, a professional services firm. In my view that are inherent difficulties which the applicant must surmount in regards to the manner and approach with which these figures were arrived at.

[23] The obvious difficulty is that it is not stated as to who Sekela Xabiso Inc is. Their credentials are unknown even if it cannot be doubted that they are a reputable professional services firm as averred by its Director, Ms Zoliswa Ntombela in her confirmatory affidavit. Be that as it may, it is not known how they came to be appointed, and what their expertise was in matters that they were required to investigate and verify.

[24] Several concerns were raised in regards to their findings and methodology in verifying the figures that dramatically changed over the period in question. These include that;

(a) The affected unions were not engaged when the verification exercise was done. That on its own raises questions as to the legitimacy, transparency or validity of that process. The applicant's contention that the engagement was not possible or practical due to the nature of the on-going strike, or that it was not aware that AMCU would dispute the figures, can hardly be a reasonable excuse given the far-reaching implications of that exercise, especially on AMCU's constitutional right to continue with the strike. The adherence to a fundamental right to be heard is or was clearly paramount in such an exercise, and AMCU clearly deserved to be engaged in the light of its own interests that were at stake.

(b) Two fundamental flaws are immediately discernible form the report. The first is highlighted under paragraph **1.5.1 Engagement Scope**, of the report, where it is recorded that;

> *"The engagement covered the verification of union application forms processed from 23 November 2018 until 13 December 2018 (11h30AM). In relation to the representation before 23 November 2018, SKX has relied on the information provided by the Company and no verification was done on those numbers. The last monthly payroll was on 23 November 2018 and was based on information up to 22 November 2018"*

(c) The second can be found under paragraph **1.5.3 Scope Exclusions/Limitations** of the report, where it is recorded *inter alia* that;

> *"The following do not form part of this engagement;*
>
> *…*
>
> *Verification of application forms received prior to November 2018*

[25] Other than the above which point to fundamental lapses, AMCU in its answering affidavit raises various factors which creates doubt as to the veracity of the figures relied upon by the applicant. The applicant having set this application down on an urgent basis and electing not to file a replying affidavit, it took a risk as correctly pointed out on behalf of the respondents, and it is trite that *interim* relief cannot simply be granted for the purposes of allowing a party to supplement its papers at a later stage. It is either the requirements for the relief sought are met or not, and fundamental being a

prima facie right to that relief. If uncontested averments in the answering affidavit creates doubt, *interim* relief ought to be declined.

[26] In the answering affidavit, AMCU contends that the applicant's figures are wrong, inflated, skewed and unreliable, and that the claim that the three other unions now represents a majority by the slightest margin is flawed for the following reasons;

i. A total of 149 AMCU members, who were previously NUM members employed in the applicant's Protection Services were wrongly accredited as NUM members despite having resigned from the latter and having signed up with AMCU between 2017 and 2018.

ii. A total of 442 of employees at Driefontein and Kloof mines have moved from NUM and UASA to AMCU, and despite various engagements with the applicant and the handing over of membership forms, their processing had not been done.

iii. A total 167 employees at Beatrix joined AMCU during the course of the current strike after having resigned from NUM and, and there is no evidence that this was taken into account

iv. A total of 100 AMCU members at Beatrix mine are not reflected in management's records, and 70 of them are wrongly reflected as members of NUM and other unions.

v. Members of AMCU performing essential services at the three mines, and who are not permitted to join the strike, have been unlawfully induced by management to resign from it and join NUM. This was done through 'parades' at various shafts between 11 and 12 December 2018, where they were told to join NUM if they wished to continue working or be paid, or avoid retrenchments in the new year. Various instances of inducements and threats made by management towards AMCU members in this regards were cited in the papers.

vi. AMCU further contends that even if its members are said to have recently resigned from it and joined other unions, in accordance with its constitution, those members could not immediately effect the resignation as they were required to give four weeks' written notice. It was contended that no such notices were received, and that even if there were such resignations, no proof had been provided in that regard. To that end, AMCU disputed that it had lost 473 members during the period in question as alleged by the applicant, and that the other unions could have achieved majority representation during that period.

[27] Flowing from the above, the following conclusions can be readily made;

27.1 It follows that serious doubt has been cast by the answering affidavit in regards to clearly unsubstantiated versions in the founding affidavit in regards to how the figures were arrived at. The Sekela Xabiso Inc verification report may be helpful to the applicant, but in the light of the fundamental flaws pointed out in this judgment, inclusive of its apparent lack of transparency, it is of little consequence to the Court in the determination of this application.

27.2 The applicant has not provided source documents to back up the verification process and its conclusions, whilst AMCU has tendered an inspection of the documents it relied upon. It is accepted that some of the documents relied upon by AMCU, especially in regards to membership application forms may fall outside of the period in question as correctly pointed out on behalf of the applicant. Whether the figure of 149 AMCU in the applicant's Protection Services was relevant to the issues or not as contended on behalf of the applicant does not in any event detract from the fundamental flaws in the verification process. However, it cannot on the whole, be concluded that the doubts created or disputed versions averred in the answering papers are lacking in merit. This is so particularly in the light of the spectacular manner with which the verification process breached the fundamental principle of *audi alteram partem*, or at worst solely relied on management's unverified figures as pointed out in the Sekela Xabiso Inc report.

27.3 There can be no merit in the applicant's contentions that no serious doubts have been created in regards to the figures as alleged in the answering papers. The fact that AMCU had not also independently verified its figures does not make the applicant's figures any better or correct.

27.4 If the AMCU's figures are backed up by source documents which were tendered and readily available, something which the applicant had failed to do despite approaching the Court on an urgent basis, I fail to appreciate why this Court should ignore the fact that those figures, even if unverified, indeed raises serious doubts for the purposes of determining whether the wage agreement was validly extended to AMCU and its members for the purposes of declaring their strike unprotected.

[28] Flowing from the accepted test for a *prima facie* right as restated in *Simon N.O v Air Operations of Europe AB and Others*[8] , the Court having had regard to the facts averred by the applicant, the common cause facts and those facts that remain undisputed as set out in the answering papers, serious doubts have been thrown upon the applicant's case. I am accordingly not satisfied that the applicant has established a *prima facie* right to the relief it seeks, or let alone a clear right to the enforcement of the provisions of sections 23(1)(d); 65(1)(a) and/or 65(3)(a)(i) of the LRA. There is clearly no basis, let alone even on a *prima facie* one, for any conclusion to be reached that the three other unions could have between the period 22 November 2018 and 13 December 2018 dramatically increased their membership to enjoy majority representation for the purposes of extending the wage agreement.

[8] 1999 (1) SA 217 (SCA) at .. where it was held that;

> "The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed"

[29] The Court would however be remiss to ignore the irreparable harm the on-going strike has caused. The consequences of the extension of the wage agreement however, and its impact on AMCU's guaranteed constitutional right to strike are equally factors not to be ignored. To this end, it is my view that in the light of the orders to be made as below, it is within the powers of this Court to make any further orders that it deems prudent under the provisions of section 158 of the LRA, that will give effect to the primary purposes of the LRA, paramount being the effective resolution of labour disputes.

[30] I have further had regard to the requirements of law and fairness in regards to the issue of costs. Even though I am mindful of the fact that the applicant may have had cause to approach the Court on an urgent basis, the basis upon which it did so was not well thought through, causing the respondents the inconvenience of having to put up opposing papers over a long weekend. In my view, even though there might be an on-going relationship between the parties, fairness dictates that the applicant should be burdened with the costs of this application.

[31] Accordingly, the following order is made:

1. The applicant's application is dismissed.
2. The Registrar of this Court is ordered to forward a copy of this judgment to the Office of the National Director of the Commission for Conciliation, Mediation and Arbitration (The CCMA), for it (National Director), to facilitate and set in motion within a period of three (3) days upon receipt of a copy of this judgment, a union membership verification process at the applicant's workplace.
3. The National Director of the CCMA is ordered to file a report on the progress made in regards to order (2) as above with the Registrar of this Court by no later than 7January 2019.
4. The applicant is ordered to pay to the first respondent, the costs of this application.

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Dion Masher of Edward Nathan Sonnenberg INC

For the Respondent: P Kennedy SC

Instructed by: Larry Dave INC