

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: P162/17

In the matter between:

BORBET SOUTH AFRICA (PTY) LTD Applicant

and

NATIONAL UNION OF METAL WORKERS First Respondent
OF SOUTH AFRICA (NUMSA)

THE PERSONS LISTED IN Second and Further Respondents
ANNEXURE "**BOR** 1" TO THE FOUNDING
AFFIDAVIT

Heard: 08 September 2017

Delivered: 16 January 2018

JUDGMENT

MAMOSEBO. AJ

Introduction

[1] On 28 June 2017 Lallie J issued out of this Court, a *Rule Nisi* in terms of s

68 (1)(a) of the Labour Relations Act¹ (LRA) calling upon the respondents to show cause on 08 September 2017 why the following order should not be made:

1.1 declaring the strike contemplated to commence on Thursday morning unprotected;

1.2 interdicting and restraining the respondents from participating in any strike arising from the following demands or any other demands motivated by or relating to applicant's participation in the demarcation proceedings currently underway in terms of s 62 of the LRA:

- (a). A housing subsidy of R3500.00 for C1.1rent and future employees;
- (b). A transport allowance of R1000.00 for current and future employees;
- (c). Two full time shop stewards for as long as NUMSA is the majority trade union;
- (d). A production bonus for current and future employees at R1800.00 per month on achieving 60% targets of production;
- (e). A total of 30 days per annum per person for training of each NUMSA member with fun payment by the employer;
- (f). A 100% employer contribution to both medical and provident fund schemes for all NUMSA members;
- (g). Full BBBEE compliance within the next 12 months;
- (h). A service allowance as follows per annum:
 - (i) 1- 3 years= R500.00
 - (ii) 4 - 6 years= R1000.00
 - (iii) 6- 10 years= R2000.00
- (i). Staff discount of 90% per product per annum.
- (j). That service of this order shall be effected by:
 - (i). The applicant's representative hand delivering a copy of the order to the office

¹ Act 66 of 1995

of the first respondent (NUMSA) in Port Elizabeth;

(ii). Placing a copy thereof on at least one notice board of the applicant's workplace;

2. Paragraph 1.2 operates as an interim order pending the return date.
3. The applicant is granted leave to supplement its papers to extent deemed necessary.
4. Costs are reserved."

[2] The application, originally granted by consent, served before me on the return date and is opposed. The applicant is seeking confirmation of the rule *nisi* but concedes that the respondents have complied with the procedural provisions of the LRA and as a result acquired the right to strike. It nevertheless urges me to consider the submission favourably that the respondents may be harbouring some form of retaliation against it for its involvement in the demarcation dispute which is pending and opposed by NUMSA.

The parties

[3] The applicant is Borbet South Africa (Pty) Ltd, a company with limited liability, operating in Port Elizabeth. The first respondent is the National Union of Metal Workers of South Africa (NUMSA), a trade Union registered in terms of the LRA. The second and further respondents are those persons whose names appear on Annex "BOR 1" and are employed by the applicant.

The issue

[4] The issue that falls for determination is whether the mere compliance by the union with the procedural requirements contemplated in s 64 of the

LRA entitles it to strike without being limited by s 65 of the LRA. Can or should the Court disregard the contention by the applicant that the action by NUMSA abuses the right to strike and is a retaliation against the applicant for taking part in the demarcation process?

Background facts

[5] Counsel for the applicant, Mr John Grogan, conceded that it is trite that the courts will be slow to interfere with collective bargaining between parties but pleaded that these circumstances be regarded as exceptional. Counsel's motivation for the exceptional nature of the case arises as follows: The applicant and 13 other employers are involved in a demarcation dispute and NUMSA is opposing that process. When the strike notice was issued the arbitrator's award was still pending. The demarcation process involves a decision whether the applicant and other employers should remain in the Metal and Engineering Industry Bargaining Council (MEIBC) or be demarcated to fall under the Motor Industry Bargaining Council (MIBCO). The employers support the demarcation. When this application was made the employers were already involved in national wage negotiations. In as far as in-house development was concerned, the applicant had introduced a four-shift system negotiated at plant level and yet NUMSA added it as a demand to the applicant.

[6] Mr Franscois le Roux, arguing for the respondents, submitted that: The respondents view the demarcation of the applicant from MEIBC to MIBCO as having the potential to detrimentally affect their terms and conditions of employment as well as their interests. These, counsel contended, are the reasons why NUMSA on behalf of the respondents, resists the demarcation. There seems to be a dispute of fact around whether or not Mr Twani, NUMSA's Regional Secretary, demanded the applicant's withdrawal from the demarcation process in a meeting held on 30 March

2017. It is further common cause that the parties approached the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation but NUMSA subsequently requested the certificate of non-resolution having realised that there were no prospects of a resolution. After several meetings and correspondence between the parties a strike notice was issued by NUMSA on 27 June 2017 which is the subject of the matter for determination before me.

[7] Mr Roux sought to convince me that the applicant is not correct in alleging a connection between the demarcation dispute and the demands sent to it by Mr Twani of NUMSA on 07 April 2017. He reckons that those demands were merely an act of attempting to secure economic survival for the second and further respondents. It thus becomes necessary to interrogate the letter dated 07 April 2017 addressed to Borbet Management by NUMSA.

"The National Union of Metal Workers of SA after careful consideration of the dynamics at play in both the industry as a whole and Bargaining Council in particular we have concluded that there is economic war at play between parties. This has been evidenced by your part-taking in the campaign to seek to demarcate from the MEIBC to MIBCO for no other reason other than the economic rational of future profit fortunes derived at the back of super exploitation of our current and future membership.

On the basis of the above, we have thoroughly examined, analysed and consulted on both the objective realities that faced us and subjective conditions that we find ourselves under and concluded that a counter campaign from our side will suffice to guarantee our current and future survival to protect us and our future as necessary. Hence our demands are as follows to you to give effect to the decision ..."

[8] The submission by the respondent's counsel can therefore not be correct that

there is no link between the demarcation process and these demands. I agree with the applicant's counsel that the demands made in the letter dated 07 April 2017 were part of a counter campaign to counteract the applicant's participation in the demarcation process. The letter clearly makes reference to it in the following phrase: *'This has been evidence by your part-taking in the campaign to seek to demarcate from MEIBC to MIBCO...'*

[9] This counter-campaign is also illustrated in issues pertaining to the four-shift arrangement by the applicant as captured in minutes of the Special Meeting between NUMSA and Management dated 30 March 2017 compiled by Mr Glen Zamisa, the applicant's Human Resources Manager. It is important to note that the contents of these minutes were not disputed by NUMSA. The item of demarcation was not on the agenda but was introduced by Mr M Twani who said the following:

"He [Mr Twani] reported to the company that Numsa NEC has taken strong resolution to engage all the 18 companies that are party to the application for demarcation which has been in arbitration since 2016 and is about to be finalised. The secretary made a wide range of scathing allegations as to the motive of the company in joining the action including but not limited to varying down employment conditions, reducing the wage bill, destroying the current MEIBC council and destabilising collective bargaining. He informed the company that as Numsa they will ask for demands from the workers in order to protect members from the effect of the demarcation process. He asked that the company should consider withdrawing from the demarcation process or risk the consequences of instability and actions that Numsa will be embarking upon in defence of its members. The regional secretary made it clear that Numsa has taken a tough stand on this issue notwithstanding the fact that they will also pursue the companies through the legal process. The company was asked to respond if it wants to but was also given the option to respond later in writing. B van Vuuren

attempted to make a response but was interrupted by the regional secretary. The meeting was thereby terminated."

[10] It is clear from the aforementioned minutes of the meeting that the applicant

was pressurised to withdraw from the demarcation process failing. which it will face the consequences of what is termed a counter-campaign by the union.

[11] If arbitration proceedings were nearing completion it is incomprehensible why the parties could not await the outcome and only then entertain further options. It can only mean one thing; the demands by NUMSA were indeed contrived as an act of retaliation against the applicant for its participation in the demarcation process. One cannot see it in any other way. I am also of the view that NUMSA did not afford the conciliation process an adequate opportunity to thresh out the issues in an open and conciliatory manner. The fact that they asked for the certificate of non-resolution and thereby pre-empting that there was no prospect of a settlement does not portray a picture of a party that intended to have the issues amicably resolved. What is worse, NUMSA acknowledges in its answering affidavit that Mr Twani did not meet with its members between the period of the meeting of 30 March 2017 and writing to the applicant on 07 April 2017. The demands were canvassed with the members after the fact, that is, after the letter was communicated to Management and the members plainly endorsed them later. I have not discerned from the papers NUMSA's explanation on how it was able to arrive at the list of the demands without input from the general membership. This is a cause for concern. It is the very demands that led to the notice to strike. In my view, the argument by the applicant around this aspect is legitimate.

[12] The applicant has further submitted that the argument by NUMSA that their member's demands are "merely an attempt to secure the economic survival" should the applicant move from MEIBC to M1BCO cannot be legitimate. This submission was correctly argued by the applicant's counsel as demonstrating the link between the demands and the awaited possible outcome on the demarcation process. It is also inexplicable to me why the applicant was singled out of the 13 employers who are participating in the demarcation process. I am left with no doubt in my mind that the demands by NUMSA are nothing but a measure of retaliation against the applicant for participating in the demarcation process. Having found that the action by the respondents was to retaliate, the next question that I need to answer is whether their strike would be unprotected or not.

[13] I am not satisfied that the dispute that NUMSA referred to conciliation was properly referred. I have found the link between the demands and the applicant's participation in the demarcation process. That is the true dispute that was not referred for conciliation. Because no effort was made to resolve the true dispute, the strike emanating from the incorrect dispute cannot be protected.

[14] Sec 7(1)(c)(iv) stipulates:

"7. Protection of employer's rights. -

- (1) No person may discriminate against an employer for exercising any right conferred by this Act.
- (2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following -
 - (c) prejudice an employer because of past, present or anticipated -

(iv) disclosure of information that the employer is lawfully entitled or required to give another person."

It is my view that the strike called by NUMSA was for purposes of compelling the employer to withdraw from the demarcation process. This is not what the aforementioned provision of the LRA contemplated. In actual fact, NUMSA's actions calling for a strike are in direct contravention of s7 of the LRA."

[15] Mr le Roux argued that the right to strike is a constitutional right. This is not in dispute. Counsel further submits that the applicant has no dispute of right that should be adjudicated by the Labour Court or arbitrated upon. Sec 65(1)(c) stipulates:

"65. Limitations on right to strike or recourse to lock-out. -

(1) No person may take part in a strike or 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."

It remains incomprehensible how the latest demands cannot be characterized as putting pressure on the applicant not to participate in the demarcation process. I accept that the demands were solely raised for that purpose. It can only follow that s 65(1)(c) has been contravened by NUMSA. It is my finding that NUMSA is attempting to prevent the applicant from participating in a process well knowing that they are still entitled to have the matter arbitrated. As a matter of fact, arbitration on the demarcation process is pending.

[16] I am satisfied that the applicant has made out a proper case for the rule *nisi* to be confirmed. There is also no reason why costs should not follow the

result.

Order

[17] In the result, the following order is made:

1. The rule *nisi* is confirmed.
2. The respondents are ordered to pay the costs of the application

MC Mamosebo

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: Advocate John Grogan

Instructed by: Joubert Galpin Searle Attorneys

For the third respondent: Advocate Francois Le Roux

Instructed by: Gray Moodliar Attorneys