



IN THE LABOUR COURT OF SOUTH AFRICA, PORT-ELIZABETH

Not Reportable

Case no: P 205/17

In the matter between

VOLKSWAGEN OF SOUTH AFRICA (PTY) LTD

Applicant

and

**NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA ("NUMSA")**

First Respondent

**THE PERSONS REFERRED TO IN SCHEDULE "1"
TO THE NOTICE OF APPLICATION**

Further Respondents

Heard: 07 November 2017

Delivered: 11 April 2018

JUDGMENT

MAHOSI. J

Introduction

[1] This is an application to confirm a *rule nisi* that was granted by this Honorable Court on 1 September 2017, calling the First Respondent (NUMSA) and Further Respondents to show cause, if any, before this Court on 13 October 2017 at 10:00, why an order should not be granted in the following terms:

- '1.1 Interdicting and restraining the First and Further Respondents from initiating, taking part in and supporting any strike action in pursuance of their demand that the Applicant refrain from the implementation of a split shift working arrangement as from Monday, 4 September 2017.
- 1.2 Directing that the First Respondent do all things necessary and reasonably possible to ensure that its members (the Further Respondents) do not initiate and/or participate in strike action such as that referred to paragraph 1.1 above, and instead, comply with their obligations in terms of their contracts of employment and tender their services to the Applicant in a lawful manner.
- 1.3 Alternatively to the above, directing and/or declaring that the Further Respondents are obliged to work the split shift arrangement pattern implemented by the Applicant.'

[2] On 13 October 2017, the matter was postponed by agreement between the parties to 7 November 2017 on which date it was finally argued.

[3] The main issue for determination is whether the proposed strike is lawful. If it is not lawful, the *rule* should be confirmed. If it is lawful, the *rule* should be discharged.

Background

[4] The Applicant (VWSA) manufactures motor vehicles for the export and local market and the vehicle that is currently manufactured is the Polo model.

[5] VWSA is currently one of the two predominant manufacturers in the world of right-hand drive Polo vehicles, and the export market primarily supplied by VWSA is that which predominantly exists in Japan, New Zealand and the United Kingdom.

The Pamplona plant in Spain is the other facility that predominantly produces right-hand drive Volkswagen.

- [6] The new build allocations are made by VWSA's parent company, VWAG, which allocations are based on meeting phased production target commitments and are subject to termination at the instance of VWAG if the facility receiving the build allocation fails to meet the required production targets.
- [7] The Polo is currently approaching the end of its life production schedule that was scheduled to take place during the course of 2017. VWSA managed to secure the build Program from VWAG for the new generation Polo (VW270) as a replacement for the Polo. The VW270 was scheduled to commence with the ramp up phase of production in September 2017 until March 2018.
- [8] Prior to September 2017 the further respondents were working a back-to-back shift pattern. VWSA implemented a split shift pattern at its workplace with effect from September 2017. The difference between the back-to-back shifts previously worked, and the split shift pattern, is that the second shift in a split shift pattern does not commence work immediately after the first shift, but a few hours later.
- [9] VWSA seeks to change the starting time of work of the second shift worked prior to September 2017 and contends that the employment contracts of the further respondents entitles it to do so. Clause 4 of the employment contracts of the further respondents provides as follows:

'HOURS OF WORK

4.1 The maximum normal hours (excluding breaks) during which the EMPLOYEE will be required to render services to VW shall comprise 8 (eight) hour per day from Monday to Friday inclusive, and shall be subject to such shift patterns as may be required from time to time by VWSA, including a 3 (three) shift pattern of 8 (eight) hour shift.

4.2 The commencement times:

of the EMPLOYEE's normal hours of work; and

- of any lunch or other breaks which may be afforded to the EMPLOYEE; shall be fixed from time to time by the VWSA.

4.3 It is recorded that the operational requirements as determined by VWSA may necessitate a change to the commencement times of an EMPLOYEE's duties, as also to the hours of work provided for in 4.1 above.'

[10] NUMSA conceded that the provisions of the contracts of employment permits VWSA to set the commencement times of hours of work and determine shift configurations in respect of the further respondents, however it contended that the introduction of the split-shift arrangement constitutes a unilateral change to the conditions of employment applicable to the further respondents, as the individual contracts of employment had been superseded by the "*Agreement between NUMSA and VWSA on the A4 Golf Export Project and General Transformation at VWSA*" (the A4 Agreement).

[11] It is common cause that on 26 September 2017, five days after the interim order was handed down, NUMSA's representative signed a *pro forma* notice withdrawing the referral in which the demand that VWSA revert to a back-to-back shift system was contained.

[12] NUMSA conceded that the withdrawal of the matter deprives the section 64(4) of the Labour Relations Act¹(LRA) referral and the demand coupled with it of the jurisdictional foundation. On the basis of its withdrawal of the dispute, NUMSA accepted that it could not embark on a strike on the strength of the referral under case number ECPE 5816-17.

[13] NUMSA submitted that it was unnecessary for this Court to determine the merits of the underlying dispute between the parties. It further submitted that the proposed strike may be declared unprotected and the respondents interdicted against involvement in it on the basis of the withdrawal alone as there is no longer a dispute to strike over.

¹ Act 66 of 1995 as amended.

[14] In the light of the concession, NUMSA relied on its alternative submission that the interim order should not be confirmed in its present form. Accordingly, NUMSA submitted that VWSA is entitled to an order in the following terms:

- ‘1. The First and the Second Respondents are interdicted and restrained from initiating, taking part in and supporting any strike action in pursuance of their demand that the applicant refrain from implementation of the split shift working arrangement as from Monday, 4 September 2017 to 30 March 2018 unless and until the First Respondent has complied with the requirement of section 64(1) of the Labour Relations Act 66 of 1995.
2. The First Respondent is directed to do all things necessary and reasonably possible to ensure that its members (the Further Respondents) do not initiate and/or participate in strike action such as that referred to paragraph 1 above, as qualified by the underlined *proviso*.
3. It is declared that the Further Respondents are obliged to work the split shift system arrangement pattern implemented by the applicant between 4 September 2017 and 30 March 2018, unless they engage in strike which enjoys protection under the Labour Relations Act 66 of 1995.’

[15] NUMSA is of the view that the interim order is too broad because it has no end date and that it would preclude the respondents from striking during the ramp up phase even though they have abandoned their reliance on section 64(3)(e) of the LRA. NUMSA further submitted that the interim order goes beyond the basis on which the proposed strike would be unprotected, that is the withdrawal of the referral.

[16] By seeking an altered order, NUMSA is attempting to obtain, via an order of this Court, a permission to embark on a strike over the introduction of a particular shift pattern upon compliance with the procedural requirement of section 64(1) of the LRA. This is clearly inconsistent with the purposes of the Act.

Applicable law and analysis

[17] It is trite that the workers must comply with the procedural requirement set out in

section 64 of the LRA to engage in a protected strike. Section 64(1) provides as follows:

- '(1) Every employee has the right to strike and every employer has recourse to lock-out if -
 - (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and
 - (i) a certificate stating that the dispute remains unresolved has been issued; or
 - (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that -
 - (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless -
 - (i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or
 - (ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organization.'

[18] While section 64(1) requires a referral of a dispute to the council or commission and a certificate of outcome to be issued or the lapse of 30 days after the referral of the dispute to a council or to the commission, section 64(3)(e) provides that the requirements of subsection (1) do not apply to a strike or a lock-out if the employer fails to comply with the requirements of subsections (4) and (5).²

² Section 64 (4) Any employee who or any trade union that refers a dispute about a unilateral change to terms and conditions or employment to a council or the Commission in terms of subsection (1)(a) may, in the referral, and for the period referred to in subsection (1)(a) -

- (a) require the employer not to implement unilaterally the change to terms and conditions of employment; or

- [19] The LRA, therefore, exempts the employees or a trade union from complying with statutory conciliation and notice requirements if the dispute relates to a unilateral change to terms and conditions of employment and the employer fails to restore the *status quo* within 48 hours. However, the employees or the trade union must require the employer, in the referral, not to unilaterally implement the change to terms and conditions of employment or to restore the terms and conditions of employment that applied before the change.
- [20] Therefore, NUMSA's withdrawal of its referral amounts to failure to comply with the procedural requirement as contemplated in section 64(4) of the LRA. As aforesaid, NUMSA conceded that the proposed strike should be declared unprotected on the basis of the withdrawal alone as there is no longer a dispute to strike over. VWSA's application to confirm a *rule nisi* should be granted on this basis alone. For the sake of completeness, I will consider whether the proposed strike relates to a permissible demand and not subject to limitations contained in section 65 of the LRA.
- [21] Section 65 of the LRA provides for the substantive limitations on the right to strike or recourse to lockout, and it states as follows:
- '(1) 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 -
- (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute.
-
- (b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.
- (5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of service of the referral on the employer.

- (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;
- (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;
- (d) that person is engaged in -
 - (i) an essential service; or
 - (ii) a maintenance service.¹³

(2)(a) Despite section 65(1)(c), a person may take part in a strike or a lock-out or in any conduct in contemplation or in furtherance of a strike or lock-out if the issue in dispute is about any matter dealt with in sections 12 to 15.¹⁴

- (b) If the registered trade union has given notice of the proposed strike in terms of section 64(1) in respect of an issue in dispute referred to in paragraph (a), it may not exercise the right to refer the dispute to arbitration in terms of section 21 for a period of 12 months from the date of the notice.

(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; or
 - (ii) any determination made in terms of section 44 by the Minister that regulates the issue in dispute; or
- (b) any determination made in terms of Chapter Eight of the Basic Conditions of Employment Act and that regulates the issue in

dispute, during the first year of that determination.'

- [22] On the one hand, VWSA's submission was that its entitlement to unilaterally implement the split shift is regulated by clause 4 of the employment contracts of the further respondents and reaffirmed or alternatively restored by the 2013 Collective Agreement that was entered into in order to recover the losses in scheduled productions as a consequence of the strike in the automobile industry in 2012. The 2013 Collective Agreement expressly recorded that its provisions did not constitute waiver of any contractual rights that VWSA had in terms of its contracts of employment to change and/or introduce shift configuration necessary and permissible in law in order to meet its operational requirements.
- [23] On the other hand, NUMSA submitted that the introduction of the split-shift arrangement constitutes a unilateral change to the conditions of employment applicable to the further respondents, as the A4 Agreement had superseded the individual contracts of employment. According to NUMSA, the further respondents have, since the introduction of the A4 Agreement, worked back-to-back shifts during most export related projects and this practice has hardened into a condition of service, which VWSA has accepted by custom. On the non waiver provision of the 2013 Agreement, on which VWSA relies, NUMSA is of the view that it merely confirms its contractual right to change shift patterns in order to meet its operational requirements but does not constitute the recognition of VWSA's right to unilaterally alter the shift pattern established by the A4 Agreement.
- [24] It is common cause that both the A4 Agreement and the 2013 Agreement are collective agreements. I agree with VWSA that on any version, the issue in dispute is one regulated by a collective agreement and may be referred to arbitration. Alternatively, it is regulated contractually and may be referred to the Labour Court for adjudication. Section 65(1)(c) of the LRA clearly precludes a strike if the issue in dispute is one that a party may refer to arbitration or to the Labour Court in terms of the LRA or any other employment law. There can be no strike where the dispute is regulated by a contract of employment or a collective

agreement or any other agreement between the parties. For the aforesaid reasons, there is no reason why the *rule nisi* that was granted by this Honorable Court should not be confirmed.

[25] With regard to costs, taking into account the requirements of law and equity, I believe this is a matter in which there should be no order as to costs.

[26] In the circumstances, I make the following order

Order

1. The *rule nisi* that was granted by this Honorable Court on 1 September 2017 is confirmed.
2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court

Appearances

For the Applicant: Advocate Franklin SC with J Partington

Instructed by: Chris Baker and Associates

For the Respondent: Advocate JG Grogan

Instructed by: Gray Moodliar Attorneys

LABOUR COURT