THE LABOUR COURT OF SOUTH AFRICA,

(HELD AT JOHANNESBURG)

Case No: J 1799/19

OF INTEREST TO OTHER JUDGES

In the matter between:

JOHANNESBURG METROPOLITAN BUS SERVICES (SOC) LTD	Applicant
and	
DEMOCRATIC MUNICIPAL AND ALLIED WORKERS UNION	First Respondent
MEMBERS LISTED IN ANNEXURE "A"	Second Respondent

Heard: 29 August 2019

Delivered: 30 August 2019

Summary: (Urgent application – strike interdict – effect of non-compliance with s19 of Labour Relations Amendment Act – whether demands part of settlement agreement regulating issues – partial relief granted)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an urgent application for a final interdict of a strike called by the first respondent [' DEMAWUSA'] due to commence on 2 September 2019. The applicant ['JMB'] raises a number of grounds on which it contests the strike would be unprotected. Most of the grounds relied on by JMB concerned whether or not the demands set out in the strike notice concern matters which have been settled in previous disputes. The other ground JMB relies on is that the union has not held a secret ballot of members before engaging in the strike, contrary to section 19 of the Labour Relations Amendment Act, 8 of 2018 [' the Amendment Act'].

The effect of the transitional provision in section 19 of the Amendment Act

[2] Section 19 of the amending act introduced the following provision:

> Transitional provisions
>
> **19.** (1) The *registrar* must, within 180 days of the commencement of *this Act,* in respect of registered *trade unions* and *employers' organisations* that do not provide for a recorded and secret ballot in their constitutions—
>
> *(a)* consult with the national office bearers of those unions or *employers' organisations* on the most appropriate means to amend the constitution to comply with section 95; and
>
> *(b)* issue a directive to those unions and *employers' organisations* as to the period within which the amendment to their constitution is to be effected, in compliance with the procedures set out in the amended constitution.
>
> (2) Until a registered *trade union* or employers' organisation complies with the directive made in terms of subsection (1)*(b)* and the requirements of section 95(5)*(p)* and *(q)* of the Act, the *trade union* or employer organisation, before engaging in a *strike in* or *lockout*, must conduct a secret ballot of members.

[Emphasis added]

[3] In terms of section 67 of the Labour Relations Act 66 of 1995 [' the LRA'], a strike is protected if it complies with the provisions of Chapter IV of the LRA. In the main, the positive prerequisites which must be fulfilled for a strike to be protected under this chapter are those set out in section 64 of the LRA. Section 65 of the LRA, correspondingly describes those circumstances in which a strike is nonetheless prohibited, irrespective of whether or not the requirements of section 64 have been complied with.

[4] Interestingly, the transitional provisions in section 19 of the Amending Act are not part of Chapter IV. On a literal reading of the transitional provisions of this section read with section 67 of the LRA, the failure of a union to conduct a secret ballot of members when that is required in terms of section 19 would not render a subsequent strike unprotected, because that failure would not constitute non-compliance with a provision of Chapter IV of the LRA.

[5] Nonetheless, a failure to comply with section 19 of the Amending Act in the circumstances described in that section would be a breach of a provision of the LRA. Accordingly, a party with a legal interest in the prerequisites for a union engaging in a strike being met, could approach the Labour Court to exercise its power to order compliance with any provision of the LRA, set out in section 158 [1] [b] of the LRA, by granting an order requiring the union to comply with the balloting requirement in section 19. Unlike an order declaring a strike unprotected, an order requiring a union to conduct a secret ballot, would merely prohibit it from engaging in the planned strike, until such time as it had conducted a secret ballot. As such, this relief might only provide a temporary limitation on strike action.

[6] In the circumstances of this application, can JMB obtain an order compelling DEMAWUSA to conduct a secret ballot before it engages in the planned strike action, assuming there are no other limitations on it engaging in protected strike action?

[7] In the matter of ***Mahle Behr SA (Pty) Ltd v Numsa and Others ; Foskor (Pty) Ltd v NUMSA and Others***[1] , the labour court made precisely such an order in relation to a registered union which had not complied with the requirements of section 95 [5] [p] or [q] of the LRA. The court also noted that the balloting provisions to be included in a registered union's constitution under these last mentioned sections, have been a prescribed requirement for the constitutions of registered unions since the inception of the LRA.

[8] In that matter it was contended amongst other things by the union that the transitional provisions amounted to an infringement of the union's constitutional right to strike. Further, it was argued that the requirement to conduct a secret ballot could only be imposed if the registrar had issued a directive to the union under s 19(1)(b) as to the period within which the amendments to the union's constitution must be effected.

[9] In *Mahle Behr* the court rejected the suggestion that the transitional provision infringed the right to strike, because it did not prevent a union from engaging in strike action provided it conducts a ballot, which is merely giving effect to the missing clauses which are supposed to be in its constitution in terms of section 95 of the LRA, requiring it to ballot members in respect of whom it intends to call the strike. In that matter the court also rejected the second argument that the requirement of conducting a secret ballot only arose once the registrar had issued the directive.

[10] I am inclined to concur that an obligation on a registered union to conduct a secret ballot of its members before engaging in strike action in conformity with a provision which it ought to have included in its constitution in any event does not impose a limitation on the right to strike. It remains entirely within the union's power to remedy the situation by

[1] (D448/19;D439/19) [2019] ZALCD 2; (2019) 40 ILJ 1814 (LC) (20 March 2019)

amending its constitution. In relation to the second argument, the court held that on a plain reading of the provision a union which had not included the obligatory provisions in its constitution had to conduct a secret ballot of members before engaging in a strike. If one has regard to the context in which section 19(2) applies it is principally aimed at compelling a registered union which has failed to include in its constitution the provisions required by section 95 [5] [p] and [q] of the LRA to do so. It could never have been the intention of the legislators that if the union did make the necessary amendments, even though the registrar had not yet issued the directive under section 19 [1](b), that it would still be compelled to hold a ballot, simply because the registrar had not issued the directive. The object of the section would have been achieved once the amendments were effected.

<u>Are any of the demands in the strike notice of 14 August 2019, issues that have previously been settled or otherwise cannot be the subject of a protected strike?</u>

[11] Without repeating the strike notice verbatim, the three demands may be summarized as:

11.1 Withdrawing the 2018 disciplinary code and using the 2008 disciplinary code.

11.2 Acceding to the principle of salary progression based on an employee's number of years of service in the employment of the JMB with employees being grouped in cohorts of three years' service beginning at 0 to 3 years and ending at 24 to 27 years.

11.3 Allocating offices and office equipment and materials to the union at all three depots of JMB.

[12] JMB claims that all these demands were the subject of settlement agreements on 15 June 2018 and 30 January 2019 and as such may not

be the subject matter of protected strike action in terms of section 65 [3] (a)(i) of the LRA.

The withdrawal of the 2018 disciplinary code

[13] DEMAWUSA argued that the demand to revert to the 2008 disciplinary code is not the same as the demand it previously tabled which was to review the 2008 disciplinary code. That had been the demand tabled together with others in the strike notice of 26 October 2018. However, JMB contends that this is just a reformulation of the demand to review the code and is the same as a demand that a circular MD 1 of 2017 be withdrawn because it replaced the previous disciplinary code. DEMAWUSA is adamant that a demand to implement the 2008 disciplinary code is completely distinguishable from a review. It contends that JMB should have tabled both disciplinary codes and not just the circular. However, DEMAWUSA does not make the slightest attempt to explain, apart from the use of different words, what is the substantive distinction between the demand to review the disciplinary code and the demand to revert to the 2008 disciplinary code. As the author of the demands it is best placed to clarify why the demands are not the same. This is particularly necessary where a demand is expressed in vague terms such as in this instance “a review”. On the papers before me I am inclined to accept that in the absence of a more detailed explanation why the implementation of the 2008 disciplinary code is not the same as withdrawing the circular, that the same dispute was the subject of the settlement agreement of 30 January 2019.

[14] Taking this further, JMB maintains that it was agreed in the settlement agreement of 30 January 2019 that the review of the disciplinary code would be referred to a relationship by objectives [’RBO’] exercise with numerous other matters. Nowhere does it claim that the exercise resolved the issue relating to the disciplinary code, but contends that by referring it

to the RBO process this amounts to an agreement to regulate the issue and accordingly the union may not embark on a protected strike action as this would be contrary to section 65(3)(a)(i) of the LRA which prohibits strike action where the issue in dispute is regulated by a collective agreement. It appears that the RBO process faltered but the mere fact that it may not have proven efficacious does not mean demands can simply be re-issued, unless it was clear from the agreement what would happen if the RBO process failed to yield agreement. Having identified a process to address the issues in dispute, that process should have been implemented and exhausted. If it was abandoned or never invoked, that does not detract from the fact that it was the mechanism chosen by the parties to deal with the issue in dispute they remained bound by that.

Pay Progression

[15] JMB argued that this issue was nothing more than a disguised wage demand but did not claim that it was therefore a matter dealt with in another collective agreement, except in so far as it might have been equated with salary related items listed in Annexure 2 of the 2018 settlement agreement which was referred to the RBO exercise. However, in my view, this is not one of those cases where there is a collective agreement which settles wage increases and then employees wish to pursue a new demand, the effect of which is to augment those increases. Further, the issue of pay progression is sufficiently distinct to even constitute a separate demand from a long service bonus.

[16] In the circumstances I am not satisfied that this is an issue that was the subject matter of a previous settlement agreement. Secondly, insofar as JMB contends that it is too vague for an employer to accede to in principle, I agree with DEMAWUSA that simply because the demand is not one which identifies the value of pay progression scales, that does not mean that parties could not agree in principle that pay progression should be

introduced. The precise shape that might take and when it might be implemented would have to be the subject matter of future negotiations.

Union office facilities

[17] JMB argued that this issue which had been tabled in a strike notice in May 2018 was a matter of mutual interest that was to be referred to a CCMA facilitation process. However, strike notice of 7 May 2018 simply does not bear out that contention which makes no mention of union office facilities is a demand.

[18] Consequently, I am satisfied that this is not an issue which is regulated or settled by another agreement.

Conclusion

[19] *In summary, in so far as the three demands are concerned, JMB has failed to establish that the demands relating to pay progression and union office facilities are the subject matter of previous settlement agreements.* However, the dispute regarding the review of the disciplinary code was a matter that was agreed would be addressed in an RBO process and on the evidence before me it is reasonable to conclude that casting the demand as one of implementation of the 2008 Disciplinary agreement did not constitute a distinctly new demand.

[20] In relation to the effect of not having amended the union's constitution to provide for balloting, the failure to do so might not render a strike unprotected, but nonetheless the union cannot embark on the strike without conducting a ballot in terms of section 19(2) of the Amending Act.

Order

[1] The first respondent may not engage in the strike due to commence on 2 September 2019 before it has conducted a secret ballot of the members who might be affected by the strike.

[2] Subject to complying with paragraph 1 above, the respondents may not embark on a strike in support of the first demand in the strike notice dated 14 August 2019 but may embark on a protected strike in support of the second and third demand in that notice.

[3] No order is made as to costs.

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R G Lagrange

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	Adv. M.J Van As – Instructed by Werksmans Attorneys
RESPONDENT:	Reynaud Daniels of Cheadle Thompson & Haysom Inc.