

VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

DATE: 23 July 1999

CASE NO. J2805/99

In the matter between:

SAMANCOR LTD

First Applicant

MANGANESE METAL CO. (PTY) LTD

Second Applicant

and

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA

Respondents

J U D G M E N T

LANDMAN J:

1.The Constitution of the Republic of South Africa of 1996 recognises and protects the right of employees to strike. See section 23(2)(c) of the Constitution. The right to strike embraces the right to embark on a secondary strike.

2.When, where and in what manner employees may strike is dealt with in other laws. In this case the right to embark upon a secondary strike is regulated by the Labour Relations Act, No. 66 of 1995. The Act not only regulates these matters but, more importantly, it contains limitations on the right to strike including the right to embark on a secondary strike. These limitations which are set out in the Labour

Relations Act must comply with section 36 of the Constitution which deals with the limitation of rights in the Bill of Rights.

3./..

3. In this case it was not contended that the Labour Relations Act was unconstitutional in any respect. It is therefore unnecessary to traverse the provisions of the limitation clause save to state that the limitations may not have the effect of negating the right to embark on secondary action in the form of a strike.

4. Employees, or their trade union, who have embarked on a primary strike may decide to engage in secondary action in order to further pressurise the primary employer. The Labour Relations Act provides that employees may not engage in a secondary strike unless certain conditions are met. See section 66 of the Act. It is unnecessary, in this judgment, to deal with the way in which secondary strikes are regulated and the way in which section 66(1) is phrased. Prima facie it appears to negate the right to a strike. But having prohibited the right to strike, it sets out certain conditions, which if met, entitle the employees to strike. I do not propose to deal with the prohibition any further because, read positively, the employees are entitled to engage in a secondary strike if the following conditions are met:

1. The primary strike complies with sections 64 and 65 of the Labour Relations Act;

2. The employer of the employees taking part in the secondary

strike (and where appropriate the employers organisation of which that employer is a member) has received written notice of the proposed secondary strike at least seven days prior to its commencement;

3./..

3.The nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.

5.Clearly the employees or their union are enjoined to consider these conditions, particularly those set out in section 66(2) which relate to the reasonableness or proportionality of the secondary strike, before embarking on such a strike. Section 66(2)(c) must be read with section 66(3). Section 66(3) provides that subject to section 68(2) and (3) a secondary employer may apply to the Labour Court for an interdict to prohibit or limit a secondary strike that contravenes subsection (2). These subsections therefore require the strikers mero motu to consider whether they are entitled to engage in secondary strike action and, if so, whether their action should be limited in any respect. If the strikers must limit their action then the strikers must decide to what extent it must be limited and act in compliance with their insight. If they do not do so, or, if the secondary employer believes that the strike falls foul of section 66(2), the employer may apply in terms of section 66(3) for an interdict to limit or prohibit the secondary strike. If an interdict is sought, the onus rests on the

secondary employer, even on the return day, to prove that the interdict should be granted. The employer must show that the conditions for embarking on a secondary strike have not been met. The employer would therefore also have to show that, as in this case, the secondary strike is unreasonable or not proportional.

6./..

6.The union would have to rebut any prima facie case that the employer may make out and may have to justify its decision to have embarked on the secondary strike. Evidence about the considerations which it took into account in making the decision to embark on the sympathy action will obviously be relevant but of course other evidence may be admitted to bolster its case.

7.In this particular matter my brother, Mlambo J, issued a rule nisi on 19 July 1999 interdicting the respondents, NUMSA and its members employed at certain plants operated by Samancor Ltd (the first applicant), and Manganese Metal Co. (Pty) Ltd (the second applicant) from embarking on or carrying on with a secondary strike in support of the primary strike which NUMSA and its members had instituted against Columbus Steel, Joint Venture. The rule nisi did not deal with allegations of unlawful and violent conduct, although this had been prayed for in the application. This aspect was taken care of by means of an agreement entered into between the parties which was recorded by the court.

8.The respondents have anticipated the return day, as they were permitted to do. Mr Kennedy, who appeared on the return day on behalf of the applicants, moved for the following

relief:

(a) The confirmation of the rule, alternatively for the extension of the rule until the CCMA has reported in terms of section 66(5) of the Act.

(b) That the agreement regarding the commission of unlawful acts be made an order of court.

(c) Costs.

In/..

In moving for the relief which I have set out in paragraph (a), Mr Kennedy dealt with only two attacks by the respondent on the rule. He expressly reserved his rights to deal with a third matter, namely that the strike in question was not a secondary strike. I am therefore not called upon to deal with the third question and I refrain from doing so.

9. Mr Kennedy's first submission was that the primary strike was itself unprotected and that a fortiori the secondary strike was unprotected. See also section 66(2)(a) of the Act. The basis for his submission was that NUMSA had referred a dispute to the CCMA for the purposes of its strike with Columbus on four issues, one of which was impermissible. The impermissible issue related to the issue of out-sourcing and the continued job security of its members. At the eleventh hour NUMSA recognised that it was impermissible to strike about the issue of out-sourcing and continued job security. It abandoned this demand at the commencement of the application for the interim interdict. This, of course, took place after notice had been given of the primary strike and after the institution of the secondary strike.

10. In my opinion there is no substance in this submission. In the matter of Ceramic Industries Ltd t/a Beta Sanitaryware v National Construction Building and Allied Workers Union and others (1997) 18 ILJ 716 (LC) at 726 this same argument was raised by Mr Pretorius. I stated:

"Mr Pretorius argued that if I came to the conclusion that one of the three disputes was

permissible/..

permissible and not hit by the limitation on the right to strike, then I should find that the strike is wholly impermissible until the respondents had abandoned the impermissible dispute."

I found this argument to be a good one in that case and it appears to me that it is a good one in this case. Although the case to which I have referred was overturned on appeal in Ceramic Industries Ltd t/a Beta Sanitaryware v National Construction Building and Allied Workers Union (2) (1997) 18 ILJ 671 (LAC) it was not overturned on this point. If it is possible to distinguish between the permissible and impermissible demands then, once the impermissible demands have been abandoned, the primary strike is a protected one. Accordingly I find that there is no substance in this point.

11. Mr Kennedy's second submission was that the secondary strike did not meet the requirements of reasonableness or proportionality as set out in section 66(2)(c) of the Act. Before dealing with this submission it is necessary to set out briefly the pertinent facts as they appear in the papers.

12. The first applicant is Samancor Ltd, a public company with

limited liability. The second applicant is Manganese Metal Co (Pty) Ltd which, on the applicants' version, is held, by way of a majority shareholding, by Samancor Ltd. On the union's version it is virtually a wholly owned subsidiary of Samancor and for purposes of the determination of a final interdict I must assume that the union's version is correct.

The/..

13.The first applicant divides its business into two divisions: the chrome division and the manganese division. The chrome division consists of two mines concerned with the mining of chrome ore, namely Eastern Chrome Mines at Steelpoort and Western Chrome Mines near Rustenburg. The chrome ore mined at these mines is then converted into chrome alloy at one of four works within the chrome division. These works are Ferro Metals (situated at Witbank), Ferro Chrome (situated at Middelburg), Palmiet Ferro Chrome (situated at Krugersdorp) and Tubatsi Ferro Chrome (situated at Steelpoort).

14.The manganese division consists of mines in the Hozatel area of the Northern Cape where manganese ore is mined. This ore is then converted to manganese alloy at one of three works. The first of these works, namely Metal Alloy, is situated at Meyerton. The other two works forms part of the second applicant and are situated at Nelspruit and Krugersdorp.

15.This application concerns the following operations where the secondary strike was instituted, namely Ferro Metals, Ferro Chrome, Palmiet Ferro Chrome, Metal Alloys, MMC

Krugersdorp and MMC Nelspruit.

16.The primary activity of the first applicant's business is the mining of chrome and manganese ores at the mines which have been set out above and their conversion into chrome alloys and manganese alloys respectively. Approximately 80% of the total chrome ore mined by the first applicant is converted into ferro chrome by the first applicant itself at its four chrome works. The chrome alloys produced are then provided to customers

for/..

for use in the production of stainless steel. Approximately 80% of the total chrome alloys produced by the first applicant are sold to foreign customers in terms of long term contracts and joint venture partnerships who utilise the chrome alloys in the production of stainless steel. Approximately 80% of the production of chrome alloy produced at Ferro Chrome is sold to Columbus Steel JV; the only stainless steel plant in South Africa. Approximately 45% of the manganese ore mined at the first applicant's manganese mines is exported while approximately 10% is sold locally. The remaining 45% is converted into manganese alloys at Metal Alloy and the manganese alloys sold to customers overseas (approximately 85%) and in South Africa (approximately 15%). These manganese alloys are used in the production of steel.

17.The works of Manganese Metal at Nelspruit and Krugersdorp also convert manganese ore into manganese alloys but utilise a different process to produce manganese alloys of a higher quality. These are used for more special applications.

18. Apart from the various operations which are set out above, the applicants have interests in various other operations linked to the production of chrome and manganese alloys. Of relevance here is the interest in Columbus Steel JV. This is a partnership between the first applicant, the Industrial Development Corporation Ltd and Highveld Steel and Vanadium Corporation Ltd. The first applicant has a 33-1/3% share in this joint venture. It is said that the first applicant has no control in the daily management of Columbus.

19./..

19. The applicants say that the strike at its operations, which I have set out above, will lead to a loss in production of approximately 4 200 tons per day during the period of the strike. This represents a loss in revenue amounting to approximately R3,5 million per day. In addition, there are other repercussions which relate inter alia to contractual obligations, the disruptions caused by the strike, loss of production, stoppage of productions, the problem of slag in the furnaces, etcetera.

20. The applicants deal with the possible direct or indirect effect of the secondary strike on the business of Columbus. The applicants say their ability to avoid and minimise disruptions that flow from the secondary strikes are minimal. Although the first applicant has a 33-1/3% share in Columbus, it does not have a controlling interest. It can therefore not force Columbus' management to comply with the demands made by NUMSA. It says it made enquiries with Columbus in this regard and the following facts are relevant: Columbus

is making a loss and has done so since its establishment. In addition, because of the fact that Columbus is currently undergoing a shut-down for maintenance purposes and is operating minimally, the loss of production caused by the strike is not severe. NUMSA's representativity is approximately 25% of the Columbus workforce. The other employees at Columbus are not in dispute with Columbus and have been prepared to tender their services to man the furnaces and other plants that are not subject to the shut-down. The effect of the secondary strike will be to prevent

approximately/..

approximately 20% of the Samancor's chrome alloy production reaching Columbus. Much of this is not needed by Columbus at this stage due to the shut-down and the curtailment of operations.

21.It will also, however, lead to the loss of the other 80% of the production with huge potential losses. Manganese production will also be lost.

22.In its answering affidavit the respondents make the following points:

1.During the 1996 wage negotiations between Columbus and NUMSA, after deadlock had been reached, an intended strike by the union members employed at Columbus had been interdicted. Ms Ditshwe and Mr Jort, both of whom were representatives of Samancor Ltd, participated in the negotiations and assisted in the settlement of the dispute which led to the conclusion of a two-year agreement which was extended subsequently to 1999.

2.NUMSA affirm that the purpose of its secondary strike is inter alia to pressurise the applicants to intervene in the Columbus strike in order to persuade or pressurise Columbus management to settle the dispute.

3.NUMSA admits that the secondary strike has the potential to cause huge losses to the applicants but that is why the union members are embarking on a secondary strike. The union reasonably believes that as a result of the secondary strike the applicants will pressurise Columbus to settle the primary strike. This has been the experience of the union in the past, notably in 1996 (this may

have/..

have been 1997). In addition, although not a majority shareholder, Samancor is a major shareholder in Columbus. Samancor has led the union to believe that it has assisted Columbus to survive over the past few years. Losses suffered as a result of the primary strike will be felt by Samancor and financial statements are annexed.

23.I should also refer to a supplementary replying affidavit filed by Mr Prinsloo, the General Manager: Human Resources of Columbus JV. He says the following:

"All the chrome utilised by Columbus is ordinarily supplied by Middelburg Ferro Chrome. The cessation of supply from Ferro Chrome will however not have a material impact on the operations of Columbus. Production and delivery of stainless steel to customers has not been affected by the strike".

He sets out the various reasons why it is so. He continues to say that:

"It appears that full operations will resume on Monday, 26 July. Should Ferro Chrome be unable to supply product to Columbus, Columbus will be able to utilise stockpiles of Ferro Chrome alloy received from the first applicant to maintain full production. It is estimated that the stockpiles will last approximately four days. Thereafter supplies may be obtained from alternative sources".

He concludes by saying:

"Because a relatively small percentage of the workforce is on strike, Columbus will be able to

maintain/..

maintain full production with the available manpower on 26 July 1999 and thereafter".

He also points out that the day to day operational control of Columbus is regulated by a management committee consisting of nine general managers and these are all fulltime Columbus employees who have no direct affiliation to Samancor.

24. I proceed to the task of determining whether the strike by the respondents, when it was instituted, for that is the relevant time, complied with section 66(2)(c) regarding reasonableness and proportionality. In doing so I am mindful that not only do I have to determine whether the necessary ingredients for the experiment, as it were, are present but I must make a determination, a judgment, of the possible outcome of those ingredients in action. This is akin to a chemical process which takes place within its own peculiar circumstances. It may be impossible to predict with anything

reaching certainty what the outcome will be. Fortunately I am not required to judge the probable outcome. The object of the exercise set out in section 66(2)(c), involves a determination of the possible outcomes as opposed to the probable results.

25.The Legislature intended the respondents to have contemplated this prior to embarking on secondary action. I must now perform this exercise at the moment that the interdict is sought but, of course, with reference to the time that the secondary strike was instituted.

26./..

26.The Labour Relations Act provides that this court may be assisted in this task by means of a report prepared by the CCMA. Section 66(4) provides that any person who is a party to proceedings in the Labour Court may request the Commission to conduct an urgent investigation to assist the court to determine whether the requirements of subsection (2)(c) have been met. On receipt of a request the Commission must appoint a suitably qualified person to conduct the investigation and then submit a report to the Labour Court as soon as possible. The Labour Court must take into account the Commission's report before making its order. I have been told that the CCMA may be in a position to commence working on such a report on Wednesday or Thursday next week.

27.Mr Bruinders, who appeared on behalf of the respondents, submitted that I need not wait for this report. He was

prepared to argue on the basis of the material before me. Mr Kennedy also took this approach and submitted that I can decide the matter on the papers. However, if I was in doubt, then he submitted that I should extend the rule and wait until the report is delivered. In the circumstances I have decided to decide the matter on the material presently before me.

28. The respondents intended to pressurise Columbus by putting pressure on Samancor and Manganese Metals in turn to pressure and influence Columbus in its collective bargaining with the NUMSA employees who are on strike. This, of course, is permissible. The

respondents/..

respondents intended to inflict harm on the applicants. This, too, is permissible subject to reasonableness and proportionality as explained in section 66(2)(c) of the Act.

29. The two applicants appear to do business together. It appears that some of their plants are conducted jointly or fall within the scope of management of the first applicant, Samancor. However, Manganese Metals does not seem to play any significant role in the provision of chrome: the mineral which underpins the operations of the primary employer, Columbus. It is therefore not clear to me that the strike at the plant of Manganese Metal could possibly have any direct or indirect effect on the business of Columbus. Even accepting that Manganese Metal is a wholly owned subsidiary

of Samancor, it merely establishes a nexus between it and Columbus. But a mere nexus which does not have an effect on the primary employer's business is insufficient to permit a secondary strike.

30. As far as Samancor is concerned, it provides at least 80% of the chrome required by Columbus from its plant in Middelburg. At present Columbus is engaged in a shut-down or a maintenance programme which has the effect that its furnaces are inoperative or at least one of them is inoperative. It will recommence its operations on Monday, 26 July. It has four days worth of stock. Samancor is a partner in the joint venture with Columbus Stainless Steel. It has a stake in the outcome of the strike, for any further losses which Columbus may suffer will be debited, proportionally, to its/..

its account. It is therefore in a position to influence the business of Columbus if spurred on by a secondary strike at its plant and mines. The fact that it may have no say in the day to day running of Columbus is not especially pertinent. The strike is not about the day to day operations of Samancor. It is about the wages paid to its NUMSA employees. This is a matter of capital funding in which Samancor has a real and substantial interest and thus an incentive to use its influence on the collective bargaining process between Columbus and its NUMSA employees.

31. Now that I have found that the secondary strike has a

possible direct or indirect effect on the business of Columbus, I must consider whether the nature and extent of the strike at the applicants' plants and mines is reasonable in relation to the effects of the strike at Columbus and on Columbus' business. I do not think that it is necessary to weigh up the damage inflicted to the applicants against the effect of the strike on the business at Columbus but of course I do not ignore it. It seems to me that section 66(2) (c) requires me to concentrate on the nature and extent of the strike, that is the withholding of labour, its timing and other ramifications in relation to the effects which it may have on the business of Columbus. It seems to me that it would have been reasonable for the respondents to have targeted only the chrome ore mines and chrome or ferro alloy producing plants which belong to Samancor. In so far as Manganese Metal is concerned, the secondary strike at its mines and plants will not have

a/..

a possible effect on the business of Columbus. It is therefore clear to me that an interdict should be granted in regard to the operations of Manganese Metal.

32.I have indicated above that the secondary strike should be limited as regards Samancor in regard to its chrome mines and its alloy plants. I, therefore, propose at this stage to allow the parties the opportunity of submitting representations in regard to a suitable order which this

court should make which permits a secondary strike at various mines and branches of Samancor but limited to the extent that I have set out above.

34.I pass on to deal with the question of the agreement. The agreement relating to the commission or non-commission of unlawful acts resolved a dispute between the parties which was alive at the time an application was lodged for interim relief. That issue was settled by agreement. Even if that agreement has been breached, it is not an issue which is alive before me today. I cannot make that agreement an order of court. The parties expressly provided that the court should merely record its existence. In the circumstances I am unable to accede to Mr Kennedy's request to make the agreement an order of court.

34.Finally, on the issue of costs, both parties have been partially successful on this return day and it seems to me that having regard to the relationship between them that costs should fall where they lie and that I should make no order as to costs.

36./..

35.Consequently at this stage I adjourn to allow the parties an opportunity to draft either jointly or separately the order which I have referred to above and to supply me with it in chambers. After considering those representations I will then issue the order in this matter.

POSTEA

The parties jointly presented a draft order. In consequence the following order was granted:

1. In relation to the second applicant, a final order is granted:

a. Declaring the proposed secondary strike by the respondents to be unprotected.

b. Interdicting and restraining the second to further respondents from participating in, promoting or inciting the strike or industrial action against the second applicant.

c. Interdicting and restraining the first respondent from instigating or promoting the strike or industrial action against the second applicant.

2. In relation to the first applicant, a final order is granted in respect of the first applicant's metal alloy works:

a. Declaring the proposed secondary strike by the respondents to be unprotected and unlawful.

b.

b. Interdicting and restraining the second to further respondents from participating in, promoting or inciting the strike or industrial action against the first applicant's metal alloy works.

c. Interdicting and restraining the first respondent from instigating or promoting the strike or industrial action against the first applicant's metal alloy works.

3.In relation to the first applicant, a final order is granted in respect of the first applicant's Ferro Chrome, Ferro Metals and Palmiet works declaring the proposed secondary strike by the respondents to be protected. A limitation on this protection is however imposed, in that the secondary strike shall only take place every Monday and Tuesday for the duration that the primary dispute is unresolved.

4.The agreement made between the parties on 19 July 1999 is recorded.

5.It is recorded that the parties have agreed to meet over the weekend of 24 and 25 July 1999 for the purpose of agreeing on picketing rules.

6.No order is made as to costs.

DATED AT JOHANNESBURG ON THIS DAY OF AUGUST 1999

JUDGE A A LANDMAN

ON BEHALF OF APPLICANTS:ADV P M KENNEDY

Instructed by:Brink, Cohen & Le Roux and Roodt

ON BEHALF OF RESPONDENTS:ADV T J BRUINDERS

Instructed by:Ruth Edmonds

DATE OF HEARING:22 JULY 1999

DATE OF JUDGMENT:23 JULY 1999