

REVISED/REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN**CASE NO** D1575/2001**DATE OF JUDGMENT** 2001/10/29**DATE REVISED** 2001/11/02

In the matter between:

BILLITON ALUMINIUM SA LTD

Applicant

and

NATIONAL UNION OF METALWORKERS OF SA

Respondent

JUDGMENT DELIVERED BY THE HONOURABLE MS JUSTICE PILLAY**ON 29 OCTOBER 2001**

PILLAY, J

1] This is an application to interdict the respondent from embarking on a secondary strike in terms of section 66 of the Labour Relations Act No 66 of 1995 (the LRA).

2] A comparative study of the jurisprudence on secondary strikes is usefully summarised in "Secondary Strikes" by Carol Cooper in the Industrial Law Journal, page 759, Volume 16, Part IV, 1995. The article also provides a background to secondary strikes as it now appears at section 66 of the LRA. However, as the Legislature has spoken, my task is but an interpretive one and not a policy ranking one. Section 66(2)(c) provides:

"2. No person may take part in a secondary strike unless:

.....

(c) 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."

- 3] The secondary strike must have an effect on the primary employer. That presupposes there must be a nexus between the secondary employer or its employees on the one hand and the primary employer or its employees on the other hand. If there is no nexus then there cannot be any effect on the primary employer and that would be the end of the inquiry.
- 4] The secondary strike must also be reasonable in relation to the business of the primary employer. The requirement of reasonableness qualifies the effect of the secondary strike on the primary employer.
- 5] Reasonableness is determined by reference to the nature and extent of the secondary strike. The nature of the strike may be a partial or a total work stoppage targeted at particular or all operations, or it may be a go slow. The extent of the strike refers *inter alia* to the number of strikers and the workplaces involved and the duration of the strike.
- 6] However, whatever the nature and extent of the secondary strike, it has to be reasonable in relation to the "possible" effect on the primary employer.
- 7] The standard of reasonableness is somewhat anti-climactically whittled down to a mere possibility. It is further widened by permitting the effect to be either direct or indirect.
- 8] The nature and extent of the secondary strike has to be proportional to its effect on the primary employer. However, as the effect need be merely possible, direct or indirect, the Court has an extremely wide discretion in determining whether a secondary strike could, not would, have an effect on the primary employer.

9] It follows from this analysis that the requirement of reasonableness does not qualify the effect of the secondary strike on the secondary employer.

10] In so far as it may be suggested that the proportionality test applies in regard to the effect of the secondary strike on the secondary employer, this is rejected. Such an interpretation would impose a limitation on the right to strike. The effect of the limitation would be to permit or require adjudicators to enter the arena of the power play during strikes. Adjudicators are not permitted to do so in primary strikes save at the invitation of the parties. If the procedural requirements for a lawful strike have been met, and provided there are no restrictions relating to essential services and maintenance services, the Court may not adjudicate the reasonableness of a strike. Likewise, the Court is barred from adjudicating the reasonableness of a secondary strike in relation to a secondary employer.

11] Any limitation on a constitutional right, which the right to strike is, must be couched in unambiguous terms. (*National Coalition for Gay and Lesbian Equality and Another, Minister of Justice and Others*, 1998(6) BCLR 726(W); *Rattigan and Others v The Chief Immigration Officer and Others* 1995(1) BCLR 1-5 at 2D and 4J; *S v Zuma and Others* 1995(4) BCLR 1 SA.)

12] The provisions of section 66(2)(c) do not impose clear limitations on the effect of the secondary strike on the secondary employer.

13] Any limitation on the effect of the secondary strike on the secondary employer would be voluntary or self-regulatory. The strikers would have to balance their own interests against those of their colleagues in the primary strike. If the secondary strikers have to bear a greater cost, for example

if the secondary employer has to shut down for any length of time when the strikers are ready to return to work, this would probably be factored into their decision as to the nature and extent of their support for the primary strikers.

4] Section 66(2)(c) is underpinned by one of the pillars on which the LRA is constructed, namely self-regulation and dispute resolution by consensus. Parliament's preferred option was to exclude the imposition of salaries and other terms and conditions of employment by a third party. My analysis of section 66(2)(c) may be a disincentive for investment and job creation. On the other hand it may be consistent with the government's competition policy, namely to discourage "excessive concentrations of ownership and control within the national economy" (preamble to Competition Act No 89 of 1998.) These and other legislation promulgated after 1994 constitute a matrix of social and economic reforms which a court must be slow to interfere with in a piecemeal fashion. Parliament has made its policy choice in framing section 66(2)(c) in the way that it has. It remains for me to apply the section to the facts of this case.

5] The applicant is a wholly owned subsidiary of BHP Billiton. The primary employer is SAMANCOR. Sixty percent of the shares in SAMANCOR are held by BHP Billiton. There is a nexus between the applicant and the primary employer. This much the applicant has conceded.

16] The second inquiry is: does the nexus have a possible effect on the primary employer's business? I am privileged to have the insights of my brothers LANDMAN J and BASSON J who have previously considered section 66(2)(c). In *SAMANCOR Limited and Another v National Union of Metalworkers of South Africa* 1999(20) ILJ 294 at 295 [LC] LANDMAN J answered this question affirmatively in relation to SAMANCOR, the first applicant in that case, on the basis of the following:

- SAMANCOR provided eighty percent of the chrome required by Columbus, the primary employer in that case. Chrome underpinned Columbus' operations.
- SAMANCOR was a partner in the joint venture with Columbus.
- SAMANCOR had a stake in the outcome of the strike as any further losses which Columbus suffered would be debited proportionately to its account. Therefore SAMANCOR was in a position to influence the business of Columbus if it was pressured by a secondary strike.
- This was a matter of capital funding in which SAMANCOR had a real and substantial interest and thus an incentive to influence the collective bargaining at Columbus.
- The fact that it might have had no say in the day-to-day running of Columbus was not pertinent.

7] With regard to Manganese Metal, the secondary employer in that case, the learned judge found that it did not play any significant role in the provision of chrome to Columbus. Furthermore, despite the fact that Manganese Metal was a wholly owned subsidiary of SAMANCOR, the Court found that the secondary strike there would not have had an effect on the business of Columbus.

8] BASSON J in *Sealy of South Africa (Pty) Limited and Others v Paper Printing Wood and Allied Workers Union* 1997(18) ILJ 392 (LC) found that the nexus was tenuous because the shareholding by Anglo American in the secondary employer was "negligible". There was, therefore, not a strong enough nexus between the primary and some of the secondary employers in that case (at 396D-E).

9] In this case the primary employer and the secondary employer are connected indirectly through their

common owner, namely BHP Billiton in London. All three are governed by independent boards. However, all are public entities. As such, they may be susceptible to market sentiment which could react negatively to industrial action. The inter-connected structure of the three entities, the extent of the ownership of the primary and secondary employers by BHP Billiton and the possible vulnerability of all three to the effect of market sentiment on their share prices could cause the secondary strike to have an effect on the primary employer indirectly.

20] In view of this finding it is not necessary to consider whether there is also a trade relationship between the applicant and the primary employer. There is in any event a dispute of fact on the papers on this issue.

21] As the nature and extent of the secondary strike is a total stoppage by all the first respondent's members its effect on the primary employer is reasonably possible. The primary employer may be continuing its operations by using replacement labour. That does not mean that the secondary strike could not have any effect on it.

22] The effect of the secondary strike on the secondary employer will be enormous. The applicant is a continuous operation. It would cost about R700-million to recommission if it were to shut down one smelter alone. Furthermore, it would take about twelve months to recommission the plant. In the event of a strike its smelters will come to a halt and the applicant would suffer irreparable harm. It would also suffer losses in excess of R2-billion. If the respondents were not aware of this data before then this application has certainly brought to their attention the consequences of the strike.

23] The respondents must balance their right to strike and bargain collectively with their economic

interests. It cannot be in the interests of either party if the smelters remain inoperative long after the strike and the employees are ready to return to work. Likewise, the applicant will be mindful of the risks if the primary dispute is not resolved. This is the essence of collective bargaining. It is not within my discretion to balance the interests of the respective parties during the power play.

24] In making no order as to costs, I take into account that the point canvassed has a new dimension.

Furthermore, the parties have an ongoing relationship. In the circumstances I make an order in the following terms:

The application for the interdict is dismissed with no order as to costs.

J U D G M E N T

[ON APPLICATION FOR LEAVE TO APPEAL]

PILLAY J

1] The application for leave to appeal is granted against the judgment given in Case No 1575/2001 on 29 October 2001.

2] Pending the outcome of the appeal and by way of interim relief, the respondent and its members are interdicted and restrained from promoting, inciting, instigating and participating in the proposed secondary strike against the applicant.

3] There is no order as to costs.

FOR THE APPLICANTS: G. VAN NIEKERK

INSTRUCTED BY: DENEYS REITZ

4TH FLOOR, THE MARINE

22 GARDINER STREET, DURBAN

FOR THE REPONDENTS: NORMA CRAVEN

INSTRUCTED BY: NATIONAL UNION OF METALWORKERS OF
SOUTH AFRICA