IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JA 96/2014

In the matter between:

NATIONAL UNION OF MENTAL WORKERS OF SOUTH AFRICA	**First Appellant** **[First Respondent in the Court *a quo*]**
INDIVIDUALS LISTED IN ANNEXURE "A"	**Second to Further Appellants** **[Second to Further Respondents in the Court *a quo*]**

and

TRANSNET SOC LIMITED	**Respondent** **[Applicant in the Court *a quo*]**

Heard: **15 September 2015**

Delivered: **06 November 2015**

Summary: Collective bargaining and organisational right – employer refusing to bargain until such time that union meeting the threshold of representativeness set out in the recognition agreement signed with other unions – union embarking on strike in order to force employer to meet its

demands- employer locking out union' s members – dispute relating to the refusal to bargain - union not entitled to strike without advisory award – Labour Court Judgment upheld – appeal dismissed.

Coram: Tlaletsi DJP, C J Musi JA *et* Savage AJA

JUDGMENT

C J Musi JA

[1] This is an appeal against the judgment of the Labour Court, (Lagrange J), wherein it found that the strike, which was embarked upon by members of the first appellant (NUMSA), was unprotected because it, firstly, concerned a refusal to bargain and no advisory arbitration award had been made and secondly, that the vast majority of the employees were bound by a collective agreement that regulated the issues in dispute. Although the court *a quo* found against the appellants on both issues, a finding against the appellants on either issue would be dispositive of this appeal.

[2] The respondent, (Transnet SOC Limited), is a state owned company responsible for transport and logistics in the Republic of South Africa. It employed approximately 63 000 employees in various operating divisions. One of its divisions, Transnet Port Terminals (TPT), employed approximately 6255 employees in the bargaining unit. It employed approximately 537 employees at the Ngqura Container Terminal (Ngqura or NCT) which is a small part of the TPT division.

[3] NUMSA's testimony was that it had 220 members at Ngqura while the respondent contended that it only had approximately 100 members at Ngqura. It is common cause that NUMSA's members at Ngqura are former members of the South African Transport and Allied Workers Union (SATAWU)

[4] NUMSA endeavoured to secure recognition at the respondent, nationally and at Ngqura. It wrote numerous letters to the respondent in this regard. On 24 February 2014, the respondent responded to those letters indicating that it would not process payment (of union dues) in favour of NUMSA until it had achieved the threshold or representativeness as prescribed by the recognition agreement entered into between Transnet, SATAWU and UTATU SARHWU (the recognition agreement). The respondent also referred to NUMSA's letter of 22 February 2014, wherein it requested a meeting, and responded as follows:

> 'A meeting of the nature you seek will only be considered when NUMSA has followed due process to obtain recognition/organisational rights.'

[5] NUMSA responded on 7 April 2014 indicating that s20 of the Labour Relation Act 55 of 1996 (the Act), gives unrecognized unions the right to conclude collective agreements and that the Act does not define a sufficiently representative union.

[6] On 24 April 2014, the respondent responded as follows:

> '1. As you are aware, the existing recognition agreement between Transnet, SATAWU and UTATU SARHWU establishes thresholds for recognition for all purposes, including organisational rights and collective bargaining.
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> 2. Transnet believes that those thresholds are fair, appropriate and consisted with the objectives of the LRA, and that they should be applied consistently to all trade unions. Transnet is not willing to enter into a separate relationship with NUMSA to recognise it or to enter into collective bargaining with NUMSA unless and until NUMSA meets the thresholds set in that recognition agreement.
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> 3. Transnet also does not agree that NUMSA is a sufficiently representatives union as contemplated in the provision of Chapter III of the LRA. If NUMSA disputes this, and believes that it is sufficiently representative, it is entitled to use available mechanisms in term of the LRA to test that belief.'

[7] SATAWU and UTATU SARHWU (the recognized unions) were the only recognised trade unions and therefore the only bargaining agents on behalf of employees within the agreed bargaining unit. There was a valid written collective agreement between the respondent and the recognised unions. The recognition agreement established certain thresholds. A trade union had to represent at least 30% of the bargaining unit employees across Transnet and 30% in an operating division in order to enjoy recognition and organisational rights. Transnet and the recognised unions were the only parties to the Transnet Bargaining Council. NUMSA was not a party to the collective agreement or the Bargaining Council.

[8] During the latter part of 2013, the respondent proposed a change in the manning ratios at Ngqura. Manning ratios are the number of employees assigned to a machine or item of equipment per shift within the port terminal. It engaged in negotiations with the recognised unions. The respondent implemented the new manning ratios during December 2013. On 14 January 2014, approximately 68 employees at Ngqura went on an unprotected strike demanding that the responded revert to the manning ratios which were in place prior to December 2013. Some of the employees heeded an ultimatum to return to work whilst others continued with the industrial action. Those who continued with the industrial action were suspended pending disciplinary hearing.

[9] On 18 January 2014, NUMSA referred two disputes to the Transnet Bargaining Council. It is not clear what happened at the Bargaining Council but on 17 February 2014, NUMSA gave notice that it would commence with a strike on 22 February 2014. On 21 February 2014, the respondent successfully applied for an interdict against the envisaged strike.

[10] On 28 February 2014, NUMSA sent a letter to the respondent setting out its demands. The letter reads as follows:

> 'NUMSA DEMANDS TO TRANSNET PORT TERMINALS
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> 1. We refer to the above and hereby demand that your company implements the demand of all our members that your company implements a

change from the present arrangement where our members work on a five (5) hour on and one (1) hour basis to a three (3) on and one (1) hour off basis.

2. The union is happy to meet with you to discuss the implementation of our members' demand, should you wish to do so

3. As you are aware, our members' concerns are that the present working arrangements lead to fatigue, which could result in the injury of our members or persons in the vicinity of the heavy machinery being operated by our members, or damage to property.

4. We furthermore demand that all of our members who are currently employed by labour brokers and who render service to or perform work for your company be permanently employed by your company. Our demand is founded on the basis that the work performed by our members for your company is ongoing, however, they do not enjoy all social benefits which are afforded to your permanent employees.

5. The union further demands that the transport subsidy afforded to employees at other Ports be afforded to all employees equally, as there is no plausible reason as to why such benefit is not applied equally to all employees.

6. We anticipate your response by close of business on Monday, 3 March 2014." (Quoted without correction)

[11] The respondent replied on 3 March 2014 as follows:

'Please note that NUMSA is not a sufficiently representative trade union in either TPT or Transnet. Accordingly, Transnet is not in a position to engage with your union on the issues raised in your latest letter. Rest assured that the issues you raise are in process or have been dealt with by Transnet and its recognised trade unions.'

[12] On 4 March 2014, NUMSA referred a mutual interest dispute to the Bargaining Council. It characterised the dispute as follows:

'Implementation of 3.1 (2) Demand permanent employment of labour brokers (3) Transport subsidy to be equal to all employees employed.' (Quoted without emendation)

[13] Under special features of the dispute, it stated that the respondent was afforded an opportunity to engage it on the aforesaid demands to no avail. It stated it desired outcome as follows:

> 'To meet with the respondent in order to reach an agreement to our demands.'

[14] On 17 April 2014, no conciliation had taken place and NUMSA issued a strike notice, on the same day, indicating that the strike would commence on 25 April 2014 at 16h00. It further indicated that its demands were those articulated in its letter of 28 February 2014.

[15] After attempts to avert the strike failed, the respondent gave notice on 24 April 2014 that it intended to institute a lock-out with effect from 28 April 2014. The lock-out demands were set out as follows:

> '3.1 NUMSA agrees that Transnet will not engage NUMSA separately on the matters referred to in 3.2 and 3.3 or on other matter of mutual interest unless and until NUMSA meets the thresholds of representativeness set out in the existing recognition agreement.
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> 3.2 NUMSA accepts that Transnet has a managerial prerogative to determine the manning ratios within the Ngqura Container Terminal; and NUMSA accepts the manning ratios applied by Transnet from January 2014.
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> 3.3 NUMSA agrees that any engagement between Transnet and Trade Unions concerning manning levels, the use of labour brokers, and transport subsidies will take place with trade unions recognised in terms of the existing recognition agreement concluded between Transnet, SATAWU/SARWHU.'

[16] The lock-out commenced on 28 April 2014. On 21 May 2014, NUMSA's attorneys wrote to the respondent informing it that its lock-out was unprotected because its lock-out demands included a refusal to bargain and that it could therefore not embark upon industrial action without first obtaining an advisory award. The respondent's attorneys responded by pointing out that the same would apply to NUMSA's industrial action.

[17] On 12 June 2014, NUMSA issued a press statement wherein it*, inter alia*, stated that "it has never been our intention to embark on an indefinite strike, but the strike was imposed on us by Transnet for their blatant refusal to negotiate with us…"

[18] The respondent further alleged that all but 14 of the second and further appellants were members of SATAWU. They were therefore bound at all material times by the provisions of the collective agreement and the constitution of the Bargaining Council. The collective agreement regulated the issues in dispute and they were therefore precluded from lawfully participating in the strike.

[19] The court *a quo* found that it seemed "unduly artificial and strained to say that the dispute does not concern a refusal to bargain when abandonment of the stance is an implicit pre-requisite for acceding to the substantive demands." It concluded that the failure by NUMSA to obtain an advisory arbitration award meant that the strike was unprotected.

[20] The court *a quo* had regard to the collective agreement and concluded that NUMSA's members who were erstwhile members of the recognised unions were still bound by the dispute resolution process contained in the recognition agreement by virtue of s23(1)(c)(ii) of the Act.[1]

[21] Mr Van der Riet, on behalf of NUMSA, contended that the purpose of the strike was to persuade the respondent to accede to its demands and thereby resolve the dispute. He further contended that NUMSA never demanded that the respondent should negotiate with or recognise it. He submitted that there was therefore no need to obtain an advisory award. In relation to the second issue, he contended that NUMSA complied with section 64(1) of the Act and it

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[1] Section 23(1)(c)(ii) of the Act reads as follows:
"A collection agreement binds-
(a)…
(b)…
(c) the members of a registered trade union and the employers who are members of a registered employer's organisation that are party to the collective agreement if the collective agreement regulates-
(i)…
(ii) the conduct of the employers in relation to their employers or the conduct of the employees in relation to their employers;"

therefore does not matter whether the strike procedures in the collective agreement were not followed. He therefore submitted that NUMSA's members were not bound by any collective agreement that regulated the issues in dispute.

[22] Section 64(2) of the Act reads as follows:

> '(2) if the issue in dispute concerns a refusal to bargain, an advisory award must have been made in terms of section 135 (3)(c) before notice is given in terms of subsection (1)(b) or (c). A refusal to bargain includes-
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> (a) a refusal-
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> (i) to recognise a trade union as a collective bargaining agent; or
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> (ii) to agree to establish a bargaining council;
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> (b) a withdrawal of recognition of a collective bargaining agent;
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> (c) a resignation of a party from a bargaining council;
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> (d) a dispute about-
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> (i) appropriate bargaining units;
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> (ii) appropriate bargaining levels; or
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> (iii) bargaining subjects.' [2]

[2] Section 64(1)(a)-(c) reads as follows:
"(1) Every employee has a right to strike and every employer 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 to the council; or
(ii) the employer is a member of an employer's organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or

[23] Section 135(3)(c) reads as follows:

> 'The Commissioner must determine a process to attempt to resolve the dispute, which may include-
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> (a)…
>
> (b)…
>
> (c) making a recommendation to the parties, which may be in the form of an advisory arbitration award.'

[24] Issue in dispute is defined in section 213 of the Act as follows:

> 'in relation to a strike or a lock-out means the demands, the grievance, or the dispute that forms the subject matter of the strike or lock-out.'

[25] In *Coin Security Group (Pty) Ltd v Adams and 37Others*,[3] it was said that:

> 'It is the court's duty to ascertain the true or real issue in dispute…In conducting that enquiry a court looks at the substance of the dispute and not at the form in which it is presented. The characterization of a dispute by a party is not necessarily conclusive…'[4]

[26] How the parties understood and characterised the dispute is therefore relevant but not determinative. In *NUMSA and Others v Driveline Technologies (Pty) and Another,*[5] it was said that:

> '…it has been accepted by our courts that a dispute postulates, as a minimum, the notion of expression by the parties opposing each other of conflicting views, claims or contentions…In *Williams v Benoni Town Council* 1949 (1) SA 501 (W) AT 507 Roper J said, among other things, that a dispute

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(c) in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless 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…"

[3] (2000) 21 ILJ 924 LAC.
[4] At para [15].
[5] (2000) 21 ILJ 142 (LAC).

exists "when one party maintains one point of the view and the other the contrary or a different one."[6]

[27] The true dispute between the parties can therefore be determined by, *inter alia*, having regards to the respective stances and conduct of parties, the correspondence between them and the information contained in the referral.

[28] The respondent was always of the view that it does not want to bargain with NUMSA because the recognised unions were the only recognized bargaining agents at Ngqura.

[29] When NUMSA presented its demands in the letter of 28 February 2014, it also requested to meet with the respondent to discuss the implementation of the demands. The respondent's response was clear and unambiguous; that it is not in a position to engage with NUMSA on the demands because NUMSA was not a sufficiently representative union at the TPT or Transnet.

[30] In its referral, NUMSA clearly stated that the outcome it desired was to meet with the respondent in order to reach an agreement on its demands. This was also because the respondent refused to meet with it.

[31] Although NUMSA had clearly articulated demands, those demands could not be addressed before the recognition of the union was addressed. The strike could therefore only be prevented and/or stopped when the conditions preceding collective bargaining were met. Only after the issues pertaining to recognition and organizational rights were settled could NUMSA's demand be attended to. The dispute was therefore a dispute concerning a refusal to bargain and not a refusal by the respondent to meet NUMSA's demands.

[32] The respondent's lock-out demands also made plain that it wanted NUMSA to accept that it will not engage in collective bargaining with it unless and until NUMSA met the threshold of representativeness as set out in the recognition agreement.

[6] At para 36.

[33] In its press statement, NUMSA also stated, correctly, that the strike was as a result of the respondent's blatant refusal to negotiate with it.

[34] In my judgment, the dispute in this matter concerned a refusal to bargain and NUMSA could only embark on industrial action after obtaining an advisory arbitration award.

[35] My conclusion on this issue renders it unnecessary for me to deal with the second issue. In my view, the law and fairness dictate that no order as to costs should be made.

[36] The following order is made:

a. The appeal is dismissed,

b. No order as to costs is made.

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C.J Musi JA

Tlaletsi DJP and Savage AJA agreed with C J Musi JA.

APPEARANCES:

FOR THE APPELANT:	Adv J.G Van der Riet SC
	Instructed by Ruth Edmonds Attorneys
FOR THE RESPONDNENT:	Adv P.J Pretorius SC with Adv M.J Engelbrecht
	Instructed by Bowman Gilfillan Inc.