IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J727/18

In the matter between:

TRANSNET SOC LTD	**Applicant**
and	
NATIONAL TRANSPORT MOVEMENT	**First Respondent**
THE PERSONS LISTED IN "ANNEXURE A"	**Second Respondent**

Heard: **15 March 2018**

Delivered: **28 March 2018**

JUDGMENT

MAHOSI J

Introduction

[1] This is an urgent application brought in terms of section 68 of the Labour Relations Act [1] (LRA) to interdict a strike by the members of the first respondent (NTM). The matter was initially set down for 09 March 2018 on

[1] Act 66 of 1995 as amended.

which date the matter was, by agreement, postponed to 15 March 2018 to enable the parties to exchange pleadings.

Material facts

[2] On 2 October 2017, NTM's dispute was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA). In its referral, the dispute was summarised as follows:

> 'We are demanding permanent positions for all contract workers and adjustments of salaries for all workers working on higher positions whilst being paid lower salary scale.'

[3] The dispute was conciliated unsuccessfully on 6 November 2017 and a certificate of non-resolution, which indicated that NTM may embark on a strike, was issued. On 20 November 2017, NTM handed a list of demands to the applicant in terms of which the applicant had 14 days to respond positively. In the absence of a response and on the strength of the certificate of non-resolution, NTM issued a strike notice dated 6 March 2018.

[4] Attached to the strike notice was a certificate of non-resolution of a dispute that was referred to the CCMA on 2 October 2017. The strike notice further refers to a list of demands that were handed to the applicant on 20 November 2017 when NTM had organised a march by its members to the applicant's premises. The demands were as follows:

> '1. We demand permanent employment for all employees of Transnet engineering SOC Ltd who are not permanent as of 1 January 2018.
>
> 2. We demand direct employment of all Mjayeli Security and Dyron Cleaning employees to be insourced and appointed permanently as of 1 January 2018.
>
> 3. We further demand a precautionary suspension of Miss Esther Maifadi a human resource manager for manipulation of policies and procedures for her own personal gain.

4. We demand that all workers working on higher position who are paid lower salaries be remunerated according to the current position/fair and just promotions.

5. We demand equalisation of gain sharing monies to all employees for Transnet Engineering SOC Limited.

6. We further demand the introduction of 40 hours working hours per week.

7. We further demands the complete eradication of racial remuneration system.

8. We further demands that overtime must be paid on 1.5 rates per hour.

9. We further demand that immediate investigation be conducted surrounding favouritism involving Ms D Matlou or submitted fraudulent qualifications and curriculum vitae and still in the employ of the company even though this was brought to the company's attention timeously.

10. We again demand that immediate investigation be conducted regarding nepotism of the family of Baloyi whose family members are preferred over other people wherein more than five (5) members were given full-time status from 2012 until 2014 whereas the company is dishing out only contracts job to other candidates.

11. We again demand that an immediate investigation be conducted concerning the awarding of the “kiosk” machines that are malfunction and continue to be paid around R100 000.00 (hundred thousand rands) each month for idling in plants.

12. We further demand an immediate investigation into the disappearance of more than R22 000 000.00 (twenty two million rand), electric cables and roof cables estimated value of more than R5 000 000.00 (Five million rand) which resulted in two unproductive weeks, amazing enough nobody was held accountable. This incident happened at around August/September 2017 at Bay 44, CSR Logistics Warehouse.

13. With further demand immediate investigation on the awarding of tenders to the Gupta family and its associates and the millions of rand that were paid out on a monthly basis.

We consequently demand a positive response within fourteen days by making an undertaking in writing confirming that all non-permanent employees including those of contracted companies that they will be employed permanently as of the 1 January 2018.

We further demand that within 14 days of the above you give a detailed progress report on the allegations raised in relation to corruption, favouritism, nepotism and theft that occurred under your executive position.'

[5] On 15 December 2017, the first respondent referred a second mutual interest dispute to the CCMA under case number GATW78-18. The dispute was related to the NTM's demand for the applicant to employ the employees of Mjayeli and Dyron permanently. The matter was conciliated unsuccessfully and the CCMA issued a certificate of non-resolution. The CCMA further issued a jurisdictional ruling in terms of which it found that the dispute must be arbitrated as it relates to section 198B of the LRA. NTM then conceded that on the second referral dated 15 December 2017 the jurisdictional ruling which was issued was not taken on review.

[6] There was a further referral of a mutual interest dispute on the 15 December 2017. In its referral form, the dispute was summarised as the applicant's failure to respond to its demands. The demands were the same as stated above. The respondent's submission was that in light of the fact that the CCMA failed to set this matter down for conciliation and due to the fact that 30 days have elapsed, it is entitled to issue a strike notice on the basis of this referral. It is unnecessary at this point to consider this submission as it was not in dispute that a memorandum dated 7 March 2018 was served on NTM in response to its demands dated 20 November 2017. In addition, NTM's legal representative conceded in the proceedings that these demands were met. Consequently, the respondent's attorney abandoned the submissions made in relation to the demands dated 20 November 2017.

The urgent application

[7] The applicant's approached the Court on an urgent basis and submitted that NTM's intended strike action would be unprotected because it would be in contravention of sections 64 and 65 of the LRA.

[8] In relation to the dispute relating to the status of the fixed-term contract employees, the applicant contends that such dispute must be conciliated and arbitrated by the CCMA. In addition, the applicant contends that a collective agreement was concluded with its recognised trade unions which permitted the employment of employees on fixed-term contracts as contemplated by section 198B. The said collective agreement was extended to non-parties and is binding on NTM and its members. NTM had challenged the collective agreement at the Transnet Bargaining Council and an arbitration award dated 24 July 2017 was issued in terms of which it was found that the collective agreement was binding on NTM and its members.

[9] On the dispute relating to payment of an acting allowance, the applicant contends that acting allowances are paid in terms of a collective agreement concluded between South African Transport and Allied Workers Union and United National Transport Union which agreement has been extended to non-parties including NTM and its members. The applicant contends that the strike in respect of these demands is unprotected as it is prohibited by section 65 of the LRA.

[10] NTM submitted that the dispute it seeks to strike on relates to two issues which it argues are of mutual interest. The first issue relates to the demand for permanent positions for workers employed on a fixed-term contract. The second issue relates to equal remuneration for fixed-term employees on the same level as permanent workers. The issue is whether NTM's strike is prohibited in terms of the LRA.

Applicable law and analysis

[11] 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 65 of the

LRA provides for the substantive limitations on the right to strike or recourse to lock-out, 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) 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.'

[12] The applicant contends that the issue relating to a demand for permanent positions for workers employed on a fixed-term contract is regulated by section 198B of the LRA and further that there is a collective agreement that permits the employment of fixed-term contracts as contemplated by section 198B which agreement was extended to non-parties. This is a collective agreement that was challenged by NTM at the bargaining council. An arbitration award was then issued by commissioner Le Roux in terms of which the following was found:

'36. The agreement of the Transnet Bargaining Council regarding Fixed Term Contract Employees is binding on the applicants.

37. The provisions of s189B(2)(c) of the LRA apply to the applicants. Consequently, subsection 198B(3) and (5) do not apply, as their application is removed by section 198(2)(c).

38. The matter is dismissed.'

[13] The first respondent conceded that the above ruling is binding on them. However, they submitted that the reason the jurisdictional ruling was not reviewed was that it would culminate into a moot issue as the fixed-term contracts of employees in the application would have been terminated by the submitted that although the dispute may be referred to arbitration, the first respondent may still elect to refer a dispute of mutual interest to the CCMA in circumstances where they intend to advance their socio-economic interest. There is no merit to the first respondent's submission. 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 Labour Court in terms of the LRA or any other employment law.

[14] It is well established and settled in our law that minority unions may be bound by collective agreements entered into with majority unions on matters of mutual interest and minority unions need not be consulted in those instances. This is so despite the fact that the subject matter of the collective agreements affects individual employees and their unions. In *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others*,[2] the Labour Appeal Court stated as follows:

> 'Section 23(1)(d) of the LRA is but one instance in the LRA where the legislature had chosen to apply the principle of majoritarianism. There is nothing unconstitutional about the principle itself. It is a useful and essential principle applied in all modern democracies, including the Republic of South Africa. It has been recognised as an essential and reasonable policy choice for the achievement of orderly collective bargaining and for democratisation of the workplace and the different sectors.'

[15] In *Association of Mineworkers and Construction Union (AMCU) and Others Bafokeng Rasimone Management Services (Pty) Ltd and Others*[3] observed that the subject matter of the collective agreement is irrelevant to its extension to non-parties:

> 'In my view there is merit in this submission and it matters not what the subject matter of the collective agreement is. If a collective agreement had been concluded, the effect and consequences should be the same, irrespective of the subject matter of the agreement and it would be inappropriate to treat some matters of mutual interest different from others.'

[16] The Constitutional Court (CC) recently dealt with the validity of the extension of a collective agreement to members of a union who are not a party to the collective agreement in *Association of Mineworkers and Construction Union*

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[2] [2016] 9 BLLR 872 (LAC) at para 105

[3] (2017) 38 ILJ 931 (LC) at para 133

and Others v Chamber of Mines of South Africa and Others[4] where held as follows:

> '…The decision by private parties to invoke the power of section 23(1)(d) affords them to extend their collective agreement to parties entirely alien to it has a coercive effect: it binds nonparties to the agreement willy-nilly. And, as AMCU rightly points out here, the statutes empower contracting parties to do this with just about industry wide effects. The extension of the agreement also has extensive implications for members of the public. For its duration, non-members employees are bound. Even more, they forfeit the right to strike if the collective agreement regulates the issue in dispute.'[5]

[17] Therefore, in circumstances where the majority unions had concluded a collective agreement with the employer which prohibited strike action over the issue in dispute (as it is in this case), the strike by the minority union would be unprotected. There is no reason to depart from the CC's decision as it binds this Court.

[18] In this case, the issue relating to a demand for permanent positions for workers employed on a fixed-term contract is not only regulated by the Agreement of the Transnet Bargaining Council Regarding Fixed Term Contract Employees, it was arbitrated and an award was issued in relation thereto. Although NTM was not a party to the collective agreement, it is bound by it because it had been extended to all the employees of the applicant. As such, NTM is precluded by section 65(3)(a)(i) from striking in support of this demand because it is bound by the arbitration award and the collective agreement that regulates the issue in dispute.

[19] On the dispute relating to the demand that the fixed-term employees working on higher positions be remunerated on the same level as permanent workers, the applicant's contention was that the dispute was already referred for arbitration. The first respondent conceded that the award thereof is the subject of the review application under case number JR2049/15. However, the first respondent submitted that it was not aware of the outcome of the

4 2017 (6) BCLR 700 (CC).

5 At para 78.

review application.[6] Section 65(1)(c) precludes any party from striking in support of the demand where the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of LRA or any other employment law. This dispute was arbitrated and the outcome was in favour of NTM. It is not clear why NTM would want to embark on a strike in relation to a dispute that was arbitrated. More so, where the outcome was in its favour. The fact that there is still no outcome in the review application cannot be a basis for a strike action. As such, NTM is precluded from striking on an issue that was already arbitrated and which is still pending in this Court.

[20] 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.

[21] In the premises, I make the following order:

Order

1. The intended strike action is declared unlawful, unprotected and prohibited as contemplated by section 65 of the LRA.

2. The first respondent is interdicted and restrained from encouraging its members employed by the applicant to participate in the intended strike action.

3. The first and the second respondents are interdicted and restrained from participating in the intended strike.

4. The first and the second respondents are interdicted and restrained from, in any manner, interfering with the running of the applicant's business operations.

5. There is no order as to costs.

[6] Page 152 para 7 of Index to the application.

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D. Mahosi

Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT: Mr. Maserumule of Maserumule Attorneys

FOR THE RESPONDENTS: Mr. Anton Swart of Aton Swart Attorneys