

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J 891/19

COMAIR LTD

Applicant

And

**NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA**

First Respondent

EMPLOYEES LISTED IN ANNEXURE "A" Second to further Respondents

Heard: 18 April 2019

Delivered: 25 April 2019

JUDGMENT

PRINSLOO, J

Introduction:

[1] The Applicant approached this Court on an urgent basis seeking an order declaring the strike action by the Respondents unprotected and further interdicting and restraining them from instigating or participating in such strike action.

- [2] The Respondents filed an answering affidavit, to which the Applicant filed a reply. The answering and replying affidavits were handed up in Court when the matter was heard and as I had no prior sight of these affidavits or any opportunity to peruse them, judgment in the matter was reserved. As all the papers are before me, the matter will be finally determined.
- [3] The Respondents took issue with urgency. I do not intend to deal with the issue in any detail as this Court has a discretion and in exercising my discretion I am inclined to deal with the matter notwithstanding the objections regarding urgency. Not only am I of the view that the matter is urgent, it is also in the interest of the parties that the issues raised be decided without delay.

Brief history

- [4] The Applicant has established an 'Employment Equity Forum' (EEF) in accordance with the provisions of the Employment Equity Act¹ (EEA) to deal with *inter alia*, issues relating to allegations of discrimination in the workplace. In September 2018 the First Respondent (NUMSA) raised an equal pay grievance with the EEF, claiming pay differentiation on the basis of race or ethnicity. NUMSA demanded that the Applicant eliminates the alleged unfair differentiation.
- [5] In October 2018, NUMSA referred *inter alia*, the wage parity dispute raised in September 2018, to the Commission for Conciliation, Mediation and Arbitration (CCMA). On 20 December 2018 and at the CCMA, the parties entered into a settlement agreement and in respect of the salary discrepancies issue, the parties agreed to set up a working committee to deal with it. They agreed to identify the group of affected employees, to do an investigation and classify where necessary according to job description. The parties further agreed that the Applicant would provide all the relevant salary information to include race, gender, date of employment, basic salary and other variable earnings. The working committee agreed to meet on 8 and 9 January 2019.

¹ Act 55 of 1998, as amended.

- [6] At the meeting of the working committee on 8 and 9 January 2019, the Applicant tabled several proposals as a means of dealing with the equal pay/discrimination dispute, but NUMSA rejected the proposals. NUMSA demanded that the wages of the majority of employees be increased to those of the highest paid employees.
- [7] NUMSA had two disputes with the Applicant; namely a wage dispute relating to wage increases and a dispute on wage discrepancies.
- [8] On 23 January 2019, the parties concluded a wage agreement that settled NUMSA's wage demands for a two-year period. In terms of the agreement, wage increases and other benefits, are to be implemented over a period of two years.
- [9] On 25 January 2019, NUMSA referred a dispute on wage discrepancy as a dispute of mutual interest to the CCMA. Conciliation took place on 14 February 2019 and on 26 March 2019, a certificate of non-resolution was issued, following unsuccessful conciliation of the dispute.
- [10] On 16 April 2019, NUMSA served a notice of intention to strike on the Applicant, which strike action was to commence at 13:00 on 18 April 2019.

The Applicant's case

- [11] The Applicant's case is that the Respondent's industrial action is unprotected for three following reasons.

11.1 Firstly, the true nature of the dispute is an equal pay/discrimination dispute which is to be resolved in terms of the provisions of section 10(6) of the EEA by way of referral to the Labour Court for adjudication or arbitration. The dispute is not a dispute in respect of which industrial action is permissible as strike action is excluded by the provisions of section 65(1)(c) of the Labour Relations Act²(the LRA).

11.2 Secondly, the parties had entered into a collective agreement on 23 January 2019 in terms of which the terms and conditions of employment

² Act 66 of 1995 as amended.

had been agreed to for a period of two years, save for the issues expressly reserved for further discussion in May 2019. The said wage agreement regulates all issues relating to wages and terms and conditions of employment, including the current issue. NUMSA accepted the sign-on bonus and it is therefore obliged to accept that all issues relating to wages and terms and conditions of employment have been resolved. The wage parity issue must be deferred for consideration after the conclusion of the wage agreement. The issue is therefore regulated by a collective agreement and strike action on the issue is prohibited in terms of section 65(3)(c) of the LRA.

- 11.3 Thirdly, absent a secret ballot as required by section 19 of the Labour Relations Amendment Act³, NUMSA's members may not engage in strike action.

The Respondents' case

[12] The Respondents' case is that for many years, salary discrepancies have existed within the Applicant as a number of employees performing the same job do not receive the same remuneration. This is a long-standing problem and the Applicant's management has made little or no effort to resolve the issue.

[13] Initially, NUMSA believed that the pay discrepancies were based on race or ethnicity but after the Applicant disclosed information to the union, it is satisfied that the salary discrepancies are not based on race or ethnicity.

[14] NUMSA's demand is that all employees performing the same work must receive the same remuneration. A dispute in respect of salary discrepancies was declared and on 20 December 2018, a settlement agreement was concluded at the CCMA. The settlement agreement established a working committee to deal with the salary discrepancies and after the discrepancies were not resolved at the meetings of 8 and 9 January 2019, the parties remain in dispute concerning the salary discrepancies.

³ Labour Relations Amendment Act 8 of 2018.

[15] The true nature of the dispute is salary discrepancies, but it does not fall within the scope of section 10 of the EEA as NUMSA's case is not that the discrepancies arise from any of the grounds set out in section 6 of the EEA. NUMSA has moved away from referring to the salary discrepancy dispute as an equal pay / discrimination dispute. The salary discrepancies are unrelated to race and ethnicity.

[16] The dispute is a matter of mutual interest as the issue in dispute is related to the terms and conditions of employment. The dispute concerning salary discrepancies is not regulated by any wage agreement and at the time the wage agreement was concluded, the Applicant was aware of the existence of the dispute about salary discrepancies and the fact that NUMSA did not seek to address the said issue in the wage agreement concluded in January 2019. The wage agreement that the parties entered into, does not relate to salary discrepancies and the agreement does not regulate the issue at all. NUMSA's case is that the Applicant was fully aware that when it concluded the wage agreement, it did not settle the salary discrepancies dispute.

[17] NUMSA made it clear that it refused to classify the dispute as an equal pay/discrimination dispute and instead classified the dispute as a wage gap dispute. NUMSA's position is that it is entitled to strike on the issue in dispute.

Analysis: The dispute

[18] It is evident that the nature of the dispute is a contentious issue on which the parties do not agree. The starting point therefore is to determine the true nature of the dispute and to consider whether NUMSA has to refer the dispute for adjudication or arbitration or whether it could embark on industrial action.

[19] In *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd*⁴ it was held that:

'It is the duty of a court to ascertain the true nature of the dispute between the parties. In ascertaining the real dispute a court must look at the substance of

⁴ 2003 (3) SA 513 (CC), (2003) 24 ILJ 305 (CC) at para 52.

the dispute and not at the form in which it is presented. The label given to a dispute by a party is not necessarily conclusive. The true nature of the dispute must be distilled from the history of the dispute, as reflected in the communications between the parties and between the parties and the Commission for Conciliation, Mediation & Arbitration (CCMA), before and after referral of such dispute. These would include referral documents, the certificate of outcome and all relevant communications. It is also important to bear in mind that parties may modify their demands in the course of discussing the dispute or during the conciliation process. All of this must be taken into consideration in ascertaining the true nature of the dispute.' (Footnotes omitted)

[20] In *National Union of Metalworkers of SA and Others v Edelweiss Glass and Aluminium(Pty) Ltd*⁵ it was confirmed that it is the duty of a court to ascertain the true nature of the dispute between the parties and in doing so, the court must look at the substance of the dispute. It was held that:

[60] The true nature of the dispute may be discerned from the history of the dispute, as reflected in the communications between the parties themselves and between the parties and the CCMA, before and after referral of the dispute. Relevant documents for this purpose may include the referral form, the certificate of outcome, any relevant correspondence, negotiations between the parties, and affidavits filed in court proceedings in which the issue must be determined.

[61] Although as a general proposition it may be said that the issue in dispute over which a strike may be called must be the issue in dispute that was referred to conciliation, this is not a rule 'to be applied in a literal sense'. This would unduly restrict the process of collective bargaining. Parties may readily modify or develop their demands in the course of a collective bargaining dispute, whether during or after the conciliation process. But this does not mean that a trade union may call a strike ostensibly in support of one demand when the true demand is one over which no strike is permissible. One of the considerations which the court will take into account is whether the nominal issue in dispute is the true dispute'.

⁵ (2010) 31 ILJ 139 (LC).

- [21] In ascertaining the true nature of the dispute, I am guided by the aforesaid principles and the first issue to be considered is the history of the dispute, as reflected in relevant documents. NUMSA's version is that for many years, salary discrepancies existed in that a number of employees performing the same job do not receive the same remuneration. This is a long-standing problem and NUMSA's members are frustrated that the discrepancies have continued for such a lengthy period with the Applicant's management making little or no effort to resolve the issue.
- [22] NUMSA held meetings with the Applicant in July and August 2018, where after it declared a dispute in respect of the ongoing salary discrepancies. On 5 October 2018, NUMSA issued a 'notice of dispute' in accordance with the recognition agreement and in the said notice, NUMSA recorded *inter alia*, that the 'salary discrepancies' was an unresolved issue. The solution proposed was that all employees who are doing the same job in the same department should earn the same salary and that the salary gap be closed with immediate effect.
- [23] Subsequently and on 11 October 2018, NUMSA referred a dispute to the CCMA and the dispute was described as being that '*the employer refuses to resolve the issue that was raised by the union*' and the result required was for the Applicant to resolve all the issues that were raised. This included the salary discrepancies issue.
- [24] In respect of the referral, a settlement agreement was concluded on 20 December 2018 at the CCMA. A working committee was established to deal with the salary discrepancies and to meet on 8 and 9 January 2019. The dispute concerning the salary discrepancies was not resolved.
- [25] On 25 January 2019, NUMSA referred a second dispute regarding salary discrepancies to the CCMA. In the referral, the dispute is recorded as '*the employer is refusing to close the gap between employees who are earning more than the others.*' The result required was left open on the referral form.
- [26] It is evident from the dispute notice as well as the referral forms that the dispute relates to salary discrepancies.

[27] The Applicant placed reliance on the way NUMSA has aired the issue in dispute. To this extent, NUMSA's spokesperson, Ms Phakamile Hlubi-Majola, stated in a live interview on eNCA radio that "*...at Comair, there continues to be this system where the majority of white workers earn more than black workers, even those who fulfil the same tasks. That's apartheid. That's modern day apartheid.*" On 20 December 2018 the Citizen Newspaper published an article quoting Ms Hlubi-Majola as saying that the Applicant "*is a racist company which refuses to pay workers equal pay for work of equal value. There is a significant gap between the salaries of white workers and African workers who do the same work.*" Similar comments were made by NUMSA's general secretary, Mr Irvin Jim.

[28] On 18 January 2019, Fin24 published an article where NUMSA was quoted saying that it could not allow a situation where the principle of equal pay for work of equal value is violated and that the wage discrepancies should be corrected.

[29] As recent as 16 April 2019, and after the strike notice was issued to the Applicant, Ms Hlubi-Majola stated in a Radio 702 interview that NUMSA was calling for equal pay for all employees performing the same duties and that the strike was called after the Applicant had failed to agree on a timeframe to implement the union's proposal to resolve pay discrepancies.

[30] NUMSA admitted that the statements were made but indicated that they no longer reflect its views as at the present time, as it has shifted its position and no longer contended that the salary discrepancies were related to race or ethnicity. NUMSA submitted that as the employees no longer contend that the pay discrepancies constitute unfair discrimination, their only remedy is to resolve the dispute through industrial action.

[31] The Applicant's response to NUMSA's shifted position is that the issue raised by NUMSA is an equal pay claim and that remained NUMSA's public position until today. NUMSA has provided a confirmatory affidavit by Ms Hlubi-Majola, confirming the allegations in the answering affidavit as far as they relate to her. NUMSA has however not amended its public statements on the claim of racially motivated pay discrimination. Similar statements

were made by Mr Jim, with no indication in the answering affidavit that he got it wrong or that he was misinformed or misquoted or that he no longer believes the issue to be what he indicated it to be. The Applicant's case is that NUMSA cannot put forward one version to their members and the public, in the hope of raising support, and in the same breath create a different set of facts to get around the legal difficulties they face in proceeding with the industrial action.

[32] NUMSA made public statements calling the employer '*a racist company*' and labelling pay discrepancies as '*modern day apartheid*' without hesitation and made it clear that the strike was to resolve the pay discrepancies. NUMSA has not publicly distanced itself from or withdrew the statements that were made and in the papers before this Court, the first attempt is made to state that the views publicly expressed, no longer represent its position.

[33] NUMSA has since moved away from its position that the salary discrepancies were related to race or ethnicity and its case is that the dispute is no more than a wage gap dispute. According to NUMSA, the dispute is no longer an equal pay dispute.

[34] The true nature of the dispute is to be determined from all the relevant facts. This Court must have regard to the substance and not the form of the demand and the Court is not bound by the CCMA's characterisation of a dispute.

[35] An assessment of NUMSA's case shows that it demanded that there should be parity of wages for all employees performing the same work in the bargaining unit. Initially it was based on discrimination on the grounds of race or ethnicity, which, according to the answering affidavit, is no longer NUMSA's case. The current demand is essentially that employees doing the same work, should receive the same pay and according to NUMSA, the issue in dispute is related to the terms and conditions of employment.

[36] The Applicant's case is that the demand remained the same – from the outset NUMSA demanded that there should be parity of wages for all

employees performing the same work in the bargaining unit. Initially it was based on discrimination and the current demand is essentially the same in that NUMSA still demands that employees doing the same work, should receive the same pay. The essence of the demand did not change, save for the move away from the assertion that the motive for the pay difference was based on discrimination.

[37] It is evident that NUMSA's demand is that there should be a parity of wages for all employees performing the same work in the bargaining unit. In my view, the essence of the dispute is equal pay for equal work.

[38] Notwithstanding the fact that NUMSA stated in the papers before this Court that it does not assert that the salary discrepancies were based, directly or indirectly, on any of the grounds identified in section 6 of the EEA and that the dispute is about salary discrepancies but does not fall within the scope of section 10 of the EEA, the facts before me establish a classic case provided for in the EEA.

[39] NUMSA stated that how the salary discrepancies arose is not known, but that such discrepancies are not related to race or ethnicity or any other grounds identified in section 6 of the EEA. The phrase 'or on any other arbitrary ground' was added to section 6(1) and section 6(4) was added to the EEA by way of the 2013 amendments to the EEA, which came into operation on 1 August 2014.

[40] Section 6(4) of the EEA provides that:

'A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination'.

[41] Section 6(1) of the EEA provides that:

'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion,

HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.' (Own emphasis)

[42] The essence of the demand made by NUMSA remains one that employees who perform the same work should receive the same pay. Although the difference in remuneration is no longer alleged to be based on race or ethnicity, what NUMSA asserts is that there is no substantively good reason or justification for the difference; in other words, that the difference is arbitrary, or that its members are being less favourably treated on an arbitrary ground. This is precisely what section 6 of the EEA prohibits, and what this Court is empowered to remedy where the employer is unable to proffer some rational justification for the difference in the form of a difference in levels of skill, experience, qualification and the like. That being so, the dispute giving rise to the strike is one that is capable of determination by this Court and therefore may not be the subject of industrial action.

[43] The amendments to the EEA, as alluded to *supra*, intended to put differentiation in terms and conditions of employment without an obvious basis (any other arbitrary ground) to the test and the appropriate forum to test any alleged differentiation, is the CCMA or the Labour Court. The dispute has to be resolved in terms of section 10 of the EEA. In the event that the dispute is pursued, NUMSA has to make out a case on an arbitrary ground.

[44] The real dispute indeed triggered the limitation on the right to strike as provided for in section 65(1)(c) of the LRA where it is provided that no person may take part in a strike if the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of the LRA or any other employment law.

[45] In view of my findings on the true nature of the dispute, it is not necessary to deal with the other grounds on why the strike is unprotected, as raised by the Applicant.

Costs

[46] In awarding costs this Court has a wide discretion. In my view the interest of justice will be best served by making no order as to costs, having regard to the ongoing collective bargaining relationship between the parties and the prospect of prejudice to the relationship and the successful resolution of the current dispute, should an order for costs be made.

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

Order

1. The strike action by the Respondents is declared unprotected in terms of the provisions of section 65(1)(c) of the Labour Relations Act;
2. The Respondents are interdicted and restrained from participating in strike action pursuant to the certificate of outcome issued under case number H0257-19;
3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate A Cook

Instructed by: Baker Mckenzie Attorneys

For Respondents: Advocate I de Vos

Instructed by: Cheadle Thomson & Haysom Attorneys