

SOUTH AFRICA / JUDGMENT

Botselo Holdings (Pty) Ltd v National Transport Movement Members of the National Transport Movement (J 479-16) [2016] ZALCJHB 101; (2016) 37 ILJ 2059 (LC) (18 March 2016)

[2016] ZALCJHB 101

COURT

Labour Court Johannesburg

BEFORE

Lagrange

CASE / FILE NUMBER

J 479-16

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The Labour Court of South Africa

HELD AT JOHANNESBURG

Case No: J 479-16

DATE: 18 MARCH 2016

In the matter between:

BOTSELO HOLDINGS (PTY) LTD.....First Applicant

And

NATIONAL TRANSPORT MOVEMENT.....First Respondent

MEMBERS OF THE NATIONAL TRANSPORT MOVEMENT

(as per the attached list of members).....Second Respondent

Heard: 17 March 2016

Delivered: 18 March 2016

Summary: (Urgent – unprotected strike interdict – s 65(3) (a)(i) of the LRA -effect of collective agreement on wage dispute and bargaining threshold)

Judgment

LAGRANGE J

Introduction

[1] The applicant ('Botselo') is a milling business in the agricultural sector. It seeks to interdict a strike by The National Transport Movement ('NTM') and its members which commenced on 14 March 2016, on the basis that the strike is unprotected. The application was opposed by the respondents and both parties agreed that the court could determine final rather than interim relief. Urgency was not disputed.

Sequence of events

[2] In brief, the material sequence of events leading to this application are:

2.1 Botselo and NTM started to engage with each other in December 2015.

2.2 On 20 November and 18 December 2015 NTM presented wage negotiation proposals, setting out in detail specific demands relating to terms and conditions of employment and proposed a meeting on 9 January 2015 to negotiate over the same.

2.3 On 14 January 2016, Botselo received a notice from the CCMA setting down a refusal to bargain dispute for conciliation.

2.4 The parties seem to have only met on 25 January 2015 when a recognition agreement was concluded.

2.5 In terms of clause 3.1 of the recognition agreement, Botselo agreed to recognise NTM for organisational and collective bargaining rights in respect of its members provided that the union obtained representation of 30 % and 50% +1 respectively for those rights.

2.6 Clause 3.2 of the recognition agreement states union representivity is determined by the number of "Union stop orders in operation at any given time".

2.7 Clause 16 of the agreement contains a dispute resolution procedure which requires the formal declaration of the dispute in writing together with the required solution and obligated the parties to meet within 10 days of the receipt of the dispute notice to endeavour to resolve the dispute. The parties agreed in terms of clause 16.1.4 that only if they were unable to resolve the dispute can they invoke the statutory dispute resolution procedures.

2.8 On 29 January 2016 the refusal to bargain dispute was set down for conciliation and the Commissioner issued an advisory award to the effect that the parties should attempt to resolve the dispute as per the recognition agreement and that the dispute had been referred prematurely to the CCMA. According to the advisory award, the referral form had described the dispute as "employer refused to negotiate wages with the union".

2.9 It is also common cause between the parties that the dispute related to the refusal to bargain on wages, which was the same dispute that gave rise to the strike action on 14 March 2016.

2.10 On 11 February 2016, the parties concluded an agency shop agreement. In terms of clause 9.1 of the agreement came into effect on the same date and would only lapse on expiry of a 90 day grace period if the union's membership declined to less than 50% +1 of Botselo's employees.

2.11 The same day, a membership verification exercise was conducted.

2.12 The next day, NTM requested a meeting to engage with Botselo "...on wages that was already served to yourselves..."

2.13 On 17 February, Botselo advised the union that its representivity level was currently 44, 4% and called on the union to follow the dispute procedure in the agreement. In view of this figure, Botselo advised the union that the agency shop agreement could not be effected.

2.14 Botselo only responded to the union's request to engage in wage negotiations on 18 February. In light of the union's representativity being below the threshold for collective bargaining, Botselo insisted that the agreement be adhered to.

2.15 On 8 March, the union issued notice of its intention to embark on strike action on 14 March. In the notice it stated:

"Pursuant to the refusal on the part of Botselo Mills to meet the wage negotiation demands, which matter and/or dispute was referred to the CCMA in December 2015, the National Transport Movement hereby serves the notice of the strike action ..."

2.16 Botselo reacted by warning the union that it regarded the strike as unprotected and that it could interdict the strike.

[3] In essence, the three grounds on which the applicant relies for its claim that the strike was unprotected may be summarised as follows:

3.1 In so far as a dispute had been referred to the CCMA for conciliation prior to the strike, that dispute concerned a refusal to bargain over wages and was settled by the conclusion of a recognition agreement.

3.2 Secondly, NTM was only entitled to collective bargaining rights if it met the threshold of 50% +1 of the workforce set out in the recognition agreement.

3.3 NTM's membership paying their dues by stop order amounted to approximately 44% of the workforce, and accordingly could not demand collective bargaining on wages and working conditions.

[4] Mr Mphahlele, NTM's general secretary who represented the respondents, argued that:

4.1 The applicant was attempting to apply the recognition agreement retrospectively to have wage dispute that arose before it was concluded.

4.2 NTM in fact had 191 members out of a workforce of 358, which was conceded by the applicant, and accordingly was entitled to collective bargaining rights.

4.3 Botselo never gave notice in terms of the agency shop agreement to terminate that agreement on account of NTM's representativeness falling below the 50% +1 threshold, and accordingly it must be accepted that it met the requirement.

4.4 NTM had properly referred the dispute to the CCMA, the dispute was unresolved after 30 days had elapsed and the union had given Botselo ample notice of the strike.

Evaluation

NTM's representativeness

- [5] It is clear from the applicant's reference to 191 members in 2.3.7 of the replying affidavit that it is merely referring to the number of members on the union's own list and not to the number of union members having current stop orders on their pay for the union subscriptions. It is also clear that for the purposes of the recognition agreement representativeness must be calculated on the basis of employees with current stop orders. On the papers that is no basis for concluding that the union had achieved the necessary 50% +1 threshold by the time the strike commenced, based on the agreed method of determining that threshold using operative stop orders. The fact that the parties had concluded an agency shop agreement, in and of itself, does not mean that NTM actually had more than half the workforce as members with current stop orders, which is what the recognition agreement required.
- [6] Accordingly, in terms of the recognition agreement which NTM had agreed to, it could only invoke the right to collectively bargain on behalf of its members when it achieved the 50% +1 threshold.

The nature of the dispute referred to the CCMA

- [7] It is obvious that the demands made by NTM in November and December 2015 were specific concrete wage demands. It is also common cause that the dispute which was referred to the CCMA concerned a refusal to bargain over wage demands. The applicant interprets this to mean that it was simply a dispute over a refusal to bargain as such, whereas the respondents argue that the dispute effectively included a failure to agree to the concrete demands that were made.
- [8] An argument might be made that the failure to accede to any of the concrete demands was part and parcel of the dispute over the failure to negotiate wage demands. However, the respondents never furnished the court with a copy of the dispute referral form. Apart from the say-so of the parties the only independent evidence of what the dispute concerned is the reference captured in the arbitrator's advisory award. The respondents also never claimed that the referral described the dispute as a failure to agree on wages and not just a failure to negotiate wages at all. On the papers, the applicant's version that the dispute referred in December 2015 to the CCMA was described as a refusal to bargain over wages must be preferred.

Effect of the recognition agreement

- [9] The respondents contend that the applicant's case necessarily entails a retrospective application of the recognition agreement. Assuming for the moment that my finding above about the nature of the dispute referred to the CCMA is incorrect and that it did include a failure to agree on changes to terms and conditions of employment, the question to be answered is what is the effect of the recognition agreement on wage demands made prior to the conclusion of the agreement which were still pending at the time it was concluded? With effect from the date of concluding the recognition agreement, the union had agreed that its entitlement to bargain collectively was contingent on it satisfying the 50% +1 threshold. Nowhere in the agreement is there any provision that pending collective bargaining demands at the time the agreement was concluded were exempted from that requirement. The issue is not the retrospective effect of the collective agreement on pending wage demands but it is prospective effect on those demands from 25 January 2016.
- [10] It is true that if the union had not concluded the recognition agreement, and provided the wage dispute had been referred to conciliation and a certificate of outcome had been issued or 30 days had passed since the dispute was referred, the union would have been entitled to embark upon a protected strike even if it did not represent a majority of the employees. However, in the absence of a provision in the agreement ring fencing pending wage demands from the preconditions for collective bargaining set out in the agreement, the respondents do not have a basis for arguing that the recognition agreement does not apply to current demands going forward from 25 January. Of course, the corollary of this is that if the union meets the threshold it will be able to insist on proceeding with the negotiations on its demands.
- [11] In conclusion, the terms of the collective agreement the union's collective bargaining rights in respect of current or future interest disputes over matters of interest are only triggered if the union meets the threshold requirement it has agreed to. Accordingly, the strike seeks to compel the applicant to engage in collective bargaining over wages which it is not obliged to do in terms of the recognition agreement, and which the union has no right to demand in terms of that agreement. By so doing the union and its members are acting in breach of the recognition agreement which regulates collective bargaining and therefore amounts to conduct in contemplation or furtherance of a strike where the issue in dispute is regulated by a collective agreement. See in this regard *ADT Security (Pty) Ltd v SA Transport & Allied Workers Union & another*
- [1] in which the court held that where a collective agreement stipulated that certain issues could only be negotiated at national level, the union was prohibited from trying to negotiate them at regional level and accordingly a strike in support of such a demand was in breach of s 65(3)(a)(i) of the Labour Relations Act, 66 of 1995 ('the LRA'). By analogy, if the union and its members are constrained by the recognition agreement in their ability to negotiate by a criterion other than bargaining levels, they too are bound by a collective agreement regulating the issue in dispute and may not pursue strike action in support of negotiations

they have agreed not to engage in under the terms of that agreement.

Order

[12] In light of the above,

12.1 The first respondent is ordered to direct its members not to participate or continue to participate in an unprotected strike which commenced on 14 March 2016.

12.2 The second and further respondents are interdicted from participating in the unprotected strike which commenced on 14 March 2016.

12.3 No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

[1] (2012) 33 ILJ 2061 (LC)

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