

SOUTH AFRICA / JUDGMENT

Transnet SOC Ltd v National Union of Metalworkers of South Africa and Others (J1540/14) [2014] ZALCJHB 282 (29 July 2014) [2014] ZALCJHB 282

COURT

Labour Court Johannesburg

BEFORE

R Lagrange

CASE / FILE NUMBER

J1540/14

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Not reportable

Case no: J1540/14

In the matter between:

TRANSNET SOC LTD Applicants And NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA
First Respondent INDIVIDUALS LISTED IN ANNEXURE “1” Second and further Respondents

Heard: 18 July 2014

Delivered: 29 July 2014

Summary: (Strike interdict – Alleged dispute over a refusal to bargain – application of s 64(2) – Issue in dispute allegedly regulated by collective agreement - application of s 65(3)(a)(i) – interpretation of “concerns” in s 64(2)).

LAGRANGE, J

Introduction

[1] This is an application which was initially brought on a semi-urgent basis but which the parties agreed when the matter was first set down on 10 July 2014 could be decided on an expedited basis on 18 July 2014 as an application for final relief. The applicant seeks to declare a strike by the respondents unprotected, on the basis that:

1.1 the strike concerns a refusal to bargain in circumstances where no advisory arbitration award has been made; and

1.2 the vast majority of the individual respondents are bound by a collective agreement which regulates the issues in dispute.

Chronology of events

[2] The applicant (Transnet) operates in various divisions, including Transnet Port Terminals ("TPT"), which handles cargo transported through South African ports. It employs approximately 6255 employees in the bargaining unit. Ngqura Container Terminal ("NCT"), which is part the TPT division, employs 537 employees within the bargaining unit. Approximately 100 of these are members of NUMSA, having joined NUMSA. NUMSA began organising at NCT in January 2014. Its membership base consists mainly of former SATAWU members.

[3] Collective Bargaining takes place in the Transnet Bargaining Council. NUMSA is not recognised by Transnet for collective bargaining purposes, but Transnet recognises two trade unions for collective bargaining purposes, namely, SATAWU UTATU SARHWU ("the recognised unions" or "the representative unions").

[4] Prior to its establishment at the NCT, the Applicant was engaged in collective bargaining negotiations with the two representative unions at NCT. These negotiations covered three demands of mutual interest concerning changes in shift systems; the use of labour brokers; and the allocation of transport subsidies. These are the demands that NUMSA is striking over. They have not been resolved as alleged by the Applicant.

[5] The Applicant conceded that NUMSA was not consulted during this process as NUMSA is not a recognised trade union, and as such is neither a member of the Bargaining Council nor a party to the collective agreement.

[6] The Applicant implemented a new shift system on 14 January 2014. On the implementation of the system, 68 employees at NCT embarked on an unprotected strike demanding a reversion to the old shift system. Some employees returned to work after the Applicant issued an ultimatum whilst others downed tools and continued with their unprotected strike. This latter group was suspended and it was during this time that the Applicant alleges becoming aware that some of the employees had joined NUMSA.

- [7] Subsequently, on 17 February 2014, NUMSA gave notice of commencement of a strike on 22 February 2014. The strike was declared particularly over the unilateral change to the terms and conditions of employment. This strike was however interdicted by the Labour Court on 21 February 2014 prompting NUMSA to address a letter to the Applicant on 28 February 2014 inviting it to negotiate on the issues of mutual interest which formed part of the interdicted strike.
- [8] NUMSA's demands were set out in a letter dated 28 February 2014 the relevant portions of which state:

"We refer to the above matter and hereby demand that your company implements the demand of all our members that your company implements (sic) a change from the present arrangement where our workers work on a five (5) hour on and one (1) hour off basis to a three (3) hour on and one (1) hour off basis.

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.

We furthermore demand that all of our members who are currently employed by labour brokers and who render services to or perform work for your company be permanently employed by your company

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 parties."

(emphasis added)

- [9] Transnet responded 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 and have been dealt with by Transnet and its recognised trade unions."

- [10] A subsequent letter addressed to NUMSA by the Applicant's attorneys of record, Bowman Gilfillan, dated 22 April 2014 reiterated Transnet could engage with NUMSA on these issues because NUMSA had not met the thresholds for recognition. Transnet contends that a large majority of striking workers, who are cited as individual respondents, were at all material times or remain members of the recognised unions SATAWU, UTATU and SARHWU.
- [11] Furthermore, the applicant proceeded to embark on a lock-out. In the lock-out notice to NUMSA dated 24 April 2014, the applicant's lock-out demands are set out , amongst others, as:

“NUMSA agrees that Transnet will not engage NUMSA separately on the matters referred to in 3.2 and 3.3 or on any other matters of mutual interest unless and until NUMSA meets the thresholds of representativeness set out in the recognition agreement.

NUMSA accepts that Transnet has a managerial relationship to determine the manning ratios within the Ngqura container terminal; and NUMSA accepts the manning ratios applied by Transnet from January 2014.

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 and UTATU SARWHU.”

[12] In response to the lock-out notice, NUMSA’s former attorneys of record, Minnaar Niehaus Attorneys, pointed out that the lock-out demands included a so-called refusal to bargain and that consequently no industrial action (in the form of the lock-out) could be embarked on until such time as that issue had been dealt with in an advisory arbitration award issued in terms of section 135(3)(a) of the Labour Relations Act, 66 of 1995 (‘the LRA’).

[13] In response to the letter from Minnaar Niehaus Attorneys, Bowman Gilfillan, on behalf of the applicant retorted that:

“Insofar as certain of our client’s lock-out demands reflect our client’s refusal to recognise NUMSA as a collective bargaining agent, bringing the matter within the ambit of section 64(2) of the LRA, this characterisation must necessarily attach to each parties position or demand in relation to that ‘issue in dispute’.”

[14] On 12 June 2014, NUMSA issued a press statement recording that its members had been on strike since 25 April 2014 "as a last organisational resort to pressure Transnet management to respond to our genuine demands". The statement continued: "The strike is already entering its second month without any form of final settlement or engagements between the parties — the Transnet management and NUMSA. 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." (emphasis added).

[15] The press statement goes on to state that the demands "remain unchanged" and concludes "Until these demands are not [sic] met by Transnet, we shall escalate the strike and shut down its operations. Lastly, we remain committed to find a lasting solution and an immediate end of the strike. The Transnet management has a responsibility to return to the boardroom to engage faithfully." (emphasis added)

Evaluation

The need for advisory arbitration on a refusal to bargain

[16] Section 64(2) reads:

“(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-

- (a) a refusal-
- (i) to recognise a trade union as a collective bargaining agent; or
- (ii) to agree to establish a bargaining council;
- (b) a withdrawal of recognition of a collective bargaining agent;
- (c) a resignation of a party from a bargaining council;
- (d) a dispute about-
- (i) appropriate bargaining units;
- (ii) appropriate bargaining levels; or
- (iii) bargaining subjects.”

[17] Much emphasis was placed by Transnet on the meaning of the word ‘concerns’ in the provision. It argued that the use of the verb indicated that it was sufficient to trigger the section that the dispute need not actually be a refusal to bargain but must “concern” a refusal to bargain. Reference was made to the dictionary definition of ‘concerns’ namely “1. Verb trans. Have relation or reference to...2. Verb trans. Affect, have a bearing on, involve.”[1]

[18] By contrast, the respondents preferred to emphasise the particularity of the phrase “the issue in dispute” which also occurs in section 65(1)(a) of the LRA, which sets limitations on the right to strike or recourse to

lockout. The section provides:-

“(1) No person may take part in a strike or a lockout or in any conduct in contemplation of furtherance of a strike or a lockout if –

that person is bound by a collective agreement that prohibits a strike or lockout in respect of the issue in dispute.”

[19] Expanding on this theme, the respondents argue that the term “issue in dispute”, which appears in the text of section 65(1)(a) and 64(2) is defined in Section 213 of the LRA. In relation to a strike or lockout, it means “the demand, the grievance, or the dispute that forms the subject matter of the strike or lockout.” (emphasis added). The respondents argued this must be understood together with the definition of the term strike, which is “the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee,....”

[20] Invoking Fidelity Guards Holdings (Pty) Ltd v PTWU and others[2], NUMSA submitted it was clear that a court must pay close attention to the issue in dispute between the parties, which entailed an examination of the “demand, the grievance, or the issue that forms the subject matter of the strike.”[3] I agree with the view expressed in Brinant Security Services v UPSWU and others

[4] that:

“The most effective way of determining the real issue in dispute is to ask the following question: What must the employer do in order to avoid the commencement of the strike. Where the strike has already begun the question would then be: what must the employer do in order to bring an end to the strike. Furthermore, employees must clarify the issue in dispute before they embark upon strike action – they cannot merely embark on strike action over an issue that has not been dealt with at conciliation.”[5]

[21] Following this train of logic, NUMSA argues that the strike will be settled if Transnet accedes to its three substantive demands. Consequently, Transnet’s refusal to bargain is not an issue in dispute and section 64(2) did not have to be invoked as a pre-requisite for strike action.

[22] In the course of argument, Mr Ngcukaitobi who appeared for the respondents, also referred to the case of Food & General Workers Union & others v Minister of Safety & Security & others [6] . In that matter, the court had found a strike was unprotected for want of compliance with s 64(2). In considering whether the dispute concerned a refusal to bargain, Grogan AJ said:

[26] Mr Nduzulwana contended that the issue in dispute underlying the applicants' strike cannot be classified as a 'refusal to bargain'. He drew my attention in this regard to the formulation of the strike notice, which provides as the reason for the proposed strike 'your company's refusal to give them [ie the second and further applicants] wage increases for 1998'. This indicated, so Mr Nduzulwana argued, that the real issue underlying the dispute was not the failure by the fifth respondent to recognize the first applicant as a bargaining agent, but the fifth respondent's refusal to grant a wage increase, even if unilaterally.

[27] This submission overlooks the fact that would-be strikers must identify and declare the issue in dispute prior to setting in motion the procedure prescribed by s 64(1)(a) . Once that issue has been identified and dealt with in conciliation, the would-be strikers can only strike over that issue. They cannot change the goal posts when they issue the notice in terms of s 64(1)(b) . How the applicants understood and designated the issue in dispute when they referred the matter to conciliation is therefore of crucial importance.

[28] While it is so that the dispute between the parties in this matter was initiated by a standard demand for a wage increase and

improvement in certain conditions of service, this is not enough in itself to categorize the ensuing dispute as one concerning a mere matter of mutual interest, as Mr Nduzulwana would have it. It is recorded in the unchallenged answering affidavit of Mr D Schnetler, the fifth respondent's regional manager, that the first applicant had been informed on a number of

occasions, and again after receiving the demands, that the fifth respondent was not prepared to negotiate with the first applicant because it was 'entirely unrepresentative' in the Eastern Cape operations. In the form LRA 7.11 upon which the dispute was filed with the CCMA, the first applicant described the dispute as being about (I quote verbatim) 'refusal of the company to negotiate wage increment and conditions of employment'. The desired outcome was that the fifth respondent 'grants us organizational rights and allow us to negotiate wage increment and adjustments of conditions of employment of our members'. Furthermore, under the heading 'special features' the first applicant proposed 'a meeting with the company for wage negotiations'. The first applicant also confirmed that 'the company's response was that we don't have a majority in the Eastern Cape region', and added: 'Our argument is that we have the majority which the LRA refers to at the workplace.' Furthermore, in the founding affidavit to this application it is stated:

'The company advised the union verbally that it is refusing to negotiate wage increases and adjustments of conditions of employment with the union because the union does not have a majority of its employees, employed in the Eastern Cape region, but conceded that in its Uitenhage shop the union has [a] majority of its employees.'

- [29] The meaning of the phrase 'refusal to recognize a trade union as a collective bargaining agent' has not yet received judicial attention. Mr Nduzulwana contended that the phrase should be restrictively construed so as to embrace only disputes arising out of the refusal by an employer to enter into a formal recognition agreement with a trade union. Although I am conscious that, insofar as they curtail the constitutional right to strike, restrictions imposed by the Act on strike action should be narrowly interpreted (see, for example, *Adams & others v Coin Security Group (Pty) Ltd* Labour Court case no C163/97 dated 3 September 1998 unreported),* in my view the phrase 'refusal to recognize a trade union as a collective bargaining agent' embraces situations, such as those in *casu*, in which the employer refuses to negotiate with a trade union over wages and conditions of service." [7]
- [23] The case has obvious similarities to the matter at hand, except that in this instance the union did not describe its dispute in the referral form as a refusal to bargain as such but described the facts of the dispute as: "Implementation of 3:1 (2) Demand Permanent Employment of Labour Brokers (3) Transport Subsidy to be equal to all employees employed." (sic).
- [24] Nonetheless, it also identified as a 'special feature' of the dispute that the "Respondent was afforded an opportunity to engage on the aforesaid demand to no avail." Further, NUMSA described the desired outcome in the following terms: "To meet with the Respondent in order to reach an agreement on our demands." It is also apparent from NUMSA's press statement that the refusal of Transnet to engage with it was a feature of the dispute warranting its comment.
- [25] So while it is true that NUMSA's demands would be met if Transnet simply wrote it a letter saying it accepted the demands that would resolve the strike that would necessarily entail Transnet acceding to entertain those demands and would imply it had accepted it, would

deal with NUMSA's demands on substantive issues of mutual interest affecting its members. In my mind it is difficult to conceive such a step taking place unless Transnet abandoned its refusal to negotiate with NUMSA, at least on this occasion. It seems unduly artificial and strained to say that the dispute in question does not 'concern' a refusal to

bargain when abandonment of that stance is an implicit pre-requisite for acceding to the substantive demands.

[26] For this reason, s 64(2) should have been invoked before issuing the strike notice.

[27] Before concluding this point, it must be mentioned that NUMSA also argued correctly that in interpreting the LRA, the court must favour an interpretation which least restricts the right to strike where the statute is capable of bearing different interpretations. The first point to be made in this regard is that the requirement of referring of obtaining a non-binding advisory arbitration award is at worst a measure which might delay the exercise of the right to strike, it does not bar it. Secondly, although NUMSA argued that a restrictive and exhaustive interpretation of the word 'includes' in s 64(2) is required in order not to unnecessarily limit the right to strike[8], even if it is correct to apply exhaustive interpretation of the word 'includes' in relation to the list of disputes which are described in s64(2)(a),(b),(c) and (d), I do not see how that avoids the dispute in question being described as one that at least involves a refusal to recognise NUMSA as a collective bargaining agent in terms of section 64(1)(a)(i) at least in relation to the substantive demands made by NUMSA.

[28] In conclusion, I am satisfied that the dispute in question does concern a refusal to bargain even if it will not be wholly resolved simply if Transnet agrees to negotiate with NUMSA. Consequently, a failure to obtain an advisory arbitration award on this issue means that the strike is unprotected on account of being embarked on without complying with s 64(2).

Are the majority of NUMSA's members barred from protected strike action in any event?

[29] Quite apart from the application of s 64(2) of the LRA, Transnet argues that there is another reason why the strike is unprotected simply on the basis of the substantive demands made by NUMSA and the recognition agreement it has concluded with the representative unions as well as the provisions of the Transnet Bargaining Council. It does not contend that NUMSA itself is bound by those agreements, but since all but respondents' numbers 9, 22, 24, 30, 32, 56, 73, 81, 89, 103, 122 and 130) are or were members of a recognised union they are bound by those instruments by virtue of section 23(1)(c) read with section 23(2) of the LRA.

[30] Section 23(1) reads:

"23(1) A collective agreement binds —

(a)...

(b) ...

- (c) the members of a registered trade union and the employers who are members of a registered employers' organisation that are party to the collective agreement if the collective agreement regulates —
- (i) terms and conditions of employment; or
- (ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers.”

[31] Section 23(2) reads:

"(2) A collective agreement binds for the whole period of the agreement every person bound in terms of subsection 1(c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered trade union or registered employers' organisation for the duration of the collective agreement."

[32] The combined effect of the two provisions which would apply equally to an employer who was a member of an employer's organisation which concluded a collective agreement, is that members of a union which was party to an agreement at the time it was concluded cannot escape the consequences of the bargains struck by their union when they belonged to it, simply by resigning and joining another. If this were not so, the value of concluding collective agreements would diminish significantly. Transnet argues that the strike prohibition linked to the application of those provisions is section 65(3)(a)(i) of the LRA which reads:

"(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 — any arbitration award or collective agreement that regulates the issue in dispute; ..."

31. Clause 18.1 of the recognition agreement provides that negotiations on wages and other substantive terms and conditions of employment for bargaining unit employees take place in the council, unless otherwise agreed. In section 19 of the recognition agreement dealing with Consultative Structures, clause 19.4 states:

“19.4 A matter of mutual interest may be raised by any party at a consultative structure meeting provided it is not a matter that falls within the jurisdiction of the Transnet Bargaining Council or a matter that should be channelled through the grievance procedures.

Clause 19.6 further provides that:

“A dispute arising from a consultative process will be dealt with in terms of clause 21”

In turn, clause 21 provides for the parties to try and resolve the dispute through discussion failing which the Transnet Bargaining Council procedures will apply unless the parties agree otherwise.

Clause 19.14 of the same agreement under the heading Local Business Committees ('LBCs') requires management to consult sufficiently representative unions on a number of issues in so far as they affect bargaining unit employees in the operating unit/depot/functional areas.

32. It is common cause that the three demands on manning levels, permanent employment of labour broker employees and a transport

subsidy are matters of mutual interest. NUMSA contends that the demands do not concern wages or terms and conditions of employment

either and accordingly do not fall within the ambit of clause 18.1 of the recognition agreement.

33. In particular, it argues that Transnet had failed to demonstrate that the demand relating to shifts or manning levels was a matter

concerning terms and conditions of employment and it clearly did not concern a wage demand. The only question is whether that is an issue which is regulated by the recognition agreement. I agree that whether the shift arrangements constitute work practices or conditions of employment, that is not the determinative issue for the purpose of determining if employees may embark on a protected strike to alter or reinstate a particular shift pattern.[9] That depends also on whether there is an agreed procedure for dealing with the dispute however it is characterized. In this instance

Transnet's stance is that the arrangements are not part of respondent's terms and conditions of employment, viz:

"Manning levels and ratios do not form part of the conditions of service of employees. They are operational matters which are determined by various factors, such as cargo volumes. They accordingly need to be adjusted and changed from time to time, depending on applicants' operational requirements. When these changes do take place, they do not affect employees' conditions of service, such as the actual jobs that they are required to perform, remuneration and number of working hours per week as agreed in collective agreements."

34. The question then is whether the recognition procedure either regulates the issue in particular or provides for a procedure for addressing disputes over such an issue. On Transnet's own version the demand on manning levels and ratios does not concern a term and condition of employment and accordingly would not be something that could be entertained in the bargaining council under

clause 18.1 of the recognition agreement. However, it would clearly then be an issue which falls to be dealt with under clause 19.4 and the subsequent dispute resolutions provisions of clause 21, ultimately being referred to the bargaining council. NUMSA may not be bound by that but its members who were once members of one of the recognized unions which are party to the recognition agreement are still bound by the dispute process which regulates an aspect of their conduct in relation to the applicant by virtue of s 23(1)(c)(ii) of the LRA. The demand in relation to the permanent employment of labour broker employees by the applicant itself would similarly

be a matter of mutual interest falling within the ambit of the same dispute resolution procedures.

35. In regard to the demand for a transport subsidy, I do not understand why this would not constitute a demand relating to a term and condition of employment. However, in any event, even if it were not it would also have to be processed under the provisions for other mutual interest disputes under the abovementioned provisions.
36. In the absence of any of those procedures being followed, the individual respondents are engaged in strike action on matters which have not been processed through the collective agreements regulating disputes concerning those matters and the strike action is in breach of section 65(3)(a)(i) of the LRA.

Conclusion

37. In the circumstances, the applicant is entitled to the declaratory and interdictory relief it seeks.

Costs

38. When this matter was first brought as an urgent matter before court on 10 July 2014, the parties agreed that the application could be dealt with as an application for final relief and the issue of urgency would fall away. At that hearing I expressed the view that the more appropriate way of dealing with a matter of this nature would have been to invoke the procedures in the Labour Court Practice Manual to obtain an expedited hearing. This would have avoided the matter being postponed. The responsibility for that approach not being initiated lay largely with the applicant which only started to canvas this possibility after it had already launched the application to be heard on 10 July on a semi-urgent basis, even if the respondents could have adopted a more flexible approach.
39. In the circumstances, I think it just and equitable that the applicant should not recover its costs of attending and appearing on 10 July 2014 even if it is entitled to the remainder of its costs in the matter.

Order

[33] An order is made in the following terms:

33.1 Declaring that the issue in dispute in the strike by the First Respondent which commenced on Friday 25 April 2014 ('the strike') concerns a refusal to bargain;

33.2 Declaring the strike to be unprotected;

33.3 Declaring that the Second and Further Respondents (except those reflected in as numbers 9, 22, 24, 30, 32, 56, 73, 81, 89, 103, 122, and 130 in Annexure 1 to the notice motion) are bound by a collective agreement that regulates the issue in dispute;

33.4 Interdicting the individual Respondents referred to in 2.4 from participating further in the strike;

33.5 Ordering the First Respondent, to pay the costs of the application save for the costs of the hearing on 10 July 2014.

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

P Pretorius, SC assisted by F J Nalane instructed by Bowman Gillfillan

FIRST RESPONDENT: T C Ngcukaitobi instructed by Ruth Edmonds Attorneys

[1] Shorter Oxford English Dictionary, Vol 1, (6ed), OUP

[2]

(1) (1998) 19 ILJ 260 (LAC)

[3] Fidelity at p264

[4] Case no: J3339/12, unreported

[5] At para [12].

[6]

(1999) 20 ILJ 1258 (LC)

[7] At 1266-7

[8] In this regard the respondents relied on the dicta in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* [2003] ZACC 19; 2004

(1) SA 406 (CC), at para [18] for guidance on the proper approach to interpreting the word 'includes'

[9] See *City of Johannesburg Metropolitan Municipality & Another v. South African Municipal Workers Union and others*

(2011) 32 ILJ 1909 (LC) at para [16].

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