

SOUTH AFRICA / JUDGMENT

York Timbers (PTY) Ltd v National Union of Metal Workers of South Africa((J 513/2022) [2022] ZALCJHB 126 (7 June 2022)

[2022] ZALCJHB 126**COURT**

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J 513/2022

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Source record**The****Labour Court of South Africa, Johannesburg****Of interest to other****Judges****Case****No: J 513/2022****In****the matter between:****YORK TIMBERS (PTY) LTD**

Applicant

and

NATIONAL**UNION OF METALWORKERS OF SOUTH****AFRICA**

First Respondent

THE**PERSONS WHOSE NAMES ARE LISTED IN THE****ANNEXURE “A”****TO THE NOTICE OF APPLICATION**

Second Respondent

Heard: 31 May 2022

Delivered: 07 June

2022

(In

view of the measures implemented as a result of the Covid 19 pandemic, this judgement was handed down electronically by circulation

to the parties' representatives, by email. The date

on which the judgment is delivered is deemed to be 07 June 2022.)

JUDGMENT

VAN NIEKERK J

[1] On 11 May 2022, this court issued a rule nisi, incorporating an interim order declaring a strike called by the first respondent (the union) at various of the business operations conducted by the applicant to be unprotected. The respondents have anticipated the return day and seek to have the rule nisi discharged.

[2] The rule nisi under consideration was preceded by another, issued on 4 May 2022, when the court granted an interim interdict in respect of strike-related

misconduct alleged to have been committed by members of the union, and afforded the applicant leave to supplement the founding papers in respect of its averments that the strike it sought to interdict was unprotected. The applicant does not seek to have the rule nisi issued on 4 May 2022 confirmed, and the parties agreed that it can be discharged.

[3] The only issue to be determined is whether the strike called by the union is protected. That issue is to be determined by identifying the issues that give rise to the strike, and to the procedural and substantive and limitations on the right to strike contained in section 64 and 65 respectively apply.

[4] The applicant recognizes the union as a collective bargaining agent. On 25 February 2022, the union referred a dispute to the CCMA. The dispute was later referred to the bargaining council. On 22 April 2022, the union issued notice of its intention to strike. What is described as the 'cause of the strike' is the subject of an annexure which reads as follows:

1. Failure by senior management to recognize NUMSA, the majority union as well as refusal by the same management to give the union access to sites as well as to represent members in their grievance.
2. Unauthorised deduction as the results of Covid 19.
3. Deliberately withholding and delaying the grading process by senior management, leaving employees worse off.
4. Bad attitude of the senior management to acting contrary to and disrespecting the agreement signed between NUMSA and York. They must be removed by York. The names of the senior management are as follows:
 - (a) Rose Shongwe (Chief human capital)
 - (b) Gerald Stolz (CFO)
 - (c) Nokuthula Mlambo (HR)
 - (d) Rams Hlope (HR Clerk forest)

5. Victimization of NUMSA shop stewards by the senior management.
6. The continued unauthorised deduction of council levy by York Timber.
- [5] The strike commenced on 25 April 2022. In the founding affidavit, and in support of its contention that it has a clear right to the relief sought, the applicant contends that the first, second, fifth and sixth demands relate to 'disputes of right' and cannot properly be the subject matter of a protected strike. Further, the applicant contends that the fourth demand is unlawful in its entirety.
- [6] In its supplementary affidavit, filed on 8 May 2022, the applicant simply repeats the contentions relating to the demands by the union. In particular, it contends that the first demand concerns a 'dispute

of right' to be dealt with by section 22 of the LRA; that the second demand is a dispute to be dealt with in terms of section 73A of the BCEA; that the third demand is unlawful and cannot be the subject matter of a protected strike; that the fifth demand concerns a dispute to be resolved in terms of section 10 of the Employment Equity act; that the sixth demand is a dispute to be dealt with in terms of section 73A of the BCEA. No averments made in respect of the union's fourth demand. The bulk of the affidavit is devoted to what are contended to be breaches of the order granted on 4 May 2022 in the form of further strike related misconduct. Why the applicant did not seek to enforce the order granted on 4 May 2022 by way of contempt or other proceedings, is not explained.

- [7] Be that as it may, the union filed an answering affidavit in response to the amended notice of motion and supplementary affidavit. The union avers that in December 2020, the applicant and the union concluded an agreement (described as the Sandton agreement) when they agreed to appoint an independent third-party facilitator to deal with the implementation of the job grading process. The union's complaint is that the facilitation process was 'tainted', for a variety of reasons, including a failure to deal with the union's concerns regarding the composition of the grading committee, the absence of any agreement on terms of reference, and a dispute about the job titles to be graded. Of particular concern to the union was the refusal to allow shop stewards to visit sites to receive feedback from workers. The second issue raised by the union is what is described as a 'high-handed and unfair attitude' towards the union by the members of management listed in the

grievances giving rise to the strike. The union states that the applicant 'is required to follow fair process to deal with the complaint of Numsa's members'. The union submits that on this basis, given that the two issues raised are 'mutual

interest disputes', the interim order declaring the strike unprotected it ought not to have been granted. The deponent to the answering affidavit concludes that 'I have been advised, which advice I accept, that at the very least, the above mentioned disputes are mutual interest disputes, hence the referral of a mutual interest dispute to the CCMA...'.

[8] In the replying affidavit, the applicant contends that the Sandton agreement is a collective agreement and that in the absence of a dispute resolution clause, any dispute about the interpretation and application of the agreement is governed by section 24 (2) of the LRA, which requires the union to refer the dispute to conciliation and failing a successful conciliation, to arbitration. In regard to the demand concerning members of the applicant's management, the applicant contends that any dispute in this regard concerns a right, and therefore cannot form the subject matter of a protected

strike. In a tender attached to the replying affidavit, the applicant undertakes to jointly appoint a suitably qualified and experienced

mediator to conduct a relationship building exercise, with the specific purpose of improving the relationship between the senior

management of the applicant and the union shop stewards and officials. The applicant tenders to pay the costs of the exercise,

and have the mediator determine the terms of reference. In regard to the job grading dispute, the applicant tenders mutually appoint a suitably qualified and experienced job grading expert to review the job grading report compiled by the CCMA. The applicant tenders to pay the costs of this exercise.

[9] It would appear to be common cause that the only two demands in issue, and in respect of which the right to strike is pursued, are those referred to in the answering affidavit, i.e. the demands concerning the grading exercise demand and what might be described as the grievance regarding the conduct of members of the applicant's management.

[10] At the outset, it should be observed that both parties labour under misconceptions regarding the nature of disputes for the purposes of the LRA. The union uses the term 'mutual interest dispute' as if that term applies to a dispute that is capable of protected strike action. The applicant, on the other hand, refers to 'rights disputes' as if that term refers to matters that are not capable of protected strike action.

[11] A dispute concerning a 'matter of mutual interest' is not defined in the LRA, but is used in a number of different contexts (including the definition of a 'strike'), which effectively requires that the purpose of any industrial action must be to resolve 'a dispute about any matter of mutual interest between employer and employee'. The term has been interpreted by the Constitutional Court to define 'the settlement scope of matters that may form the subject of collective agreements, matters which may be referred to the statutory dispute resolution mechanisms, and others which may legitimately form the subject of a strike or lockout' (Department of Home Affairs & another v Public Servants Association & others) [1]

[12] In other words, while a dispute or grievance giving rise to a strike must concern a matter of mutual interest for there to be a strike as defined (as opposed to a refusal to work that does not constitute a strike), not all disputes that concern a matter of mutual interest may legitimately form the subject of a strike. Those disputes that give rise to a protected strike

constitute a subset of disputes about matters of mutual interest, to be determined by reference to the dispute resolution mechanism prescribed by the LRA. The LRA distinguishes three subcategories of disputes within the broader category of disputes about matters of mutual interest and draws distinctions between them based on the dispute resolution mechanism by which they must ultimately be resolved. These are disputes that are arbitrable, disputes that are justiciable, and disputes in respect of which parties may resort to a strike or lockout.[2]

- [13] First, to establish whether a refusal to work constitutes a 'strike' as defined, the court is required to determine whether the dispute that gives rise to that refusal concerns a matter of mutual interest. If not, there is no strike. If so, and assuming that the remaining elements of the definition of a 'strike' are met, the

next matter for determination is whether the strike is protected or unprotected.

- [14] The procedural requirements applicable to the exercise of the right to strike are set out in section 64. The substantive limitations on the right to strike are set out in section 65. Most often, substantive compliance requires a determination of 'the issue in dispute', and whether that issue may legitimately form the subject of a protected strike. In terms of section 65 (1), if the issue in dispute is one in respect of which a strike is prohibited by a collective agreement, or which must be referred to arbitration in terms of an agreement, or is one that a party has the right to refer to arbitration or to this court in terms of the LRA or any other employment law, the strike is unprotected. [3]

- [15] The issue in dispute is ordinarily identified by reference to the demand or grievance articulated by those participating in the strike.[4] This is a factual enquiry, to be conducted mindful of the caution that 'strikeable' and arbitrable/justiciable disputes do not always divide into watertight compartments, and are often dependent on the language employed in the formulation of the demand.

- [16] A strike that is protected may become unprotected in circumstances where the employer meets the union's demand or remedies the grievance that gave rise to the strike. In *Transport and Allied Workers Union of SA (TAWUSA) obo Ngedle & others v Unitrans Fuel and Chemical (Pty) Ltd* [5] the Constitutional Court said the following at paragraphs 119 to 120 of the judgment:

Once the employer has remedied the grievance or complied with the demand or once the dispute has been resolved, the workers may not continue with a concerted refusal to work because the purpose for which they would have been entitled to hold their labour would have been achieved. Any continued refusal to work would lack an authorised purpose. Therefore, the strike would be unprotected.

- [17] Turning then to the two issues that give rise to the present strike, the grading exercise demand is articulated in the notice to strike as 'Deliberately withholding and delaying the grading process by Senior Management, leaving employees worse off'. It is difficult to

discern from this formulation quite what the union's complaint is, and what action is expected of the applicant to meet the terms of the demand. The union does not dispute that the parties concluded a collective agreement on 18 December 2020 (the Sandton agreement), when they agreed to appoint an independent third-party facilitator to deal with the implementation of the grading process. In the answering affidavit, the union complains that the facilitation process, chaired by a CCMA commissioner, was tainted. Whether the union walked out of the process or left the meeting stating that they had no mandate and would return after a council meeting is contested, but the fact remains that the terms of the union's complaint is process –related.

- [18] In my view, on the union's own version, the issue giving rise to the dispute concerning the job grading exercise is one that concerns the application and interpretation of a collective agreement in the form of the Sandton agreement. In terms of section 24 (2) of the LRA, and the absence of a dispute resolution procedure incorporated in the Sandton agreement, any dispute about the application or interpretation of the Sandton agreement must be referred to the CCMA which, failing successful conciliation, may be requested to resolve the dispute through arbitration. In terms of section 65 (1) of the LRA, a strike in support of an issue which is one that a party has the right to refer to arbitration, is unprotected. To the extent that the present strike is called in support of the union's demand regarding the application of the Sandton agreement, the strike is thus unprotected.
- [19] Even if I am wrong in coming to 'this conclusion, and to the extent that the union's demand accuses the applicant of 'deliberately withholding and delaying the grading process', the terms of the tender annexed to the replying affidavit meets the union's demand, and any continuation of the strike would thus be unprotected.
- [20] In regard to the demand concerning members of the applicant's management, the strike notice simply records as an issue in dispute the "Bad attitude of the senior management were acting contrary to disrespecting the agreement signed between NUMSA and [the named members of management]". Again, it is difficult to discern quite what the union expects the applicant to do to meet the terms of a demand cast in such nebulous terms. The union does not call on the applicant to take any specific action against the members of management concerned, nor is the agreement that they are alleged to have disrespected identified. The answering affidavit expands at some length on the nature of the union's demand and the remedy sought. The union suggests that the conduct of the managers concerned has caused 'great discontent' within the ranks of the union's members and that the applicant is required 'to follow a fair process to deal with the complaint of NUMSA's members'.
- [20] The terms of the applicant's tender, as indicated above, envisage the appointment of a suitably qualified and experienced mediator to facilitate a relationship building exercise for the purpose of improving the relationship between the applicant's senior management and the union's shop stewards and officials. Given the terms in which the issue in dispute is cast, the terms of the tender meet the demand for a fair process to deal with the union's

complaint. In these circumstances, there has been agreement in substance to the unions demand and the substratum of the dispute has thus been removed. Insofar as the strike in support of the demand concerning members of the applicant's management was ever protected, the applicant's agreement to the union's process -related demand renders the continuation of the strike unprotected.

[21] In summary: the union's demand regarding a 'withholding and delaying' of the job grading process is a dispute that concerns the application and interpretation of the Sandton Agreement, a dispute that may be referred to arbitration, and any strike in support of that demand is thus unprotected. The union's complaint in relation to the 'bad attitude' of certain members of the applicant's management fails to articulate any discernible demand of the applicant, and is in any event met by the terms of the tender to conduct a joint relationship building exercise between members of management and the union's officials and shop stewards. Any strike in support of this demand is thus unprotected. The rule nisi issued on 11 May 2022 thus stands to be confirmed.

[22] In the light of the on-going albeit fraught relationship between the parties, for the purposes of section 162 of the LRA, the requirements of the law and fairness are best met by each party bearing its own costs.

I make the following order:

1. The rule nisi issued on 4 May 2022 is discharged.
2. The rule nisi issued on 11 May 2022 is confirmed.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: M van As

Instructed by:

Fluxmans Inc.

For the respondents: A Mosam SC, with him AB Omar

Instructed by:

Phukubje Inc.

[1] (2017) 38 ILJ 1555 (CC), quoting Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of SA & others [2014] 9 BLLR 923 (LC).

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- [2] This is a simplification – there are disputes that are capable of determination by arbitration, adjudication or the exercise of economic power, at the election of the aggrieved party. For example, disputes about organisational rights (section 65 (2)(A), and disputes about substantive fairness in larger scale retrenchments (s 189A).
- [3] There are other substantive limitations of the right to strike; see section 65 (1) (d), (2), and (3).
- [4] TSI Holdings (Pty) Ltd & others v National Union of Metalworkers of SA & others (2006) 27 ILJ 1483 (LC)).
- [5] [2016] 11 BLLR 1059 (CC).
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