IN THE LABOUR APPEAL COURT

HELD AT JOHANNESBURG

CASE No: JA 71/2011

In the appeal between

BMW SOUTH AFRICA (PTY) LTD **Appellant**

and

NUMSA OBO MEMBERS **Respondent**

JUDGMENT

LANDMAN AJA:

[1] The appellant, BMW South Africa (Pty) Ltd, appeals with the leave of the court *a quo* (Molahlehi J) against a decision dismissing an application to interdict the respondent, NUMSA and its members, from striking and for ancillary relief.

The facts

[2] The appellant and the respondent are bound by the National Bargaining Forum (NBF) agreement, a collective agreement, in the Automobile Manufacturing

Industry relating to all hourly paid employees. Clause A.8.3 is of particular importance in this matter. It reads:

NO FURTHER CLAIMS UNDERTAKING

The parties undertake that they will make no further claims/demands, either at industry or company/plant level, for the duration of this Agreement, in respect of substantive wage and/or benefit on-cost items covered by this Agreement.

The parties are, however, entitled to raise proposals either at industry or company/plant level, on substantive and/or benefit items, which will result in further on-cost and which are not covered by this Agreement, for discussion and/or consultation and/or negotiation, subject to the following:

8.3.1 The party on whom the proposal is served is obliged to engage in bona fide discussion, consultation and/or negotiation on the proposal.

8.3.2 The parties will, in the event of interaction becoming deadlocked, refer the issue to expedited third party facilitation in any endeavour to reach agreement.

8.3.3 These interactions will take place in a collaborative manner without any coercion being embarked upon by either party.

Should the party serving the proposal believe that the other party is not engaging in good faith, in (sic) the first party is entitled to demand that the second party's alleged bad faith conduct be subjected to arbitration. The arbitrator will be empowered to, if he/she finds the bad faith allegation to be true, compel the second party to engage in good faith in terms of the provisions of this clause.

The costs of each facilitation will be shared equally between the parties unless otherwise agreed.

8.4 PEACE OBLIGATION IN TERMS OF ALL PROVISIONS CONTAINED IN THIS AGREEMENT

8.4.1 The Parties undertake not to strike or lock-out or engage in any other form of industrial/unilateral action in conflict with the dispute resolution provisions of this Agreement.

8.4.2 Should any Union members engage in unprocedural industrial action, the Union concerned shall immediately take active steps to restore the situation and shall continue its efforts until matters are normalised.

8.4.3 The Parties recognise that unprocedural and/or provocative conduct in the workplace is inimical to the stated objectives and underlying spirit of this Agreement. They consequently hereby record their strenuous opposition thereto and undertake to address the said conduct, if and when it may occur, in terms of clause A.8.4.2 above as well as by collaborative engagement at company level towards securing remedies to eradicate said conduct from the workplace. Said remedies may inter alia include joint declarations, codes of conduct for managers and shop stewards, and appropriate sanction of offending individuals by their principals.

8.4.4The provisions of clause A.8.4 are without prejudice to the parties' rights in law."

[3] The NBF agreement remains in force until 30 June 2013.

[4] The NBF agreement does not regulate transport allowances for the hourly paid employees.

[5] On 11 July 2011 NUMSA submitted a demand to BMW for:

> *"A Transport allowance of R3500 per employee per month for all hourly employees employed by BMW South Africa Pty Ltd-Rosslyn Plant".*

[6] It is common cause that this demand was an impermissible one by virtue of the undertaking in the opening paragraph of clause A.8.3 and could not found a protected strike.

[7] BMW declared a dispute in regard to the interpretation and application of clause A.8.3 of the NBF agreement.

[8] NUMSA referred a dispute to the CCMA concerning:

> "Refusal by the employer to agree on unions' demands-transport allowance".

[9] BMW objected to the jurisdiction of the CCMA and alleged that the true nature of the dispute was one concerning the interpretation andapplication of the NBF agreement which must be resolved by arbitration.

[10] On 14 September 2011 the respondent's attorney addressed a letter to BMW's attorney stating that the demand referred to the CCMA was a demand that:

> *"The employer make payment of a transport allowance to hourly paid employees on the same basis as that applying to the transport allowance (car and fuel allowances) provided by the employer to salaried employees entitled to such allowances."*

[11] BMW's previous attorney replied to the letter and accepted that the demand, asit was now formulated, did not fall foul of the opening paragraph of clause A.8.3 and was a permissible demand in terms of the remainder of that clause but added that NUMSA should, in accordance with clause A.8.3, not resort to any coercion in pursuing this issue.

[12] The parties entered into a written agreement at the CCMA which essentially extended the conciliation period and reserved the parties' rights and regulatedthe further procedure to be followed.

[13] BMW and NUMSA each relied on different procedural provisions of the NBF agreement. The result is that they were at cross-purposes.

[14] In a letter, dated 3 October 2011, BMW repeated its willingness to engage with NUMSA in terms of clause A.8.3 in respect of the demand that it make payments to hourly (paid) employees of a transport allowance on the same basis provided to salaried employees.

[15] On 14 October 2011BMW reiterated its understanding of NUMSA's demand that it was: *"payment to hourly employees of a transport allowance on the same basis as provided to salaried employees."*

[16] Prior to this on the 11 October 2011 NUMSA approached the CCMA for a certificate of non-resolution of the dispute. This was provided and NUMSA gave notice that it would embark upon a protected strike in support of a demand:

> *"That the employer make payment of a transport allowance to hourly paid employees on the same basis as that applied to transport (car and fuel*

allowances) provided by the employer to salaried employees entitled to such allowances."

[17] BMW responded to this notice by launching the application which is the subject of this appeal. The application was unsuccessful.

The reasoning of the court *a quo*

[18] The court*a quo* noted that BMWadvanced its case on the basis that the true nature of the demand for the transport allowance constituted a demand for a substantive wage and/or benefit on-cost item covered by the NBF agreement. The court also considered BMW's alternative contention that if NUMSA's demand for a transport allowance was not regulated by the opening paragraph of clause A.8.3, NUMSA was engaged in a forum shopping exercise to obtain a certificate of non-resolution for the purposes of coercing BMW to accede to its demand notwithstanding the prohibition on coercion in the remainder of clause A.8.3 of the agreement.

[19] The court *a quo*found that NUMSA had complied with the procedural steps provided for in section 64 of the Labour Relations Act 66 of 1995 (the LRA). Thereafter the court examined whether the limitations on the right to strike, set out in section 65 of the LRA, prohibited NUMSA's intended strike. This required the court *a quo* to turn its attention to the issue in dispute. The court *a quo* held that:

"[23] In my view the question of whether there has been compliance with the provisions of section 65 of the LRA or otherwise by NUMSA has to be determined in the context of the collective agreement concluded by the parties at the CCMA conciliation meeting. It is further my view that the true nature of the dispute as subsequently codified does not fall foul of the provisions of section 65 of the LRA. The true nature of the dispute is that which was explained after 16 September 2011.

[24] I am also of the view that the true nature of the dispute is not in conflict with the provisions of clause [A.]8.3.3 of the NBF agreement. It does not subject itself to the issue of interpretation and application as contended by BMW. It is apparent from the reading of that clause that it could never have been the intention to take away the right to strike by means of that clause. What is clear in my view is that coercion is only prohibited whilst the parties are still engaged in the facilitation process and not once the facilitation had failed or where a deadlock has been reached..."

BMW's main contention on appeal

[20] BMW's principal contention, which was advanced by Mr ESJ van Graan SC, who appeared on its behalf, is that the dispute, which was clarified on 14 September 2011, is precisely the same dispute as the one which had been declared on 11 July 2011.

[21] Mr Van Graan went on to submit, without qualification, that the provisions of clause A.8.3 (and A.8.4) of the NBF agreement prohibits NUMSA from making any claims or demands in respect of any dispute which amounts to a demand for an increased wage or a benefit on-cost item.

BMW's alternative contention on appeal

[22] Mr Van Graan's second contention, which headvanced in the event thathis first contention be rejected, is that NUMSA was prohibited from striking while the dispute resolution, facilitation or deadlock breaking mechanisms provided for in clause A.8.3.2 were employed or capable of being employed. Mr Van Graan put it this way in his heads: "After deadlock, 'facilitation' and/or 'interaction' between the parties will continue-a strike during the facilitation process or the 'interaction' is not permitted due to the inclusion of the qualifications ('collaborative manner' and 'coercion') in clause A.8.3.3." The essence of this submission is repeated, in his heads, in slightly different terms. It is submitted that NUMSA failed to exhaust the agreed procedure contemplated in paragraph 2 of the CCMA settlement agreement of 16 September 2011 read with clauses A.8.3.1 to A.8.3.3 of the NBF agreement, so that NUMSA was not entitled to approach the CCMA to obtain a certificate of non-resolution as contemplated in section 64 of the LRA.

[23] Finally Mr Van Graan contended that even if BMW acted in bad faith, which is denied, NUMSA was not entitled to approach the CCMA to obtain a certificate of outcome but was obliged in terms of clause A.8.3.3 of the agreement to subject such dispute to compulsory arbitration.

Evaluation of BMW's contentions

[24] The demand for a transport allowance for hourly paid employees is not regulated by the NBF agreement. The agreement is entirely silent in respect of a

transport allowance. It was not suggested that this is a case, where the collective agreement has provided that where the agreement is silent on an issue, the issue is regarded as being regulated by existing practices. See **Ford Motor Company of SA (Pty) Ltd v NUMSA and Others** (unreported Labour Court judgment P32/07).

[25] The first question to be considered is whether the initial demand and the demand as clarified on 14 September 2011 amounts to one and the same thing.To my mind there is a substantial difference between the two. The initial demand was that every hourly paid employee be paid a transport allowance regardless of whether the employee used transport, and if so, the nature of the transport. The clarified demand makes it clear that a transport allowance is not demanded for every hourly paid employee but only those hourly paid employees who would be entitled to such an allowance had they been salaried employees. It is recorded in the founding affidavit that many salaried employees do not qualify for a car allowance.

[26] The onus is upon BMW to show, at least prima facie, that there is no difference between the two demands as they are framed. BMW is unable to do so as its representatives have accepted that there is a difference. The only complaint is that, during the course of discussions, it appeared to BMW that the NUMSA representatives were engaging on the initial and not the clarified demand. This was not pursued in argument but, in any event, this does not show that there is no difference between them. It is not BMW's casethat NUMSA has abandoned its clarified demand and reverted to the initial demand.

[27] Is the demand for a transport allowance, on the basis of the clarified demand,a disguised demand for higher wages? The approach which must be followed was set out clearly in **Coin Security Group (Pty) Ltd vAdams and others** [2000] 4 BLLR 371 (LAC) at para 15:

> *"It is the court's duty to ascertain the true or real issue in dispute (Ceramic Industries Ltd t/a BettaSanitaryware v National Construction Building Workers' Union and others (2) 1997 (18) ILJ 671 (LAC) and Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers' Union and others(1) 1998 (19) ILJ 260 (LAC)). In conducting that enquiry a court looks at the substance of the dispute and not the form in which it is presented (Fidelity at 269G-H; Ceramic at 678C). The characterisation of a dispute by a party is not necessarily conclusive (Ceramic at 677H-I; 678A-C). There is in my view no difference in the approach of these decisions. In each case the court was concerned to establish the substance of the dispute…."*

I am satisfied that the clarified demand, which is the foundation for the proposed strike, is a demand which is unregulated by the by the opening paragraph of clause A.8.3.

[28] Clause A.8.3 goes on to regulate how a demand or proposal, which may legitimately be made, should be processed. The process does not provide for third-party resolution of the substantive dispute. However, the process provides for expedited third-party facilitation in the event of the interaction between the parties becoming deadlocked. It provides that interaction, in an endeavour to resolve the dispute, will take place in a collaborative manner. If a party alleges that the other party is not bargaining in good faith the clause permits arbitration to compel this.

[29] Assuming that BMW or NUMSA breached the procedure provided for in clause A.8.3 or acts unprocedurally in breach of clause A.8.4, the flaw in BMW's argument is that a failure to comply with these processes defeats a trade union's right to strike in circumstances where the trade union has acquired the rights by complying with the procedure prescribed by section 64 of the LRA.The position was explained in **County Fair Foods (Pty) Ltd v FAWU and others** [2001] 5 BLLR 494 (LAC) at paras [16] and [20] where Zondo JP observed:

> *[16] … The Act sets out specific requirements which must be met in order for an employee to acquire the right to strike. Once those requirements have been complied with, the Act confers a certain protection and status on the strike. That is the protection and status of a protected strike as defined in section 67(1). Section 67(1) provides: 'In this chapter, "protected strike" means a strike that complies with the provisions of this Chapter and "protected lock-out" means a lock-out that complies with the provisions of this chapter (my emphasis). From this it will be seen that the only requirement for a strike to acquire the status of a protected strike is that it must comply with the provisions of the chapter on strikes and lock-outs in the Act. Section 64(3)(b) provides in effect that, if a strike conforms with the procedures in a collective agreement, the requirements of section 64(1)need not be complied with…*
>
> *[20] What the legislature has sought to achieve is to give parties a choice of either following a pre-strike dispute procedure contained in a collective agreement or following the statutory procedure in section 64(1). Compliance with either procedure suffices to confer on employees the right to strike and the resultant strike acquires the status of a protected strike with all the benefits and consequences which flow from such status. I have considered the question whether there could be any basis on which, applying the purposive interpretation, it could be said that a strike which has been resorted to without prior compliance with the procedure in the collective agreement but has complied with the procedure of section 64(1) of the Act can nevertheless*

be said not to be a protected strike. I do not think that can be said without the court unjustifiably usurping the legislature's legislative function…"

[29] Lastly I should mention that counsel were asked to consider whether the further part of clause A.8.3, which provides for bargaining on a non-regulated issue, could lead to strike action. Mr Van Graan was prompted, with some reluctance, to agree. But Mr Van der Riet SC, who appeared for the respondent, submitted that there was no foundation for such a proposition. I am of the view that Mr Van der Riet's submission that the union party making the proposal demand would be entitled to use the right to strike should the parties be unable to reach an agreement is entirely correct. There is no reason why collective bargaining left to plant or company level should not be enforced in the same way as industry level collective bargaining.

[30] The Labour Court declined to review and set aside the CCMA's certificate of outcome citing Van Niekerk J in **Bombadier Transportation (Pty) Ltd v Miya NO and Others** (2010) 8 BLLR 840 (LC) at para 15. This approach is the correct one. See Waglay JA (as he then was) in **Gillet Exhaust Technology (Pty) Ltd t/a Tennaco v NUMSA onbehalf of Members and Another** (2010) 31 ILJ 2552 (LAC) at para 17.

[31] In the result BMW failed to make out a prima facie case (which could be open to some doubt) and was therefore not entitled to an interim interdict.

[32] The judgment of the court *a quo* should be upheld. In consequence I would dismiss the appeal with costs.

A ALandman

Acting Judge of Appeal

WAGLAY DJP

[1] I have had the benefit of considering the judgment prepared by Landman AJA. Save with regard to what my Brother has to say with respect to "BMW's alternative contention on appeal", I agree with his reasoning and I agree with the order he proposes.

[2] In July 2011, the respondent submitted a demand to the appellant which was for payment of a travel allowance to its members in the appellants employ. The demand was impermissible in terms of the Collective Agreement (also referred to as the NBF Agreement) that was binding upon it and the appellant. The appellant refused to entertain this demand. The respondent then referred appellant's refusal as a dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation. The appellant raised an exception to the referral on the grounds that the demand was impermissible in terms of the Collective Agreement that was binding upon them and as such the CCMA had no jurisdiction to conciliate the dispute.

[3] After the exception was raised, the respondent clarified its demand and the appellant accepted that the demand, as clarified, was one which was permissible. On 16 September when the matter came before the CCMA for conciliation the parties agreed to extend the 30 day period for the CCMA to issue a certificate in respect of the dispute. The extension was agreed to on the basis the parties will engage *"in facilitation in accordance with clause 8.3 of the NBF Agreement"*. They also agreed that in the event of the dispute not being resolved through facilitation the Applicant will request the CCMA to issue a certificate of non-resolution of the dispute and give notice of its intention to strike in support of its demand. The respondent reserved its right to challenge the lawfulness of the strike.

[4] The parties then met on 29 September 2011. At this meeting there was no discussion on the appointment of the facilitator. The appellant curiously adopted the attitude that the respondent confirm what its demands were. I use the term curiously because once the demand was clarified, which was prior to the meeting at the CCMA on 16 September 2011 the respondent understood and accepted that the demand was permissible and not in conflict with the provisions of the Collective Agreement. That the appellant understood and accepted the permissibility of the demand was further reinforced by the appellant not persisting with the exception it raised to the CCMA's jurisdiction to conciliate the dispute. The only reservation raised by the appellant was that, in its view, the respondent was not entitled to embark upon a strike in respect of the demand by reason of clause A8.3 of the Collective Agreement.

[5] At the aforesaid meeting on 29 September 2011, the parties failed to even get off the starting blocks with respect to *"holding a bona fide discussion, consultation and/or negotiation on the proposal".* The day after the meeting, on 30 September 2011, the respondent wrote the appellant proposing a name of a facilitator and two possible dates on which the facilitation could take place. The appellant in its response yet again sought to "engage" on the demand made by

the respondent. The respondent then, on 5 October 2011, sent an ultimatum to the appellant that the appellant respond to its letter of 30 September by 7 October 2011. The appellant failed to respond within the given time. The respondent then, correctly in my view, took the stance that the appellant had no desire to comply with the provisions of clause 8.3 of the Collective Agreement. It thus applied to the CCMA to issue a certificate of non-resolution of the dispute and on receipt thereof gave notice to the appellant of its intention to embark upon a strike in respect of the demand.

[6] The appellant sought to challenge the respondent's right to embark upon the strike on three grounds. As stated earlier I agree with my Landman AJA's reasoning in rejecting two of the grounds[1]. The third ground was that the respondent was precluded from striking because clause A 8.3 provides for a procedure that has to be followed in dealing with a demand, such as the one made by the respondent, (hereafter the "*demand*"). The procedure it argued was that an attempt must be made to resolve the dispute through third party facilitation and if and when facilitation fails to resolve the dispute, the dispute must be referred to arbitration.

[7] Clause A 8.3. of the Collective Agreement provides as follows:

> *"8.3.1 The party on whom the proposal is served is obligated to engage in bona fide discussion, consultation and/or negotiation on the proposal.*
>
> *8.3.2 The parties will, in the event of the interaction becoming deadlocked, refer the issue to the expedited third party facilitation in an endeavour to reach agreement.*
>
> *8.3.3 These interactions will take place in a collaborative manner without any coercion being embarked upon by either party.*

[1] One, dealing with the argument that the demand was impermissible and the other that issuing of the certificate by the CCMA was not permissible.

Should the party serving the proposal believe that the other party is not engaging in good faith, then the first party is entitled to demand that the second party's alleged bad faith conduct is subjected to arbitration. The arbitrator will be empowered to, if he/she finds that the bad faith allegation to be true, compel the second party to engage in good faith in terms of the provisions of this clause.

The cost of each facilitation will be shared equally between the parties unless otherwise agreed"

[8] It is not for me to interpret the above clause. It is common cause between parties that the clause sets out the procedure which the parties need to follow in dealing with the *demand*. The appellant however argued that, the procedure set out in clause A8.3 was but the only way that the respondent was entitled to proceed in addressing its *demand*. I agree. Parties by way of a collective agreement set out certain procedural steps which they will follow in dealing with their demands, grievances, concerns etc . In this respect appellant is correct to submit that the respondent was obliged to follow clause 8.3 in having its demand addressed.

[9] The respondent on the other hand argues that it is not obliged to comply with the procedure set out in clause 8.3 because its *demand* is one of mutual interest and it is entitled to embark on a strike in support of its demand as long as it does so in compliance with the provisions of the Labour Relations Act no 66 of 1995 (as amended) ("the Act)". I disagree. Where parties have concluded an agreement which does not deny any of the parties to the agreement the rights and obligations provided in the Act, I see no reason why that agreement cannot be enforced. In fact the Act seeks to promote collective bargaining, particularly at the sectoral level[2] and gives primacy to collective agreements[3].

[2] See S1 (d) (i) and (ii)
[3] See item 1 (2) of the Code of Good Practice : Dismissals.

[10] A collective agreement concluded between the parties is binding between them. It is a contract that sets the agreed terms between them and as long as what is agreed upon is not in conflict with the applicable legislation or *contra bones mores* it is binding and enforceable between them.

[11] In this matter the parties were required to comply with the procedural steps as contained in the Collective Agreement. While the respondent initially went astray, at the meeting held at the CCMA the parties came back on line by agreeing to give effect to clause A 8.3 of the collective agreement. They agreed to comply with clause A 8.3 to resolve the dispute.

[12] Clause A 8.3 seeks, where a proposal or a demand is made, to compel negotiations and consultation in good faith. This pre-supposes meaningful discussion/consutation/negotiation about the content of the demand. Where no meaningful discussions/consultations/negotiations are forthcoming, the question of good or bad faith negotiations and consultations does not arise. In the circumstances absent the appellant entering into meaningful engagement on the demand made by the respondent it cannot be said that the respondent failed to comply with the provisions of clause A 8.3 of the Collective Agreement. The appellant, as I said earlier, raised a non-issue; showed no genuine desire to engage with the respondent on its demand; or be party to a facilitation process. The lack of progress was due entirely to the appellant's failure to take seriously the respondent's demand. The respondent was therefore correct to adopt the approach that the appellant was not intent in dealing with the demand and that it take the next permissible step to have its *demand* addressed.

[13] The appellant's further argument was, in view of clause A 8.3, that the only step available to the respondent, in the absence of an agreement being

concluded between them, was that of referring the dispute to arbitration. There is nothing in the agreement that requires the dispute in the event of its non-resolution to be referred to arbitration. The arbitration process provided for in clause A8.3 deals with and relates to the issue of consultation/negotiations in good faith, no more and no less. Where the procedure as set out in clause A8.3 is exhausted -- either by virtue of its provisions being followed but the dispute remaining unresolved or where the process comes to an end because one of the parties does not meaningfully cooperate -- the parties are free, if the dispute is one where it is permissible to do so, to embark on a strike or lock out, as the case may be. This will require them to follow the provisions of the Act to do so.

[14] In this matter once the appellant failed to engage with the respondent on the demand as required by clause A 8.3 it was open to the respondent to go to the next step which was to follow the procedure set out in s64(1) of the Act. That is what the respondent did, perhaps fortuitously, but that being done it is entitled to embark on a strike in support of its *demand*.

[15] In the result, I agree with the order proposed by Landman AJA that the appeal be dismissed with costs.

_____

WAGLAY DJP

I Agree

_____

JAPPIE JA

APPEARANCES

For the appellant : Adv Van Graan SC

Instructed by : Macrobert Attorneys

For the respondent: Adv Van Der Riet SC

Instructed by : Ruth Edmonds Attorneys

Date of hearing: 28 October 2011

Date of Judgment 2 November 2011