IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

Case no: PA01/18

In the matter between:

WALLENIUS WILHELMSEN LOGISTICS

VEHICLE SERVICES **Appellant**

and

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA **First Respondent**

STATION COMMANDER: SAPS UITENHAGE **Second Respondent**

THE PERSONS LISTED IN ANNEXURE "A"

TO THE NOTICE OF MOTION **Third to Further Respondents**

Heard: **14 February 2019**

Delivered: **26 February 2019**

Summary: Collective agreement regulating negotiation and level of bargaining – union demanding an additional R40.00 for transport per day for its members – employer obtaining a rule *nisi* retraining the union intended strike- rule nisi discharged on the return date on the basis that the bargaining council

constitutional prohibitions on plant level bargaining had no application while there was no enforceable collective agreement in operation.

Held that bargaining council constitution remained (and remains) extant despite the expiry of the 2013 agreement. Clause 11 of the MIBCO constitution makes it abundantly clear that proposals and bargaining in respect of the amendment of any existing agreement, the introduction of a new agreement *or any matter of mutual interest* are to be negotiated at MIBCO level and not at plant level; and clause 12 prohibits strike action unless and until the dispute about a matter of mutual interest has been dealt with at central level…The prohibition on plant level bargaining is directed at uniformity and orderly substantive outcomes. The attempt by NUMSA to introduce two-tier bargaining sought to alter substantive wage rates at plant level in respect of a single employer. That is a matter of mutual interest reserved by the MIBCO Constitution for centralised bargaining. NUMSA's failure to do that meant that the strike was prohibited in terms of section 65(1)(a) of the LRA. NUMSA was bound by a collective agreement (the MIBCO constitution) that prohibited a strike in respect of a demand for increased wages at plant level. The Labour Court accordingly erred in not confirming the rule *nisi*. Appeal upheld.

Coram: Tlaletsi JA, Murphy and Savage AJJA

JUDGMENT

MURPHY AJA

[1] The appellant appeals against the judgment of the Labour Court (Prinsloo J) in which it discharged a rule *nisi* granting an interim interdict restraining the first respondent from conduct in furtherance of a strike in relation to a demand for what it termed a transport allowance.

[2] The appellant and the first respondent ("NUMSA") fall within the registered scope of the Motor Industry Bargaining Council ("MIBCO"). NUMSA is a party to MIBCO and was a signatory to the constitution establishing MIBCO. The other parties to MIBCO are the Retail Motor Industry Organisation ("RMI"), the Fuel Retailers Association of Southern Africa, and the Motor Industry Staff

Association ("MISA"). The appellant is a member of RMI. MIBCO operates at a national level and comprises 56 party representatives from six regions of the country.

[3] Section 11 of the MIBCO constitution governs negotiations, collective agreements and disputes. The relevant provisions of section 11 read:

> '11.1.1 The Council shall from time to time determine the timetable for negotiations in respect of the amendment of any existing agreement, the introduction of a new agreement or any matter of mutual interest.
>
> 11.1.2 Proposals in respect of the amendment of any existing agreement or the introduction of a new agreement or any matter of mutual interest shall be submitted to the General Secretary in writing.
>
> 11.1.4 If a settlement is not reached after discussion at a Council meeting, any party may declare a dispute on those issues on which they have not reached agreement as from the date of the last Council meeting.'

[4] The other provisions of section 11 set out a dispute procedure involving dispute meetings by the Council, mediation, arbitration of rights disputes and industrial action (or mutually agreed arbitration) in respect of disputes of interest.

[5] Clause 12 governs strikes and lock-outs. It reads:

> 'No strikes or lock-outs shall take place until the matter giving occasion therefor has been dealt with in accordance with the provisions of Section 11 of this Constitution and sections 64 and 65 of the Act and shall not in any event take place during the currency of an agreement arrived at by the parties.'

[6] On 4 April 2014, the Minister of Labour, acting in terms of section 32(7) of the Labour Relations Act[1] ("the LRA"), promulgated and declared the scheduled collective agreement concluded in MIBCO binding on the parties to MIBCO

[1] Act 66 of 1995.

and other employers and employees in the industry with effect from 14 April 2014 and for the period ending 31 August 2016 ("the 2013 agreement").[2]

[7] Clause 2 of the 2013 agreement entrenched centralised bargaining in the following terms:

> 'Bargaining within the Motor Industry… takes place at centralized level. There shall be no two-tier bargaining on any matter of mutual interest, other than in Sector 6 where the Parties may engage in plant level negotiations on actual wages.'

[8] Sector 6 is defined to mean dealers, sales and distribution establishments. The appellant is not an employer in this category.

[9] Clause 4(1) of the 2013 agreement included a peace clause which read:

> 'The Parties agree not to embark on and/or participate in any form of industrial action as a result of any dispute on wages and/or salary adjustments and other conditions of employment relating to any sector or chapter in this Agreement: Provided that an employer has implemented the wages and/or salary adjustments and other agreed conditions of employment matters on or before promulgation. Participation in any form of industrial action after the date of the settlement Agreement until 31 August 2016 shall be unprotected.'

[10] Clause 4(2) of the 2013 agreement repeated the stipulation in clause 2 that bargaining (other than in Sector 6) would take place at centralised level.

[11] The "Main Agreement" is set out in the schedule to GN 37508 and comprehensively regulates remuneration and other terms and conditions of employment applicable in the industry.

[12] During 2016, NUMSA raised a demand with the appellant for R40.00 per working day to be paid to each of its members at the appellant's Uitenhage plant, which it referred to as a "transport allowance". This demand was for a benefit in addition to a term contained in the 2013 agreement that the

[2] GN 37508.

appellant was obliged to provide transport to its employees who end work after 20h00.[3]

[13] The demand was essentially a demand for a wage increase in that the amount of R40.00 was not for reimbursement of actual transport costs and bore no relationship to the daily cost of transport as employees lived in different areas and travelled at different times. As stated, the demand was made by NUMSA at plant level.

[14] It is not clear from the record, the Labour Court judgment or counsel's heads of argument in the appeal when precisely the demand was first made in 2016. However, the 2013 agreement expired on 31 August 2016.

[15] The dispute was referred to the bargaining council for conciliation and remained unresolved. On 28 October 2016, NUMSA issued a strike notice advising that a strike concerning the demand would commence on 31 October 2016. The appellant immediately approached the Labour Court ("the first application") and obtained a rule *nisi* comprising an interim order interdicting the intended strike action, which rule *nisi* was returnable on 25 November 2016.

[16] In the intervening period, on 18 November 2016, the parties to MIBCO signed a "settlement agreement" providing for a new collective agreement ("the 2017 agreement") regulating wages and conditions of employment from the date of promulgation by the Minister until 31 August 2019. The settlement agreement contains a clause ("the immunisation clause") immunising from industrial action component manufacturers who implemented the agreement earlier than the date of promulgation. In the part dealing with component manufacturers, and under the marginal note "Implementation Date", the settlement agreement provided:

> 'Effective date as published by the Minister of Labour in the Government Gazette. The RMI however undertakes to recommend to its members to implement the terms of this agreement with effect from 1 September 2016,

[3] Clause 4.1B(3)(h) of Division A of the Main Agreement provided that transport for employees whose shifts ended after 20h00 may be arranged by mutual consent or with the assistance of the relevant regional council of MIBCO.

> provided that where an employer has elected to implement these terms retrospectively, it shall be immune to any industrial action that may arise as a consequence of any dispute in any other sector of the industry, with the express understanding that such industrial action will be automatically unprotected.'

[17] No similar immunisation was provided for employers other than component manufacturers in other sectors, regardless of whether they retrospectively implemented the changes to wages and conditions prior to promulgation. The appellant is not a components manufacturer and therefore did not benefit from the immunisation. It nonetheless implemented the wage increase with effect from 1 September 2016.

[18] The settlement agreement concluded with a "reservation clause"[4] as follows:

> 'All other administrative and substantive aspects of the 2013 expired agreement that are not amended by way of this settlement agreement shall survive in the new Main Agreement, which will be the 2013 agreement inclusive of amendments to the extent that they are provided for in this settlement agreement.'

[19] The appellant referred to the intervening conclusion of the settlement agreement in its replying affidavit in the first application. The Labour Court held that because the intervening settlement agreement was not raised in the founding affidavit, it could not be taken into consideration. The rule *nisi* granted in the first application was accordingly discharged on 7 December 2016. The next day, on 8 December 2016, the appellant's attorneys addressed a letter to NUMSA requesting NUMSA to advise whether it still intended to proceed with the strike action. NUMSA did not respond to the letter and the employees continued to work as they did after the interim order was first granted on 28 October 2016.

[20] On 23 January 2017, NUMSA gave the appellant notice once more of the strike action to commence on 24 January 2017. This notice precipitated the institution of another urgent application ("the second application"), which is the

[4] The clause is accompanied by a marginal note reading - "All other administrative and substantive aspects of the expired agreement(s)."

subject of this appeal. On 25 January 2017, the appellant secured another interim order interdicting the strike action. However, on 3 April 2017, the rule *nisi* was discharged by Prinsloo J for the reasons set out in the judgment under appeal.

[21] The appellant advanced two key arguments in the second application before the Labour Court, with which it persisted before us. Firstly, it argued that the strike action was unprotected in that clauses 11 and 12 of the MIBCO constitution prohibit plant level negotiations regarding any matter of mutual interest. The effect of clauses 11 and 12, it argued, is that all matters of mutual interest must be negotiated at a national level, which also accords with the centralised bargaining and peace clauses in clauses 2 and 4 of the 2013 agreement, which were re-enacted by the Minister in GN 40771 of 7 April 2017 when she promulgated the 2017 agreement.

[22] Secondly, the appellant contended that NUMSA had waived its right to continue with the demand for the payment of the R40.00 per day given that, subsequent to the demand and the original strike notice, negotiations had continued and the 2017 agreement was signed on 18 November 2016. As said, the 2017 agreement includes the overarching centralised bargaining and peace clauses, without reservation of any rights on the part of NUMSA to proceed with and pursue plant level demands, outside of all the tabled matters of mutual interest.

[23] It is unnecessary to examine the reasoning of the court *a quo* in any detail. The learned judge held *inter alia* that there was no operative or enforceable collective agreement in the period between 31 August 2016 (the date the 2013 agreement expired) and the promulgation of the 2017 agreement. Moreover, because the appellant was not a components manufacturer it was not immunised from industrial action by the settlement agreement, even though it implemented the amended wages and conditions retrospectively.

[24] The learned judge correctly interpreted the immunisation clause in the settlement agreement as foreseeing the possibility of industrial action against employers who did not benefit from its restricted scope. There was

accordingly no operative peace clause for employers other than component manufacturers after 31 August 2016 until promulgation of the 2017 agreement by the Minister in April 2017 – or perhaps more accurately the peace clause in clause 4 of the 2013 agreement had not wholly survived its expiry date in terms of either the immunisation clause or reservation clause.

[25] Moreover, in our view, the very existence and the restricted nature of the immunisation clause gives the lie to the argument that NUMSA had waived its right to strike in relation to other demands. The evident purpose of the immunisation clause was to retain, until the promulgation of the 2017 agreement, the right to strike in relation to any disputes against employers other than component manufacturers and component manufacturers who did not immediately implement the wage increases retrospectively.

[26] However, the Labour Court erred in its understanding and application of the various prohibitions against plant level bargaining in the MIBCO constitution. It regarded the provisions governing centralised bargaining in clauses 11 and 12 of the MIBCO constitution to be mere procedural provisions not imposing any substantive prohibition. It relied in this regard upon *dicta* in *County Fair Foods (Pty) Ltd v FAWU and Others*[5] which hold that parties who do not follow pre-strike procedures in collective agreements may still enjoy protection provided the procedures in section 64 of the LRA are complied with.[6] It also concluded that the MIBCO constitutional prohibitions had no application while there was no enforceable collective agreement in operation. The reasoning is erroneous for the following reasons.

[27] Firstly, the MIBCO constitution is a collective agreement as defined in section 213 of the LRA in that it is a written agreement concerned with matters of mutual interest concluded by registered trade unions and employer organisations. The MIBCO constitution remained (and remains) extant despite the expiry of the 2013 agreement. Clause 11 of the MIBCO constitution makes it abundantly clear that proposals and bargaining in respect of the

[5] [2001] 5 BLLR 494 (LAC) at para 20

[6] Section 64 of the LRA confers a right to strike or lock-out provided the matter has been referred to the relevant bargaining council or the Commission for Conciliation, Mediation and Arbitration for conciliation, the dispute remains unresolved and 48 hours' notice of commencement has been given.

amendment of any existing agreement, the introduction of a new agreement *or any matter of mutual interest* are to be negotiated at MIBCO level and not at plant level; and clause 12 prohibits strike action unless and until the dispute about a matter of mutual interest has been dealt with at central level. These are substantive prohibitions regulating levels of bargaining and go beyond mere process, notice provisions or a prerequisite of conciliation for industrial action of the kind required by section 64 of the LRA. The level of collective bargaining impacts substantively on sectoral wage rates. The prohibition on plant level bargaining is directed at uniformity and orderly substantive outcomes. The attempt by NUMSA to introduce two-tier bargaining sought to alter substantive wage rates at plant level in respect of a single employer. That is a matter of mutual interest reserved by the MIBCO Constitution for centralised bargaining.

[28] It follows that while the immunisation clause in the settlement agreement permitted NUMSA to demand an additional R40.00 per day for its members working at the appellant, and notwithstanding the fact that the centralised bargaining clause in the 2013 agreement (which survived in the 2017 agreement by virtue of the reservation clause) was not operative between 1 September 2016 and 14 April 2017, it was still obliged to raise the demand and negotiate it at central level in terms of the MIBCO constitution. NUMSA's failure to do that meant that the strike was prohibited in terms of section 65(1)(a) of the LRA. NUMSA was bound by a collective agreement (the MIBCO constitution) that prohibited a strike in respect of a demand for increased wages at plant level. The Labour Court accordingly erred in not confirming the rule *nisi*.

[29] Counsel for the respondent argued that the appeal had become moot on account of the promulgation of the 2017 agreement. We disagree. The demand has not been withdrawn or settled and NUMSA might be minded to strike in relation to it on expiry of the 2017 agreement in August 2019. An order upholding the appeal will thus be of practical effect.

[30] In the premises, the appeal is upheld and the following orders are made:

30.1 The order of the Labour Court is set aside and substituted with an order confirming the rule *nisi*.

30.2 The first respondent is ordered to pay the costs of the appeal.

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JR Murphy

Acting Judge of Appeal

I agree

_____

P Tlaletsi

Judge of Appeal

I agree

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K Savage

Acting Judge of Appeal

APPEARANCES:

FOR THE APPELLANT: CA Nel

Instructed by Macgregor Erasmus Attorneys

FOR THE RESPONDENTS: FE le Roux

Instructed by Gray Moodliar Attorneys