REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 946/2014

In the matter between:

BIDVEST FOOD SERVICES (PTY) LTD Applicant

and

NUMSA First respondent

GALLANT & 158 others Second and further respondents

Heard: **30 October 2014**

Delivered: **31 October 2014**

Summary: Urgent strike interdict – question whether union members may strike at workplace that does not fall within scope of union constitution. LRA ss 4, 21, 22, 23, 64, 65, 135 considered.

JUDGMENT

STEENKAMP J

Introduction

[1] This urgent application raises the interesting and important question whether the members of a trade union may strike in support of organisational rights at a workplace that does not fall within the scope of that union's constitution.

[2] Given the novel nature of this question, the Court would have appreciated more time to apply its mind to it. However, the application came before court at 14:00 on a Thursday afternoon. It was fully argued, albeit without the benefit of answering papers from the respondents – they only filed an affidavit pointing out that a previous jurisdictional ruling by the CCMA has not been reviewed. Both parties agreed that it is urgent. I undertook to give judgment at 10:00 on Friday morning; hence the brief reasons accompanying this ruling.

The relief sought

[3] The applicant, Bidvest, seeks the following final relief:

> "1. Dispensing with the normal Rules of this Honourable Court with regard to time periods and service of process and directing and permitting this matter to be heard as one of urgency in terms of Rule 8 of the Rules of this Honourable Court;
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> 2. Interdicting and restraining the … respondents from:
>
> 2.1 engaging upon, perpetuating, instigating or participating in strike action and declaring the strike action embarked upon by the (union)'s members and directing the strike action embarked upon by the individual respondents to be in contravention of Chapter IV of the Labour Relations Act;
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> 2.2 in any way interfering with or obstructing access to or egress from the applicant's premises;
>
> 2.3 committing any acts of violence, damage to property, intimidation or the like in relation to customers, third parties and the employees of the applicant;
>
> 3. Directing those respondents who oppose the application to pay the costs hereof."

Background

[4] Bidvest operates in the food services industry. The first respondent, NUMSA (the National Union of Metalworkers of South Africa), approached it in July 2014 seeking organisational rights in terms of section 21 of the Labour Relations Act.[1] Bidvest refused on the basis that NUMSA, in terms of its constitution (and as suggested by its name), may only organise workers in the metal industry as broadly defined in that constitution.

[5] NUMSA referred a dispute to the CCMA in terms of section 22(1) of the LRA.[2] It was set down for conciliation in Cape Town on 15 September 2014. Bidvest raised a preliminary point that the CCMA lacks jurisdiction to entertain the dispute on the grounds that the union lacked *locus standi* to claim and be awarded organisational rights in terms of the Act. The basis for that argument was that the union's scope, as defined in its constitution, does not cover workers who are engaged in the food industry.

[6] The commissioner, Vusumzi Landu, ruled that the CCMA did have jurisdiction to conciliate the dispute. He accepted that NUMSA was acting in its own interest as well as that of its members, as provided for in section 200 of the LRA. He also accepted the authority of this court in *NUM obo Mabote v CCMA & ors*[3] that a registered trade union may represent its members at the CCMA irrespective of the scope of the union. He further concluded:

> "Whilst I accept that the organisational rights dispute is determined among other aspects by having regard to the union's constitution and in fact this clear distinction between right of representation at the CCMA and the right to have organisational rights was succinctly covered in the above mentioned *NUM* case.
>
> However it cannot be correct that the union lacks locus standi to refer the matter simply because its constitutional scope does not cover employees in that sector. At worst it could mean that if the union decides to refer this dispute to arbitration

[1] Act 66 of 1995 ("the LRA").

[2] It is recorded as such in the founding affidavit and in the jurisdictional ruling, although the referral clearly flowed from a dispute in terms of ss 21(1) and 21(4).

[33] [2013] 10 BLLR 1030 (LC). Leave to appeal in that case was granted on 7 August 2013. As far as I am aware, it has not yet been argued before the Labour Appeal Court.

once conciliation fails, the union may fail to prove that it is entitled to the relief it is seeking."

[7] The commissioner handed down that jurisdictional ruling on 16 October 2014. On 20 October 2014 he issued a certificate that the dispute remains unresolved and noted that it could either be referred to arbitration or the union's members could go on strike.

[8] On 24 October 2014 NUMSA gave Bidvest notice of a strike to commence on 28 October 2014 in terms of section 64(1)(b) of the LRA. The strike commenced on that day and Bidvest launched this application the next day, 29 October, to be heard on 30 October 2014.

Legal principles

[9] In terms of section 64 of the LRA, every[4] employee has the right to strike if certain prerequisites are met. These are:

9.1 the issue in dispute must have been referred to the CCMA, and

9.1.1 a certificate stating that the dispute remains unresolved has been issued; or

9.1.2 a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral. After that –

9.2 48 hours' notice of the commencement of the strike must have been given in writing to the employer.

[10] In this case, these prerequisites have been met. NUMSA referred the issue in dispute to the CCMA. The commissioner issued a certificate stating that the dispute remains unresolved; and in any event, the period of 30 days has elapsed.

[11] Despite this, Bidvest argues that the strike is unprotected because it is in pursuit of an unlawful demand. The demand is for organisational rights. That demand is unlawful, Bidvest argues, because the union cannot obtain organisational rights in an industry that falls beyond its scope as delineated in its constitution.

[4] My emphasis.

Evaluation

[12] The applicant asks for final relief. The prerequisites for a final interdict are trite.[5] The applicant must establish:

12.1 a clear right;

12.2 an injury actually committed or reasonably apprehended; and

12.3 the absence of any other satisfactory remedy.

[13] Before dealing with the main relief sought, I should note that the union has conceded that the applicant is entitled to the relief sought in prayers 2.2 and 2.3 of its notice of motion, that is prohibiting the striking employees from committing unlawful acts such as violence, intimidation and blocking entrances.

[14] The more fundamental question is whether the strike is unprotected because it is in pursuit of an unlawful demand.

[15] As I've pointed out above, in terms of section 64 of the LRA, every employee has the right to strike once the procedure in section 64 has been complied with. In this case, it is common cause that the respondents have complied with that procedure.

[16] It is not a prerequisite for a worker to belong to a trade union before he or she can go on strike, provided it is the "concerted" refusal to work for the purpose of resolving a dispute in respect of a matter of mutual interest. Even less so is it a prerequisite that the worker must belong to a registered trade union. If every worker – whether or not that worker belongs to a trade union – can strike lawfully, provided they have followed the process in section 64, it cannot be said, in my view, that a strike by workers in pursuit of a demand that a certain trade union acquire organisational rights becomes unlawful because that union's constitution does not include the employer's industry in its scope.

[17] If an organisational rights dispute is not resolved at conciliation, the union has an election: it may either refer the dispute to arbitration or its members may strike. As O'Regan J explained in *NUMSA v Bader Bop (Pty) Ltd*[6]:

[5] Cf *Setlogelo v Setlogelo* 1914 AD 221.

"Ordinarily the scheme of the Act is that where a dispute may be referred to arbitration, it is not a matter that can constitute the basis for a strike. Section 65(1)(c) provides that:

'(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if –

(a) . . .;

(b) . . .;

(c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act".

However, section 65(2) creates an exception to this rule. It provides that:

(2) (a) Despite section 65(1)(c), a person may take part in a strike or lock-out or in any conduct in contemplation or in furtherance of a strike or lock-out if the issue in dispute is about any matter dealt with in sections 12 to 15.

(b) If the registered trade union has given notice of the proposed strike in terms of section 64(1) in respect of an issue in dispute referred to in paragraph (a), it may not exercise the right to refer the dispute to arbitration in terms of section 21 for a period of 12 months from the date of the notice.'

Accordingly, a trade union or employer still dissatisfied after the failure of the section 21 conciliation proceedings may opt for industrial action or for arbitration. If a union opts for strike action, however, it may not then refer the matter to arbitration for a period of 12 months from the date on which it gives notice of the strike in terms of section 64(1) of the Act."

[18] In this case, the respondents elected to go on strike. Had they elected to refer the dispute to arbitration, as the Commissioner noted, the union may have failed to prove that it is statutorily entitled to organisational rights at Bidvest. But they elected not to. Instead, they elected to go on strike in an effort to obtain rights and strike an agreement through collective bargaining and power play. That is a right that every worker has.

[19] The demand of the workers in this case is that NUMSA must be allowed to represent them and to exercise the organisational rights set out in section

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[6] 2003 (3) SA 513 (CC); [2003] 2 BLLR 103 (CC); [2003] 2 BCLR 182 (CC) para [24].
See also *Digistics (Pty) Ltd v SATAWU* (2010) 31 *ILJ* 2896 (LC) para [11].

21 of the LRA. That is a demand in respect of a matter of mutual interest. It is not unlawful.

[20] In *Mabote*[7], the case on which the Commissioner relied in making his jurisdictional ruling, this court considered the right of a worker to be represented by a trade union of his choice. Some of the principles outlined in that case are also applicable and relevant to this one. Given the time constraints, I will quote some of those principles in full:

"[13] The Constitution[8] guarantees the right to fair labour practices.[9] That right, in turn, includes the right of every worker to join a trade union; and every trade union has the right to determine its own administration.

[14] Section 233 of the Constitution enjoins a court, when interpreting legislation, to prefer any reasonable interpretation of the legislation that is consistent with international law to any alternative interpretation that is inconsistent with international law. And section 1 of the LRA specifies:

"**1. Purpose of this Act.**—The purpose of *this Act* is to advance economic development, social justice, labour peace and the democratisation of the work-place by fulfilling the primary objects of *this Act*, which are—

(*a*) to give effect to and regulate the fundamental rights conferred by section 27[10] of the Constitution;

(*b*) to give effect to obligations incurred by the *Republic* as a member state of the International Labour Organisation;

(*c*) to provide a framework within which *employees* and their *trade unions*, employers and *employers' organisations* can—

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

(ii) formulate industrial policy; and

(*d*) to promote—

(i) orderly collective bargaining;

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[7] *NUM obo Mabote v CCMA & ors* [2013] 10 BLLR 1020 (LC).

[8] Constitution of the Republic of South Africa, 1996.

[9] Section 23 of the Constitution.

[10] The reference to s 27 of the Interim Constitution must be read as a reference to s 23 of the final Constitution: *Business SA v COSATU* [1997] 5 BLLR 511 (LAC) at 517 A-B.

(ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the work-place; and

(iv) the effective resolution of labour disputes."

…

[35] A purposive approach to the interpretation of the LRA is mandated by section 1, read with section 3(a) of the LRA. The Labour Appeal Court has emphasised the link between the purposes of the Act and section 23 of the Constitution, adding that if the LRA is to achieve its constitutional goals, courts have to be vigilant to safeguard those employees who are particularly vulnerable to exploitation.[11]"

[21] As the Constitutional Court remarked in *Chirwa v Transnet Ltd*[12], the objects of the Act:

""must inform the interpretive process and the provisions of the LRA must be read in the light of its objects. Thus where a provision of the LRA is capable of more than one plausible interpretation, one which advances the objects of the LRA and the other which does not, a court must prefer the one which will effectuate the primary objects of the LRA."

[22] With regard to the public international law obligations of the public, the Constitutional Court noted in *Bader Bop*[13]:

"Although none of the ILO Conventions specifically referred to mentions the right to strike, both committees engaged with their supervision have asserted that the right to strike is essential to collective bargaining. The Committees accept that limitations on the right to strike for certain categories of workers such as essential services, and limitations on the procedures to be followed do not constitute an infringement of the freedom of association."

[23] Section 23(2)(c) of the Constitution guarantees, for <u>every worker</u>, the right to strike. That right is limited only by the provisions of section 64 of the LRA. In the case before me, the workers cited as respondents have

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[11] *"Kylie" v CCMA* [2010] 7 BLLR 705 (LAC) para [41]. See also *NUMSA v Bader Bop (Pty) Ltd* 2003 (3) SA 513 (CC); [2003] 2 BCLR 182 (CC); [2003] 2 BLLR 103 (CC) para [37].

[12] 2008 (4) SA 367 (CC) para [110].

[13] Supra para [32] (footnotes omitted).

complied with those provisions. They have acquired the right to strike. That right should not be further limited by reading into the provisions of ss 64 and 65(2) a provision that workers may not strike in pursuit of a demand for organisational rights for a union that is restricted in its scope by its own constitution. As the majority of the Constitutional Court noted in *SATAWU v Moloto NO*,[14]

> "the right to strike is protected in the Constitution as a fundamental right without express limitation. Also, constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least intrusive of the right, if the text is reasonably capable of bearing that meaning. These are general interpretative principles that are also applicable to the interpretation of provisions of the Act, as explicitly affirmed in section 1(a) of the Act."

[24] There is one further issue. The jurisdictional ruling of the CCMA stands. Bidvest has not applied to review it. In terms of that ruling, the CCMA had jurisdiction and NUMSA had locus standi to refer the organisational rights dispute to the CCMA. That ruling remains valid until it is set aside. As the SCA pointed out in *Oudekraal*[15]:

> "Until the administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

[25] But in any event, the Commissioner's ruling in this case is not unlawful. Neither is his issuing of the certificate stating that the dispute remains unresolved. And neither is the consequent action by the respondents to embark on strike action in terms of section 64 of the LRA.

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[14] [2012] 12 BLLR 1193 (CC) para [52] (footnotes omitted).

[15] *Oudekraal Estates (Pty) Ltd v City of Cape Town & ors* 2004 (6) SA 622 (SCA) para [26].

[26] The union may not succeed in obtaining organisational rights at Bidvest. But the workers are not precluded from striking in pursuit of that demand.

Conclusion

[27] Given the conclusion I have come to, the applicant has not established a clear right for the relief it seeks in prayer 2.1. It is not necessary to consider the other prerequisites for final relief. As far as the relief sought in prayers 2.2 and 2.3 of the notice of motion is concerned, the union has conceded that the applicant is entitled to it.

[28] With regard to costs, I take into account that the union and the individual employees are in the process of attempting to persuade the applicant to grant NUMSA organisational rights. That is what gave rise to the strike action and this application. The applicant has been partly successful. In all the circumstances, it may have a chilling effect on any further attempts at collective bargaining between the parties to make a cost order at this stage. I exercise my discretion in law and fairness, as this court may do in terms of section 162 of the LRA, not to order costs.

Order

[29] I therefore make the following order:

29.1 The application to declare the strike unprotected is dismissed.

29.2 The respondents are interdicted and restrained from:

29.2.1 interfering with or obstructing access to or egress from the applicant's premises;

29.2.2 committing any acts of violence, damage to property, intimidation or the like in relation to customers, third parties and the employees of the applicant.

29.3 There is no order as to costs.

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Steenkamp J

APPEARANCES

APPLICANT:	D O Pretorius of Fluxmans Inc.
RESPONDENTS:	R Daniels and T Ralehoko of Cheadle Thompson & Haysom.