THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J1940/15

In the matter between:

SWISSPORT (SOUTH AFRICA) (PTY) LTD	**Applicant**
And	
NATIONAL TRANSPORT UNION	**1st Respondent**
EMPLOYEES OF THE APPLICANT AND Further	**Second and**
MEMBERS OF THE FIRST RESPONDENT	**Respondents**

Date heard: 19 November 2015

Date delivered: 19 November 2015; reasons on 08 March 2017

Summary: *Rule nisi* application – the result of the verification exercise where the union is below the agreed threshold for collective bargaining does not make the strike unprotected because collective bargaining in 2015 was not provided for by the agreement. The dispute is one of refusal to bargain and not interpretation and application of a collective agreement. The latter is merely a tool for determining whether the strike is protected.

JUDGMENT

EVERETT AJ;

Introduction

[1] These are the reasons for an order made on 19 November 2015. Leave to appeal was filed on 20 November 2015 but the applicant has requested reasons so as to prepare and file written submissions for the purposes of that application.

[2] In the order of 19 November 2015, I dismissed an urgent application for a *rule nisi* calling on the respondents to show cause why an order should not be made declaring the strike which was due to begin on 16 November 2015 unlawful and unprotected, and interdicting the strike.

[3] Due to the volume of the file and numerous court proceedings between the parties, I was provided with the file only at the end of 2016.

Background

[4] The applicant employer provides baggage handling services at the airports. In years gone by the majority union was SATAWU, with which the employer had a recognition agreement. In August 2014, the employer and SATAWU concluded a three-year agreement on wage increases for the years 2015, 2016 and 2017. The agreement specified that strikes over the contents of the agreement were prohibited during the periods covered by the agreement. NTM was not a party to that agreement.

[5] By July 2015, if not before, SATAWU's membership had decreased drastically and he employer concluded a collective agreement with NTM setting a threshold of 30 percent for organizational rights and 45 percent for the right to bargain collectively. The agreement also provided that where the union had the right to

bargain collectively, wage negotiations would take place in June of that year and the wage agreement would be implemented in January of the following year.

[6] In mid-2015, NTM sent wage demands to the employer, claiming to have ousted SATAWU as the majority union. The employer did not respond to the demands and NTM then referred a refusal to bargain dispute to the CCMA in August 2015. The CCMA issued an advisory arbitration award on 15 September 2015. NTM again requested wage negotiations and when the employer did not respond, it issued a strike notice and the strike commenced on 23 September 2015.

[7] The employer applied for a *rule nisi* which was granted in the form of an interim interdict and a return date of 4 December 2015 was set. On 29 September 2015, NTM anticipated the return date and Rabkin-Naiker J discharged the *rule nisi*. The employer filed an application for leave to appeal the discharge of the *rule nisi*.

[8] The employer filed a new urgent application on 10 October 2015 and it was struck off the roll by Molahlehi J. NTM then applied for leave to give effect to the Rabkin-Naiker's judgment despite the application for leave to appeal. Rabkin-Naiker J struck the application, finding that it was unnecessary since noting an appeal does not revive a *rule nisi* once it is discharged.

[9] A verification exercise, recommended by the commissioner in the advisory award, was conducted and the outcome of 10 November 2015 identified NTM's membership as 42.5%. NTM gave notice on 13 November 2015 to commence its strike on 16 November 2015. On 14 November 2015, the employer made the urgent application which resulted in my order of 19 November 2015.

Arguments

[10] The employer argued that the strike was prohibited because the result of the verification exercise demonstrated that NTM did not have the right to bargain collectively as it had not met the threshold. Even if it had met the threshold, its wage increase demands would only be due for negotiation in May 2016 for

implementation in January 2017. The dispute, the employer argued, was not a refusal to bargain dispute in terms of section 64(2) of the Labour Relations Act but one of interpretation of a collective agreement in terms of section 24 of the Labour Relations Act.

Evaluation

[11] For this *rule nisi* application (which would operate as an interim interdict of the strike) to succeed, the employer had to show that – at least on the face of it – the strike was unprotected. Rabkin-Naiker J has already found that the dispute was a refusal to bargain dispute; that the union was entitled to strike over the issue of the employer's refusal to bargain and, in a separate decision, that an appeal of the discharge of the *rule nisi* did not revive the interim interdict.

[12] There is no reason for me to repeat the contents of Judge Rabkin-Naiker's judgment and I align myself with her reasoning and conclusion that the strike was protected.

[13] In the hearing of this matter I asked applicant's counsel to indicate what new circumstances had arisen (other than those that existed at the time of Judge Rabkin-Naiker's discharge of the *rule nisi*) to warrant a fresh *rule nisi* to be issued.

[14] The basis of the employer's application was that the verification exercise had been conducted and the union did not meet the threshold specified for collective bargaining in the recognition agreement between the parties. The employer also submitted that the demands for wage increases would be due for submission only in May of the following year.

[15] I accept that the CCMA's verification exercise of 10 November 2015 showed that NTM had 42.5% membership and that this is below the agreed threshold of 45%. There is also no question that the collective agreement between the employer and NTM is valid and binding.

[16] The employer's argument that the result of the verification exercise means that the union had not met the agreed threshold for collective bargaining, and the strike was therefore prohibited, fails to take into account that at the time this dispute arose, the collective agreement did not make provision for collective bargaining in the course of 2015, irrespective of whether the union had met the threshold or not.

[17] Simply put, there was no collective bargaining threshold agreement in respect of the 2015 year because the timeframes for negotiating for a wage increase in 2015 were impossible to meet at the time of concluding the recognition agreement, which was July 2015. It is for this reason that the employer's argument that the union's wage demands could only be submitted in May the following year contradicts its argument regarding failure to meet the threshold.

[18] From a practical labour relations perspective, it ought to have been obvious to the employer that NTM would not want to be bound by a collective agreement entered into between SATAWU and the employer when SATAWU's membership had fallen drastically. The new recognition agreement with NTM made no provision for collective bargaining with NTM in the year 2015, irrespective of a threshold. It is my opinion that the employer took a legalistic rather than practical approach to its labour relations, in a volatile situation of break-away inter-union rivalry, and the wisdom of its approach is questionable. The practice of labour law is seldom a question of right and wrong; it is more often about responding appropriately in changing environments, being pro-active, practical and fair, and respecting the wishes of the majority of workers.

[19] As held in *NUMSA v Bader Bop* (2003) 24 ILJ 305 (CC) even a minority union is entitled to strike in support of its demand for recognition or the conclusion of an agreement on terms and conditions of employment. In the absence of a collective agreement on collective bargaining in 2015, the union's strike over the employer's refusal to bargain was protected. The resumption of the strike on 16 November 2015 was also protected.

[20] I believe it worth addressing the employer's argument that this is a dispute of interpretation and application of a collective agreement and not a refusal to bargain dispute. Almost any determination of whether a strike is protected will require consideration of the collective agreements between the dispute. This does not change the dispute to one of interpretation and application of a collective agreement. It is merely a tool for determining whether the strike is protected.

[21] The Labour Appeal Court held in *Pikitup (Soc) Ltd v SAMWU & others* [2014] 3 BLLR 217 (LAC) that the phrase "matters of mutual interest" has a wide scope and it includes all matters arising in a workplace which affect employees. The employer's decision to adhere to a wage agreement entered into with the former majority union and to sideline NTM in the year 2015 relates to a refusal to bargain dispute and it is unquestionably a matter of mutual interest. Once the union had followed the required processes of conciliation and obtaining an advisory award and issuing a compliant strike notice, it was entitled to embark on protected strike action, and there is no basis to interdict the strike.

[22] The strike was protected and not unlawful. There was accordingly no basis for issuing the *rule nisi*.

[23] As regards costs, I believe it is equitable if each party covers their own.

Order

I make the following order:

1. The application is dismissed.
2. There is no order as to costs.

_____

Winnie Everett

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant:	Adv. FMM Snyman
Instructed by	C de Villiers Attorneys
For the Respondent:	Mr E Mphahlele of NTM