IN THE LABOUR COURT OF SOUTH AFRICA

Held at Johannesburg

CASE:NO **J2498/98**

In the matter between:

TRANSPORTATION MOTOR SPARES Applicant

and

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA 1st Respondent

THOSE PERSONS LISTED IN ANNEXURE "A" TO THE FOUNDING AFFIDAVIT 2nd and Further Respondents

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JUDGMENT

ZONDO J:

Introduction

[1]This is the extended return day of a Rule nisi which was granted by

Landman J on the 11th September 1998 in favour of the applicant. Paragraphs 3.1, 3.2 and 3.3 of the Rule operated as an interim Order. Those paragraphs sought to interdict the second and further respondents from unlawfully obstructing the normal operation of the applicant's business, from intimidating, assaulting, harming or in any way interfering with, the employees of the applicant, its property or any other person doing business with the applicant and directing that the South African Police Services shall assist with the service and implementation of the order of this Court. Costs were reserved for determination on the return day. Also the issue whether the strike which the second and further respondents participated in on the 10th and 11th September 1998 (and which prompted the urgent application) was protected or not was left for decision by the Court on the return day. Whether or not the strike was a protected strike depended in turn on whether there was an obligation for the giving of a notice in terms of sec 64(1)(b) of the Labour Relations Act, 1995 (**"the Act"**) before the second and further respondents could resume the strike on the 10th September 1998.

The issues

[2] In **"The New Labour Courts and Labour Law : The First Seven Months of the New LRA", (1998) 19 ILJ 686**, I, in commenting on sec 64(1)(b) and **Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building and Allied Workers Union (1997) 18 ILJ 67 (LAC)**, raised a number of questions one of which was whether, where a strike notice had been given and on the appointed day for the

commencement of the strike, the workers went on strike but later on returned to work on the basis, for example, that the strike had been suspended, a second strike notice would have to be given before the workers could resume such a strike. This is one of two questions I am called upon to decide in this matter.

[3] The second question I am called upon to decide in this matter is whether the applicant has made out a proper case for the confirmation of the rule that was issued by **Landman J**. The issue of costs will also have to be dealt with. However, before these issues can be considered, the facts, as they emerge from the affidavits, need to be set out. They are largely common cause except as far as they relate to the incidents which prompted the applicant to seek prayers 3.1 and 3.2 of the rule. I set them out here below.

The facts

[4] The applicant is a registered company and it carries on business in the motor spares and parts industry. Its principal place of business is in City Deep, Johannesburg. Its business involves the supply and distribution of motor spares and parts to the motor industry. Its customers are garages and companies involved in repairing and restoring motor vehicles. The applicant is a member of an employers' organisation known as the South African Motor Industry Employers' Association (**"SAMIEA"**).

[5] Some of the applicant's employees are members of the National Union of

Metal Workers of South Africa (**"NUMSA"**), the first respondent in this matter. The second and further respondents are all employees of the applicant. The respondent says the second and further respondents are all members of the first respondent. The first respondent says while it is true that the majority of the second and further respondents are its members, it is not in a position to admit that all of them are its members. In the light of the conclusion I have reached in this matter, this is of no consequence.

[6] Both SAMIEA and NUMSA are parties to the Motor Industry Bargaining Council ('**the council'**). It is at this council that those unions and employers' organisations which are parties to the council annually negotiate minimum terms and conditions of employment.

[7] In April/May 1998 NUMSA presented to the council its proposals relating to a wage increase and an improvement of other terms and conditions of employment for the 1998/1999 year. If those proposals were accepted, an agreement would be concluded at the council and parties to that agreement would include SAMIEA and NUMSA. NUMSA's demands/ proposals included a demand that wage increases agreed to at the council be based on actual rates of pay as opposed to minimum rates of pay as had been the case before. The employer parties to the council did not accept NUMSA's demands. This created a dispute.

[8] On the 3rd August 1998 the applicant concluded an agreement with the union at plant level on wages and conditions of employment. The wage

increase was backdated to 1 July 1998. Such agreement did not have the so-called peace clause. It is obvious that the conclusion of that agreement between the applicant and the union did not settle, and could not have settled, the dispute which had arisen from the non-acceptance of NUMSA's demands in the council by the employer parties.

[9] On the 21st August 1998 NUMSA sent a strike notice to the secretary of the Motor Industry Bargaining Council and SAMIEA by way of a letter of the same date. All parties in this matter accepted that that notice complied with the provisions of sec 64(1)(b) of the Labour Relations Act, 1995 (Act No 66 of 1995) (**"the Act"**). In terms of that notice the strike would commence on the 1st September 1998. It is not necessary to quote the whole letter. Three points need to be made in relation to the contents of the notice. Firstly, the strike would relate to the wage demands which had been tabled at the Council by NUMSA during May 1998. Secondly it said all the union members in the industry would embark on strike. Thirdly it said that all the requirements of the Council's constitution had been complied with.

[10] On the 1st September 1998 NUMSA members employed by various employers within the motor industry in various parts of South Africa went out on strike. The second and further respondents also went out on strike. According to the second and further respondents, there was some confusion within the structures of NUMSA whether in those companies such as the applicant where plant level wage agreements had been

concluded, strike action by employees in respect of the industry-wide dispute constituted primary or secondary strikes. On the 2nd September the second and further respondents returned to work and worked normally. On returning to work, the second and further respondents were not asked by the applicant's management what the basis was for their return to work nor did they proffer any explanation at the time. The strike continued in other companies.

[11] In their answering affidavit, the second and further respondents state that the reason why they returned to work on the 2nd September is that on the advice of their union they had decided to suspend their strike pending the completion of a consultation process in relation to a retrenchment exercise in the applicant. In fact they say one of the consultation meetings had been scheduled for the 2nd of September. As the shopstewards had to attend that and any subsequent meetings, the second and further respondents thought it would be more convenient if, during the retrenchment consultation meetings, the workers were back at work than if they were out on strike - especially in regard to those times when, from time to time, the shopstewards might have needed to consult the workers and take fresh mandates on the retrenchment.

[12] The second and further respondents also say they did not want to miss the retrenchment consultation meetings because of the strike for fear that the applicant could **"exploit"** the shopstewards' non-attendance of such meetings. The applicant does not dispute the version of the second

and further respondents as to the basis on which they returned to work on the 2nd September nor does it dispute the reasons given by them for their returning to work.

[13] On the 2nd September a retrenchment consultation meeting was held between the applicant and the shopstewards while the rest of the second and further respondents worked normally. This was a further meeting in a consultation process which had begun as far back as June 1998. On the 7th September 1998 there was a report back meeting of the shopstewards and the second and further respondents in regard to the retrenchment consultation. On the 8th September a further consultation meeting was held between the shopstewards and the applicant's management. On the 9th September 1998 a further report back meeting on the retrenchment was held between the shopstewards and the second and further respondents.

[14] On the 10th September the second and further respondents did not work. They resumed the strike pursuant to advice given to them by NUMSA that, as the retrenchment consultation process had been completed, the suspension of the strike at the applicant be lifted and that they should recommence the strike. Before the second and further respondents went back on strike on the 10th September, no notice was given to the applicant or SAMIEA or the Council that the second and further respondents were going to resume the strike. On this occasion the applicant was told by officials of NUMSA on the 10th September that the

reason for the strike which the second and further respondents had gone back to on the 10th September was SAMIEA's refusal to agree to NUMSA's demands at the bargaining council.

[15] From the 11th September 1998 the second and further respondents engaged, according to the applicant, in various acts of misconduct which accompanied the strike. As a result of such conduct and the applicant's belief that the strike by the second and further respondents was an unprotected strike, the applicant approached this Court by way of an urgent application on the 11th September 1998 for an interim interdict. By consent of both parties **Landman J**, before whom the matter came, granted a rule nisi with an interim interdict in regard to the alleged acts of misconduct which the applicant complained had commenced that morning. The rule was returnable on the 15th September. The issue in dispute in this matter relates to a collective agreement to be concluded at the council as envisaged in sec 64(1)(b)(i). With the above factual background, I turn to consider first the question whether the fact that no second sec 64(1)(b) notice was given before the second and further respondents resumed the strike on the 10th September 1998 rendered the strike an unprotected one.

Was the strike a protected strike

[16] Section 64(1)(b) of the Act provides in so far as it is relevant herein that every employee has the right to strike if:

"(b) ..... at least 48 hours' notice of the commencement of the strike,

in writing, has been given to the employer, unless

(i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or

(ii) the employer is a member of an employers' organisation which is a party to the dispute, in which case, notice must have been given to that employers' organisation."

[17] Mr Cassim, who appeared for the applicant, submitted that, before the second and further respondents could resume the strike on the 10th September, another strike notice should have been given in terms of section 64(1)(b) in addition to the one that had been given on the 21st August. The entire basis of Mr Cassim's argument was that, if section 64(1)(b) was not construed so as to require a second strike notice before the resumption of the strike by the second and further respondents in circumstances such as these, orderly collective bargaining, which is one of the primary objects of the Act, would be defeated or undermined. It seemed to be implied in Mr Cassim's submission that, if strikers are able to resume a strike without having to give a second strike notice, collective bargaining would not be orderly because the strikers would be able to take the employer by surprise. The submission is, it seems to me, based on the assumption that such an eventuality is not avoidable.

[18] If workers who have commenced a strike seek to resume their work on the basis that they can still go out again later and resume the strike, the

employer is under no obligation to allow them back at work. This is so primarily because the tender of their services is not unconditional. In terms of the law an employer's obligation to pay wages to an employee who has tendered his services in circumstances where the latter has not performed his duties is dependent upon the employee's tender of services being unconditional. Quite apart from this, the employer is entitled at the stage of the proposed return to work on the part of the strikers to lock them out until the dispute over which they had gone out on strike has been resolved. It is therefore up to the employer to inquire from the strikers when they seek to return to work what the basis is for their return to work and to decide whether he will allow them to resume their duties or not and if he will, then on what terms they will be so allowed.

[19] If the employer chooses to allow back at work strikers who have neither called the strike off nor accepted that the dispute is over and that, therefore, they will not have the right to resume the strike at a later stage, it cannot be heard to complain when they resume the strike. If, however, the employer is happy that the strikers resume their work even if they may later resume the strike, but he wants such return to work to be on specific terms - which may include a requirement that the strikers will have to give another strike notice before they can resume the strike, then the strikers must give such notice before they can resume the strike. There would in that event be nothing wrong with such an agreement between the parties. To my mind, what I have just outlined above shows that, if what would result if a second strike notice were not given can be said to be disorderly

collective bargaining, the disorderliness thereof is one which is avoidable. Because of this I think Mr Cassim's argument cannot be upheld. On this ground alone I am of the view that the application falls to be dismissed. However, in case I am wrong in this conclusion, I proceed to consider the actual provisions in question here below.

[20] The starting point in regard to an interpretation of section 64(1)(b) is an acknowledgement that those provisions are a procedural limitation to the right to strike which in turn is a constitutional right. In this regard the provisions of Article 23(2)(c) of the final constitution are of relevance and they say every worker has the right strike.

[21] In so far as internationally the right to strike is seen as part of the right to freedom of association, the latter right is provided for in article 18 of the constitution. Article 36 makes provisions for the circumstances under which rights entrenched in the Bill of Rights may be limited. Article 39 of the Constitution says in interpreting any legislation, a court must promote, inter alia, the spirit, purpose and objects of the constitution and, when interpreting the constitution, a court must, promote the values that underlie an open and democratic society based on human dignity, equality and freedom, must consider international law and may consider foreign case law.

[22] Then section 3 of the Act provides as follows:

"3. Interpretation of this Act.

Any person applying this Act must interpret its provisions-

(a) to give effect to its primary objects;

(b) in conformity with the constitution; and

(c) in conformity with the public international law obligations of the Republic."

[23] The primary objects of the Act, as set out in sec 1 thereof, which can arguably be said to be relevant to this matter are, in my view, the following:-

(a) to give effect to and regulate the fundamental rights conferred by section 27 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;

(ii) .....; and

(d) to promote -

(i) orderly collective bargaining;

(ii) collective bargaining at a sectoral level;

(iii).....; and

(iv) the effective resolution of labour disputes".

[24] It has been stated that, in construing a statue on any basis, the language used in the statute cannot be ignored. (**Kentridge AJ** in **S v Zuma & Others**, **1995(23) SA 642(CC) at 653A - B)** followed by the

Labour Appeal Court in **Ceramic Industries** case at **(1997)18 ILJ 671 (LAC) at 676 B).** With the above in mind, it is now appropriate to consider the parties' arguments with regard to the provisions of section 64(1)(b) of the Act.

[25] The requirement for the giving of a strike notice before a strike can be embarked upon is not exclusive to South Africa. In fact it is a procedural restriction on the right to strike which conforms with international standards (See **Ruth Ben-Israel** on: **International Labour Standards : The Case of Freedom To Strike p 118, 1983 Kluwer Law and Taxation Publishers, USA.)** It is however required to be reasonable. While on procedural restrictions on the right to strike being required to be reasonable, it may be mentioned that, unlike in South Africa, in certain countries more information is required to be contained in the strike notice than is required in section 64(1)(b) of the Act in South Africa. It would appear that in France, where the notice must be five days, the strike notice is required to include the reason for the strike, the place, time, day as well as the duration of the planned strike. (see **Rojot** in **Strikes and Lock-Outs in Industrialised Market Economies edited by R Blanpain and R Ben-Israel 1994 Kluwer Law and Taxation Publishers, p 63.)**

[26] Dealing with the Trade Union Reform and Employment Rights Act, 1993 in England in **Smith and Wood's Industrial Law (supra) at 609 I. T. Smith and G. H. Thomas**, after stating that the notice must state

whether the strike is intended to be continuous or discontinuous, say, if the strike is going to be discontinuous, the notice must specify the dates on which the strike will take place. They say because of this requirement, trade unions are no longer able to use the threat of random discontinuous strike action to put pressure on employers. However, they make the point that, having specified dates on which a discontinuous strike would take place, a union does not have to call for a strike on those dates. They also say that, where a strike is suspended, it seems that a fresh strike notice must be given thereafter before the strike can be resumed. They say this requirement to give a fresh notice before a suspended strike can be resumed would act as a disincentive to negotiations during industrial action and, in that way, it would hinder the resolution of the dispute.

[27] Although the statute whose provisions the learned authors discuss above is not available to me to compare with the South African statute in this regard, it seems abundantly clear that the discussion is based on the particular wording of the provisions of that statute. In so far as the authors express the view that, if a strike has been suspended then under that Act the strikers must give a fresh strike notice, it must be noted that not only do the learned authors refrain, unfortunately, from giving the basis of their view in this regard but also, as already stated, that they are discussing provisions of a particular statute - and not the South African statute.

[28] The provisions of sec 64(1)(b) of the Act have already been the subject of interpretation by at least two Judges of this Court as well as by the Labour Appeal Court . (See **Basson J** in **Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building and Allied Workers Union** & **Others (1997) 18 ILJ 550 (LC) at 553A-G**, **Landman J** in the same case **at (1997) 18 ILJ 716 (LC) at 727H-728A** and **Froneman DJP,** speaking for the Labour Appeal Court in the same case **at (1997) 18 ILJ 671 (LAC) at 675J-677D).** The issue in the **Ceramic** matter, in so far as the interpretation of sec 64(1)(b) is concerned, was whether or not a sec 64(1)(b) notice must specify exactly when the strike would commence - which had to be not earlier than 48 hours from the giving of such notice or whether it was sufficient if the notice reflected that there would be a strike even if it was not specified exactly when that would be.

[29] In interpreting sec 64(1)(b) the Labour Appeal Court had regard at 676C-D to orderly collective bargaining which is one of the purposes of the Act as well as what it believed was the purpose of the section, namely, **"to warn the employer of collective action in the form of a strike and <u>when</u> it is going to happen so that the employer may deal with that situation".**

[30] I have considered the applicant's submission on sec 64(1)(b) carefully. This is not a case where the strike to which the second and further respondents returned on the 10th September was a separate and

different strike from the one which they had commenced on the 1st September. In this regard a reading of the applicant's founding and replying affidavits reveals that the applicant formulated its case as if on the 10th September the strike that the second and further respondents went out on was being **"commenced"**. Of course, that is not the case. This was a continuation, or, better still, a resumption, of the strike which the second and further respondents commenced on the 1st September. In this regard I am of the opinion that the distinction between the commencement of a strike and a resumption thereof must be borne in mind. This was one and the same strike in respect of which a sec 64(1)(b) notice had already been given.

[31] In so far as the Labour Appeal Court has said in **Ceramic Industries** that a sec 64(1)(b)notice is meant to give the employer an opportunity to decide whether, in order to avoid a proposed strike, he should give in to the union demands, on the assumption that that reasoning applies in an industry-wide strike, the single notice that was given in this case would, in my view, suffice because, by the time the second and further respondents commenced the strike on the 1st September, the applicant had had an opportunity to consider whether to give in to the union demands and, had, obviously, decided that it was not going to give in to the union demands.

[32] Also, on the same assumption as referred to in the preceding paragraph, in so far as a sec 64(1)(b) notice is meant to give the employer

an opportunity to make whatever arrangements (including hiring replacement labour for the duration of the strike), such purpose would have been served by the single notice given prior to the commencement of the strike. I say this because, if the applicant wanted to make other arrangements for its business in the light of the proposed strike, it would have been able to make those arrangements between the time of the sec 64(1)(1)(b) notice and the day when the strike commenced. In fact it seems that the applicant did make use of replacement labour because, in the answering affidavit, the shopsteward who deposed thereto says, on returning to work on the 2nd September, the second and further respondents found that there was replacement labour.

[33] The applicant does not say what it did with the replacement labour on the return of the second and further respondents to work. However, it does state that the second and further respondents resumed their normal duties. It therefore seems to me that the two purposes of a sec 64(1)(b) notice would have been achieved by the giving of one strike notice. Again this is on the assumption that the purposes of sec 64(1)(b) as stated by the LAC in **Ceramic Industries** apply to an industry-wide strike.

[34] The construction of sec 64(1)(b) which Mr Cassim urged me to adopt in support of his contention that there should be a second strike notice is one which completely disregards the language of sec 64(1)(b). It is true that orderly collective bargaining is one of the purposes of the Act. However, a court cannot simply adopt a particular interpretation of a

provision of a statute simply because it would serve one of the purposes of the Act to do so even where there was no ambiguity in the statute and even where, to interpret the statute in accordance with the ordinary meaning of the words employed by the legislature to give expression to its intention would not lead to any absurdity.

[35] Quite properly, Mr Cassim did not argue that there was ambiguity in the provisions of sec 64(1)(b) nor did he argue that, if sec 64(1)(b) was interpreted so as not to require the giving of a second strike notice before the resumption of a previously suspended strike, this would lead to absurdity. Not only is there no ambiguity in sec 64(1)(b) but also if its provisions are interpreted so as not to require a second notice in circumstances such as those that prevailed in this matter, no absurdity results - least of all - glaring absurdity.

[36] Quite clearly Mr Cassim's submission called for the adoption of a purposive interpretation. While purposive interpretation has much to its credit, nevertheless, it must be adopted in appropriate cases. Purposive interpretation is no licence to ignore the language used in the statute which is the subject of interpretation. This accords with the warning which **Kentridge AJ** gave in regard to interpreting a constitution in **S v Zuma & Others 1995 (2) SA 642 (CC) at 653A-B**. There the Learned Acting Judge said **"We must heed Lord Wilbeforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the law giver is ignored in**

favour of a general resort to 'values' the result is not interpretation but divination".

[37] I am of the opinion that the language used by the legislature in enacting sec 64(1)(b) does not permit the interpretation that a second strike notice must be given before the resumption of a strike which was previously suspended. Whereas sec 64(1)(b) relates to a notice of the commencement of a strike, the second notice would not be a notice of the commencement of the strike but a notice of the resumption of the strike. In my view the second notice would not qualify as a sec 64(1)(b) notice : It would be some other notice. Indeed to interpret sec 64(1)(b) so as to say it contemplates such a notice would, in my view, amount in effect to reading into sec 64(1)(b) words which are not there or would amount to amending sec 64(1)(b) by introducing a paragraph to the effect that, should a strike be suspended after it has commenced pursuant to a notice given in terms of subsection (1)(b), at least 48 hours notice must be given in writing of its resumption before it can be resumed. To my mind there is no justifiable basis in the provisions of the Act to construe sec 64(1)(b) in this manner.

[38] The concept of the suspension of a strike is known in our law and workers do have a right to suspend their strike. (See **AECI Ltd v SACWU 1986 (3) SA 729 (W)**). Obviously if workers have a right to suspend their strike, they also have a right to lift such a suspension and resume the strike. The legislature must be taken to have been aware of the

existence of such a right in our law at the time of enacting the strike notice provisions of sec 64(1)(b). If it intended to require the giving of a notice of resumption of strike where there has been a suspension of a strike, in my view the legislature would have stated this in clear terms. It did not say so because it did not intend that requirement to apply once the strike has begun.

[39] While it is true that one of the primary objects of the Act is to promote orderly collective bargaining, this does not mean that simply because a particular strike disrupts the employers' business, collective bargaining is rendered disorderly. I say this because a strike is, by its very nature, disruptive. The legislature wanted to ensure that, before a strike can be resorted to, various steps would have been taken to try and avoid it because of the harm and pain it may inflict. There is a possibility that conciliation can help avoid that. Once attempts through conciliation to avoid the strike have failed, and the workers are determined to strike, before the strike can commence, the legislature gives the employer the last opportunity to avoid the strike or to prepare for it. It does this by requiring that a written notice of the commencement of the strike be given.

[40] Except in the case of criminal behaviour on the part of the strikers, the requirement for the giving of a strike notice is the last act of legislative interference in the process of collective bargaining. This must be because the legislature did not want to interfere in the power play once

power play has begun because to do so may well unduly interfere with or influence, the result of the power play instead of leaving power play to determine its own result.

Acts of misconduct

[41] With regard to the applicant's application for the confirmation of the rule relating to what I would call, for convenience, acts of misconduct which accompanied the strike, the applicant detailed its evidence in relation to such acts in paragraphs 10.9 up to 10.19. The respondents' answer to that is contained in par 17.2. I do not intend to go into details about this aspect of the case. However, it seems to me that the respondents' answer is a bare denial of the detailed allegations. Accordingly no genuine dispute of fact arises in these circumstances. I am satisfied that the applicant has made out a proper case for the confirmation of the rule in regard to such acts.

[42] On the issue of costs I am of the opinion that in the light of the result of the matter - each party achieving partial success - I should not make a costs order. In the premises the order I make is the following:-

1. The application to interdict the strike by the second and further respondents is dismissed.
2. The rule issued by Landman J on the 11th September 1998 in this matter is hereby confirmed.
3. There is to be no order as to costs.

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R. M. M. Zondo

Judge : Labour Court of South Africa

Date of Argument :15 September 1998

Date of Judgement :18 September 1998

For the Applicant :Mr N. Cassim SC

Instructed by :Perrott, Van Niekerk & Woodhouse INC

For the respondent :Mr Daniels (Union Official)