IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **Case Number: J 3659/98**

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA Applicant

and

NISSAN SOUTH AFRICA MANUFACTURING (PTY) LTD Respondent

JUDGMENT

BASSON J:

[1] This is an application for urgent interim relief. Due to the urgency I act under certain constraints. I am therefore not in a position to give full reasons and reserve the right to amplify these reasons.

[2] The applicant, the National Union of Metal Workers of South Africa

(hereinafter "NUMSA" or "the union") seeks to interdict the respondent, Nissan South Africa Manufacturing (Pty) Ltd in terms of an original notice of motion (at page 2 of the papers) from proceeding with any retrenchment until the arbitration pursuant to clause 21.3.2.6 of the "NBF agreement" has been completed; alternatively, until the dispute referred to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") by the applicant on 21 November 1998 has been resolved. During argument both parties indicated that compliance by the respondent with the information requirement of the said clause should be added as a third alternative instance when the said order will cease to have effect.

[3] The relevant part of clause 21 of the so-called NBF agreement (attached as Annexure "HG2" to the respondent's answering affidavit at pages 181 and further) reads as follows:

" 21.3.2.6: In the event of a dispute arising as a result of a meeting referred to in clause 21.3.2.5 above, the parties shall adhere to the provisions of the plant level dispute procedure or the Labour Relations Act, whichever is applicable. **A dispute concerning the disclosure of information shall be referred to an arbitrator"** (emphasis supplied).

[4] The dispute in the present matter is a dispute about the disclosure of such information in the course of the retrenchment exercise that the respondent has embarked upon. The required information is essentially contained at paragraphs 20.1 and 20.2 of the founding affidavit (at page 12 of the papers), that is, a request for audited financial statements and detailed management accounts and (to a lesser extent) a strategic planning budget of the respondent (although it may even include other information).

[5] In essence, the respondent refused to provide the said information set out at

paragraphs 20.1 and 20.2. The respondent also refused to adhere to the said provisions of the said agreement (clause 21.3.2.6 quoted above at paragraph [3]) and alleged that these provisions were not operational.

[6] The *prima facie* right that the applicant has to shown in the present matter, in order to succeed to obtain relief in the form of an interim interdict, has been succinctly summarised in the heads of argument for the respondent. The question is whether the applicant has shown a *prima facie* right to proceed to arbitration (in regard to the information dispute) under the said agreement.

[7] On the facts before me there clearly is a dispute about the disclosure of information. The respondent intends to embark upon a retrenchment process which apparently will take effect again tomorrow after a postponement of these compulsory retrenchments. This creates the necessary urgency in the present matter (it was common cause that the matter was urgent).

[8] The question whether the applicant has a *prima facie* right depends to a large extent upon whether the said agreement constitutes a binding collective agreement in terms of which the respondent has obligations, in particular, the obligation to provide relevant information and, in the event of a dispute about the disclosure of such information, whether the applicant has the right to proceed to arbitration over such dispute under this agreement.

[9] The applicant (at paragraph 5 at page 5 of the papers of the founding affidavit) states categorically that in July 1993 an agreement was reached concerning wage increases and conditions of employment in the automobile manufacturing industry. This is the agreement referred to above as the so-called NBF agreement. The applicant further alleges that this agreement is a collective agreement as contemplated by "the Act" (meaning the Labour Relations Act 66 of 1995).

[10] The relevant extracts of the NBF agreement were attached to the founding affidavit as Annexure " SN1".

[11] Further allegations were made to the effect that, in terms of the said agreement, the applicant is recognised by the respondent as the collective bargaining agent of its members at the respondent's plant. Indeed, the applicant has represented its members at meetings at which the impending retrenchments were discussed. Moreover, the NBF agreement relates specifically to hourly paid employees. It was further alleged that the applicant and the respondent approached discussions on the impending retrenchments *in casu* on an undifferentiated basis, that is, on the basis that the provisions of clause 21.3 of the NBF agreement (above) were applicable to all employees, that is, hourly paid and salaried employees.

[12] It was further alleged that, although various salary and other related aspects of the NBF agreement have been updated from time to time, some aspects of this agreement continued to apply to the parties to the 1993 NBF agreement, notwithstanding the fact that the agreement was scheduled to expire in June 1994 (as it appears *ex facie* the document). The applicant further alleged that an aspect of the NBF agreement that continues to apply are the provisions relating to job security commitments as set out in clause 21.3 (referred to above). It is the respondent's refusal to comply with the provisions of this clause, more particularly clause 21.3.2.6 (quoted above at paragraph [3]), that gives rise to this application.

[13] In the event, the applicant alleges that this agreement which for all intents and purposes *prima facie* appears to have been a collective agreement in terms of the previous Labour Relations Act and would comply also for all intents and purposes with the definition of a collective agreement in terms of the new Labour Relations Act, had a longer lifetime than it appears *ex facie* the

document which states that it would come to an end in 1994.

[14] This fact is not denied by the respondent which answers these allegations as follows (at page 94 paragraph 4 of the answering affidavit):

"4. In this application applicant seeks urgent interim relief based on clause 21.3.2.5 and 21.3.2.6 of the National Bargaining Forum of the Automobile Manufacturing Industry Agreement. The alternative remedy is based on the referral to the CCMA in which the applicant seeks an order that the foreknown collective agreement be adhered to.

5. It is clear, I submit, that the applicant's case rests on the aforementioned agreement."

[15] Nowhere is it denied that this was a collective agreement.

[16] The important question is, of course, whether it is denied that this agreement had a longer lifetime than it appears *ex facie* the document, especially in regard to the provisions applicable in the present matter (as alleged by the applicant).

[17] In this regard the respondent makes the following statement in answer to the contention that the said agreement is still binding (quoted above at paragraph [12]):

"I submit that for the reasons set out hereunder the application is ill conceived and without merit. In September 1998 the applicant in its representative capacity and the South African Workers Union entered into a written agreement with the

Automobile Manufacturers Employers' Organisations (AMEO) of the other part. AMEO represents the major car manufacturers of this country, including the respondent. **This agreement replaced the agreement** whereupon the applicant relies for its cause of action in this application" (emphasis supplied).

[18] It is important to note that it is **not** alleged that the agreement which allegedly had been as such "replaced" had already ceased to exist in 1994.

[19] Further, paragraph 6.2 of the respondent's answer reads as follows:

"6.2 A copy of the prevailing agreement is attached as Annexure "HG1". For purposes of completion the agreement whereupon applicant relies is also attached to my affidavit marked "HG2". As aforestated "HG1" **replaced** "HG2".

6.3 The negotiations which culminated in the agreement annexed as "HG1" commenced in May of this year and an agreement was reached in September of this year. If, in fact, this is going to be in dispute then I will beg leave to lead oral evidence as there is no doubt whatsoever that "HG2" **is the prevailing agreement** and/or applicable and any such oral evidence will be limited to this issue only.

6.4 It is apparent from page 1 of Annexure "HG1" that the parties expressly agreed that this agreement supersedes all other agreements concluded between the parties and will take effect from 1 July 1998 and will remain in effect until 30 June 2001.

6.5 SAWU, a Union party to "HG1", has agreed to the implementation of retrenchments in accordance with the terms of provisions of this agreement"(emphasis supplied).

[20] I need not spend more time on these allegations which appear to show that the new agreement is the applicable agreement. Mr Brassey on behalf of the respondent pointed out that the respondent is no longer relying on the fact that the "new" agreement supersedes the "old" agreement. The respondent's argument is that the applicant has failed to make out a proper *prima facie* case that the previous agreement, ("HG2"), is indeed an applicable or binding **collective agreement.**

[21] In order to prove its *prima facie* case the applicant also attached a letter dated 30 November 1998 of the respondent's attorneys to the founding papers (Annexure "SN16" at pages 61 to 62 of the papers) where the attorney for the respondent writes (at paragraph 6 of the letter):

"The present notice in which employees are invited to accept voluntary retrenchment is part of the process described above and which commenced in March 1996. It has also **complied with the requirements of clause 21.3** of the AMI agreement" (emphasis supplied).

[22] It is clear that this "AMI" agreement is the so-called first agreement or "HG2" that is referred to above and clause 21.3 is, of course, the applicable provisions of the selfsame "NBF agreement".

[23] In view of these facts, even if it may be it may open to some doubt, I am persuaded *prima facie* that the so-called first agreement was a collective agreement in terms of the previous dispensation which outlived its indicated 1994 deadline and was still being implemented in 1998.

[24] In this regard in the replying affidavit the applicant also sets out (albeit somewhat obscurely) the following (at paragraph 4.1):

"It is denied that the applicant's case is ill conceived -

4.1.1 agreement “HG2", notwithstanding its expiry in June 1994, continues to be a framework within which retrenchments were processed at the respondent's plants. Agreement “HG2" provided the framework of the 1996 retrenchments, as is stated in paragraph 13.3 of Grimbeek's affidavit. Agreement “HG2" continued to be the applicable framework. [It must be noted that the word “framework” is somewhat ill-conceived]. It is denied that agreement “HG2" has been entirely replaced by “HG1". Whilst agreement has been reached on substantive aspects the entire agreement has not been finalised, awaits confirmation and the commencement of negotiation on several aspects.

4.1.3 ...

4.1.4 I am surprised at this late stage the respondent has chosen to allege that agreement “HG2" has been replaced by agreement “HG1". It appears from Annexure “SN16" to my founding affidavit that the respondent as late as 30 November 1998 was of the view that **clause 21.3 of the agreement “HG2" governed this**

retrenchment. Furthermore, at no stage prior to the filing of Grimbeek's affidavit and at no stage during the unfolding of this dispute has the respondent disputed the **applicability of agreement "HG2"**" (emphasis supplied).

[25] Taking into account all of these facts, the applicant has established a *prima facie* right to proceed to arbitration under the said clause of the said collective agreement "HG2" or the so-called NBF agreement of 1993. The applicant itself appears to be of the view that agreement "HG1" is not applicable and that it is not at this moment a binding agreement between the parties. In the event, the amended relief claimed in the amended notice of motion in regard to this agreement need not be considered any further.

[26] Having thus established a *prima facie* right in order to succeed in this application for an interim interdict the applicant also has to show that the balance of convenience favours the granting of the said relief and, in the same breath, that irreparable harm will follow should the relief be refused.

[27] I will first deal shortly with the aspect of the jurisdiction of the Labour Court. It was contended on behalf of the respondent that this Court does not have the necessary jurisdiction to deal with this dispute pending the arbitration of this matter in terms of the collective agreement as this was the jurisdictional domain of the High Court.

[28] I do not agree with this contention. The Labour Court clearly has the necessary jurisdiction to deal with such disputes. It is an accepted principle that, even though the Labour Court itself does not have the jurisdiction to deal with disputes in regard to the application and interpretation of such collective agreements, (this being the jurisdictional domain of the CCMA in terms of the Act) the Labour Court may in appropriate circumstances grant interim relief pending the arbitration of such disputes in terms of the Act.

[29] The precedence that collective agreements enjoy under the Labour Relations Act, as well as the injunction upon the Court to give effect to the provisions of the Labour Relations Act, as well as the court's inherent jurisdiction to deal with all matters under its jurisdiction and its clear power to grant interdictory relief (contained in section 158 of the Act) are important factors in this regard. It is clear from these provisions of the Act that the Labour Court has the necessary jurisdiction to grant such urgent interim relief in order to give effect to the provisions of the Act.

[30] Further, it is clear that arbitration under the said clause of the agreement takes place in terms of the Arbitration Act 42 of 1965 which brings into operation the provisions of section 157(3) of the Act which read as follows:

"Any reference to the court in the Arbitration Act, 1965 (Act 42 of 1965) must be interpreted as referring to the **Labour Court** when an arbitration

is conducted under the Act **in respect of any dispute** that **may be referred to arbitration** in terms of this Act" (emphasis supplied).

[31] In the judgment of **Matthews Manaka and Others v Air Chefs (Pty) Ltd** (Case No J 53/98 unreported judgment of the Labour Court dated 19 October 1998) it was held that the Labour Court has jurisdiction to make a private arbitration award made under the auspices of the Independent Mediation Services of South Africa ("IMSSA") an order of court in terms of the (Labour Relations) Act:

"The section (section 157(3) of the Act) simply states that the dispute must

be one that may be referred to arbitration in terms of the Act. It must, therefore, be a dispute that permissably or legally can be referred to arbitration in that matter ... private arbitration awards constituting labour disputes such as might otherwise be resolved by the Labour (Relations) Act, should themselves be susceptible to the process of enforcement in terms of this statute" (at pages 4 to 5 of the judgment).

[32] See also the judgment in **Portnet, A Division of Transnet Ltd v M Finnemore and Others** (Case No P 128/98 unreported judgment of the Labour Court dated 25 November 1998) where it was held that (in terms of section 157(3) of the Act) the Labour Court in terms of its review powers under the Act has jurisdiction to review an arbitration award of an arbitrator appointed to arbitrate a matter in terms of the constitution of a bargaining council under the Arbitration Act 42 of 1965.

[33] As is pointed out above, the question of the balance of convenience must be considered and in this regard it is clear that the interests of the applicant union which is partaking in the retrenchment procedures as the legitimate representative of the purported retrenchees will be detrimentally affected if the respondent does not comply with its obligations under the collective agreement to supply the necessary information.

[34] This is not a case where the retrenchees have already been dismissed and the relief required is the reinstatement of these employees but it is a case where an important right of the retrenchees and their representative union in terms of the collective agreement concerned is *prima facie* being infringed upon by the respondent.

[35] The prejudice that the respondent will suffer is merely to comply with the said agreement and rectify its *prima facie* breach of this obligation. The prejudice that the applicant and its members will suffer is clearly far greater if the respondent is allowed to proceed with the retrenchment exercise in breach of the agreed provisions in regard to a dispute about the disclosure of information.

[36] The respondent's representative argued that the information required is in essence

purely financial and therefore does not constitute "plausible" information that would be required for the arbitrator to decide upon. Even if (and I am not persuaded that this is so) the information required is purely financial, it is clear that financial considerations or restrictions or restraints can legitimately play a role in retrenchment exercises, even in cases of redundancy such as the present.

[37] In the event, I am not persuaded that the information that is required in terms of paragraphs 20.1 and 20.2 of the founding affidavit (quoted above at paragraph [5]) is indeed irrelevant and not plausible information required in terms of this retrenchment process. I am *prima facie* satisfied as far as this fact is concerned.

[38] In thus assessing the balance of convenience *in casu,* the prejudice that the applicant and its members will suffer if the interdictory relief is refused, is an overriding consideration. I also have to consider the question of the availability of an adequate alternative remedy.

[39] I do not believe that the remedies provided by the (Labour Relations) Act in the case of retrenchment dismissals can address the harm that may follow from the refusal of the interdictory remedy in the present matter. In the event, there

is no adequate alternative remedy to an interdict in the present matter.

[40] In the event, I make the following order:

1. It is hereby ordered that the respondent is to show cause on 3 February 1999 at 10:00 or as soon thereafter as the parties' representatives may be heard why an order should not be issued in the following terms -

1.1 interdicting the respondent from proceeding with any retrenchment until the arbitration pursuant to clause 21.3.2.6 of the NBF agreement, ("HG2" to the papers), has been completed; alternatively, until the dispute referred to the CCMA by the applicant on 21 November 1998 has been resolved; alternatively, pending the production of the relevant information contained in paragraphs 20.1, 20.2 and 20.3 of the applicant's founding affidavit by the respondent, in which event the interdict will cease to have any effect.

2. Paragraph 1.1 of this Rule will operate as an interim order pending the return day thereof.

3. Costs to be reserved until the return day.

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BASSON J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

SINGED AND DATED AT JOHANNESBURG THIS 2ND DAY OF

FEBRUARY 1999

OCEEDINGS: 18 JANUARY 1999

DGMENT: EX TEMPORE (EDITED VERSION)

OF APPLICANT: ADV J G VAN DER RIET

OF RESPONDENT: ADV M S M BRASSEY SC AND WITH HIM ADV MYBURGH