

CASE NO D1379/02 REPORTABLE

DATE HEARD : 17 SEPTEMBER 2002

DATE DELIVERED : 18 SEPTEMBER 2002

In the matter between

HEXTEX, ROMATEX HOME TEXTILES

& BERG RIVER TEXTILES

(APPLICANTS)

and

SACTWU

(RESPONDENT)

JUDGMENT

PILLAY D, J

1. This application requires me to revisit section 66(2)(c) of the Labour Relations Act No 66 of 1995 (the “LRA”). It is brought urgently to declare the secondary strike due to commence at 12:00 today to be unprotected, to interdict the second and further respondents, and for certain ancillary relief.
2. The applicants are cited as divisions of the Seardel Group Trading (Pty) Limited. Mr Bingham, for the respondents, objected on the grounds that, as trading divisions, the applicants have no *locus standi* to institute proceedings.

3. Mr van Niekerk, for the applicant, conceded this principle which was upheld in *Volkskas Bank v Peterson* 1993 (1) 312 (CPD), a case relied on by Mr Bingham. However, he denied that the citation of the applicant was misleading as Seardel Group Trading (Pty) Limited trades under the name of various distinct entities.
4. The objection is more to the form than to the substance of the citation. As it is common cause that the real applicant is the Seardel Group Trading (Pty) Limited, trading as Hextex, Romatex Home Textiles and Berg River Textiles, there is only one applicant, and it ought to have been cited as such. I refer hereafter to the Seardel Group Trading (Pty) Ltd as the applicant.
5. The shortcoming in the form of the citation is not sufficient to deny the applicant of *locus standi*. However, as Mr Van Niekerk pointed out, it is necessary to distinguish between the divisions to enquire whether each has a nexus to Team Puma, the secondary employer.

The nexus

6. The applicant denies that there is any link between Hextex and Romatex Home Textiles ("Romatex"), on the one hand, and Team Puma on the other hand. They manufacture products different from that produced by Team Puma. However, the applicant acknowledges that through Berg River Textiles it supplies yarn on an irregular basis to Team Puma. Between January to April its supplies represented 0,69% of its production and 0,59% of its turnover. For these reasons the relationship between these divisions and Team Puma was either non-existent or insignificant. As a result, they were not in any position to influence Team Puma about the wage demands on it. So it is submitted for the applicant.
7. The respondent submitted that the nexus is established by the applicant which, through its divisions, has a direct relationship with Sherco (Pty) Limited, trading as Team Puma. Of particular note is the case of Bibette, a division of the applicant which receives raw materials from Team Puma. As one of its divisions, the applicant is in a position to influence Team Puma by, for example, refusing on behalf of Bibette to do business with Team Puma.

8. The nexus between Hextex and Romatex with Team Puma is therefore through the applicant. Furthermore, it was accepted in *SACTWU v Free State and Northern Cape Clothing Manufacturers Association* 2001 22 ILJ 2636 (LAC) that a trade union may strike at all the trading divisions of an employer even if a dispute does not relate to some of the divisions.
9. Accordingly, there was a substantial link between Sherco (Pty) Limited trading as Team Puma on the one hand, and some of the trading divisions of the applicant. Hence, a secondary strike against the applicant would affect all its divisions. So it was submitted for the respondents.

The effect of the secondary strike

For the applicant:

10. The applicant further submitted that Team Puma continued to operate despite the strike; a large portion of the employees continued to work. The withdrawal of the supply of yarn by Berg River Textiles would have no effect on the business of Team Puma. Previously, it had been able to operate when Berg River Textiles was unable to supply it with yarn for two

weeks for reasons unrelated to industrial action.

11. Team Puma can source yarn from other suppliers, either locally or from overseas. These three divisions of the applicant were located in the Western Cape. Suppliers of yarn beyond that region are not affected by secondary strikes. The Group Human Resources Director employed by the Frame Textile Group, a division of the applicant, who deposed to the affidavits for the applicant, confirmed that the Frame Textile Group would supply yarn to Team Puma, if required to do so.
12. Contrary to the first respondent's allegation that all potential suppliers of yarn to Team Puma have been given notice of the secondary strike, at least 60% of such suppliers had not been so notified. As such suppliers are mainly outside the Western Cape, it reduces the effect any action against Berg River Textiles' business is likely to have on the primary strike.
13. Consequently, although there is a nexus between the applicant and its divisions with Team Puma, it is not sufficient to have an effect on Team Puma's business. So it was submitted for the applicant.

For the respondents:

14. The respondents submit that the effect of the secondary strike on the business of Sherco (Pty) Limited, and consequently on Team Puma, would be reasonable. The withdrawal by Berg River Textiles of its own supplies to Team Puma would hamper the latter's production. Whatever the proportion of the supply of yarn to Team Puma might be to the applicant's own production and turnover, it is irrelevant as a reference in section 66(2)(c), to "effect" means the effect on the primary employer, not the secondary employer.
15. The secondary strike could result in the termination of the supply of material to Team Puma. The applicant could also prevent Bibette from obtaining supplies from Team Puma. These are some forms of pressure that are likely to affect collective bargaining at Team Puma. So it was submitted for the respondent.

Analysis

16. In view of the disputes of fact about the strength of the nexus

and whether it was sufficient to cause the secondary strike to have an effect on the business of the primary employer, I intend to deal with the matter on the basis of the facts that are common cause, not disputed or which constitute the respondents' version. (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (AD)*)

17. The applicant bears the *onus* of proving all the requirements for an urgent interim interdict. On the other hand, the respondents bear the *onus* of proving that they have complied with the jurisdictional prerequisites that entitle them to invoke the provisions of section 66(2)(c).

18. Section 66(2)(c) provides:

"(2) No person may take part in a
secondary strike unless ...

(c) the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer."

19. Whether a secondary strike would have an effect on the

business of the primary employer is a question of fact determined on the balance of probabilities, bearing in mind that the threshold is pitched merely as a "possible direct or indirect effect".

20. In the absence of sufficient data about the possible effect of the strike from the parties, Team Puma or an investigator appointed in terms of subsection 4, I must determine the matter on the limited facts before me.

21. The word "possible" means:

"1. capable of existing, taking place, or proving true without contravention of any natural law. 2. capable of being achieved....3.having potential.....4. feasible but less than probable."

(The Collins Dictionary and Thesaurus, 1987)

22. The word "possible" is semantically ambiguous. (*Devenish G E: Interpretation of Statutes Juta and Co Ltd 1992 at 59*) If it means, in the context of the subsection, "likely" or "capable of existing, taking place", the effect will be less restrictive of the right to participate in the secondary strike (the "first

interpretation"). It pitches the threshold for compliance fairly low. It is also the ordinary meaning of the word in the context.

23. However, if it were to be substituted with the synonym "potential", the powerfulness of the effect would be brought into the equation (the "second interpretation"). The second interpretation sets a higher standard of compliance. The powerfulness of the effect of the secondary strike on the business of the primary employer must be assessed. That calls for a value judgment.
24. If the second interpretation were to apply would it mean that the secondary strike should be permitted if it has a powerful effect and disallowed if it has little or no effect on the primary employer? Or, conversely, would it mean that a secondary strike that does not have a powerful effect, should be permitted, say, because its impact on the economy is negligible? As I said in *Billiton (supra)*, the effect of the strike on the secondary employer is not a consideration. Approached from this perspective, subsection 2(c) is contextually ambiguous. (*Devenish, supra*)

25. The second interpretation also allows for intrusion on the exercise of power during collective bargaining. That, in my view, is repugnant to the constitutionally entrenched right to bargain collectively (section 23(5) of the Constitution, Act 108 of 1996), and the conceptualisation of the exercise of that right in South Africa as a primary means of self-regulation of industrial relations.
26. The second interpretation also ignores the reality that secondary strikes are not always instantaneous but often develop gradually. At what stage then should the strength or potential of the secondary strike be assessed?
27. The interpretation that is least restrictive of rights should be followed. (*Government of the Islamic Republic of Iran v Berends* 1998 (4) SA 107 (NM); *Commissioner for Inland Revenue v Delfos* 1933 AD 242 at 254—5; *Principal Immigration Officer v Bhula* 1931 AD 323; *Arenstein v Secretary for Justice* 1970 (4) SA 273 (T) at 281; *Peter v Peter and Others* 1959 (2) SA 347 (A) and *S v Gelderblom* 1962 (1) SA 497 (C)).
28. As the right to strike is constitutionally entrenched, any limitation of it must be strictly construed. (*Nyamakazi v President*

of Bophuthatswana 1992 (4) Sa 540 (BG); Kauesa Minister of Home Affairs 1996 (4) SA 965 (NMS) at 974D-E/F; Majavu 1994 (4) SA 268 (CK))

29. Another difficulty that arises in the circumstances of this case, is that there is insufficient information to enable me to assess how powerful or otherwise the effect of the secondary strike would be on the primary employer. This may be a persistent difficulty in other similar applications that are brought urgently, without the participation of the primary employer or without an investigator's report in terms of subsection 4.
30. I accordingly adopt the first interpretation of the word "possible".
31. The word "possible" is also used to enable interdicts to be brought before the secondary strike commences. The Court then has to anticipate what the effect of the secondary strike might be in the particular circumstances on a balance of probabilities.
32. I do not believe that the word "possible" can be construed so

widely as to mean “feasible but less than probable” in the context (the “third interpretation”). Having regard to the philosophical theory of the interconnectedness of things in nature and commerce, the subsection would be meaningless if that construction is followed. The balance of probabilities test would be neutralised.

33. The practical effect of section 66(2)(c) is that the nature and extent of the secondary strike must be capable of having an effect on the primary employer’s business. The purpose of secondary strikes is to enable employees of the secondary employer to exert pressure on their employer to, in turn, put pressure on the primary employer to resolve its dispute with its employees. If a secondary strike is capable of achieving that purpose, it would be reasonable. If the possible effect of the secondary strike would be to influence collective bargaining between the primary employer and its employees, then it should be protected.
34. The effect of the secondary strike should be of a commercial or economic nature. Thus, a mere inconvenience would not satisfy the requirement. If, for example, the Frame Textile

Group were to substitute itself as a supplier in place of Berg River Textiles, the effect may be purely inconvenient for Team Puma. However, if the substitution results in increased costs of transporting the raw materials, because the Frame Textile Group is based in KwaZulu Natal whereas Berg River Textiles is in Western Cape, or because the delays in delivery cause production delays which in turn result in penalties or the cancellation of orders for Team Puma, then the secondary strike would have a possible effect on the primary employer.

35. Adjudicators are, as a matter of policy and practice, slow to interfere in the balance of forces that prevail during collective bargaining. Questions of the legitimacy and proportionality of a strike have little significance once the jurisdictional prerequisites have been complied with. This view is expatiated in the opinion I expressed at paragraph [11] to [14] in the *Billiton* case.
36. On the basis of the afore-going analysis, I doubt section 66(2)(c) invokes a proportionality test either as regards the effect of the secondary strike on the secondary employer, the primary employer or the secondary and primary employers relative to

each other. If a secondary strike has a devastating effect on the secondary employer but only a marginal, but nevertheless, possible effect on the primary employer's business, the secondary strike would not be a contravention of subsection (2).

37. The notion of a proportionality test arises from two possible sources. Firstly, section 66(3) provides:

" Subject to section 68(2) and (3), a secondary employer may apply to the Labour Court for an interdict to prohibit or limit a secondary strike that contravenes subsection 2."

38. If a secondary strike contravenes subsection (2), it should be prohibited. A secondary strike will contravene subsection (2) if it cannot have a possible effect on the primary employer. In what circumstances, then, can a secondary strike that contravenes subsection 2 be limited?

39. The word "limit" must refer to situations where the nature and extent of the secondary strike is only partially a contravention of subsection (2). By limiting the strike appropriately, the Court could bring the strike squarely within the ambit of subsection (2). For example, a secondary strike is instituted in

support of several primary employers. If the secondary employer has a commercial or economic connection with some but not all the primary employers, the secondary strike could be limited to support only those primary employers against whom the secondary strike may have a possible effect.

40. A secondary strike may also be limited if, for instance, the nature and extent of the strike is a total refusal to work by the entire plant, whereas a work stoppage by one production line only may have a possible effect because the primary employer would, as a result of the stoppage, have no supplies. The focus of the enquiry into limiting the strike remains the possible effect of the secondary strike on the primary employer.

41. If the secondary employer gives an undertaking to sever all commercial links with the primary employer, then it is arguable that the secondary strike would have no effect on the primary employer as any effect that it might have had is supplanted by the effect of the secondary employer's resolve to sever its business links with the primary employer. The secondary strike may then be prohibited altogether or be

limited in accordance with the undertaking.

42. The second source of the proportionality debate may arise from the Explanatory Memorandum to the LRA which, at paragraph 8 states *inter alia* :

"Special requirements have also been introduced for secondary strikes, picketing, protest action and temporary replacement labour. These are designed to balance the rights of employees and the harm to employers and the economy."

43. If the intention of the legislature and the social partners was to introduce a test of the proportionality of the secondary strike in relation to its effect on the primary employer or the economy, as I have found above, that objective has not been accomplished upon a proper construction of section 66 (2)(c). If the secondary strike were to be limited on the basis of proportionality, the limitations should be clear, unequivocal and unambiguous. One option would have been to frame the subsection thus:

" (2) No person may take part in a secondary strike unless...

(c) the effect of the secondary strike on the secondary

employer is reasonable and proportionate to its possible direct or indirect effect on the business of

the

primary employer.”

44. The momentum for the secondary strike in this case has developed gradually. Whether it will develop further is unknown. However, if the applicant's reasoning that the nature and extent of the secondary strike and the nexus with Team Puma are so insignificant as to have no effect is accepted, then any secondary strike that begins as a low-key limited exercise could be immediately interdicted before support for the primary strikers can be galvanised.
45. The intensity of the secondary strike is one of the factors that could affect bargaining. Another factor is the nature of the nexus between the primary and secondary employers. Consequently, a strong nexus and a weak secondary strike could be as effective as a well-supported secondary strike where the nexus is weak. A secondary employer who supplies the primary employer, such as a cut, make and trim operator, with raw materials could be quite influential because of the nature of the nexus, even if the nature and extent of the secondary strike is weak and limited. Whatever the nexus and

the nature and extent of the secondary strike may be, the jurisdictional prerequisite is met if the secondary strike has a possible direct or indirect effect on the business of the primary employer.

46. Because every potential supplier of yarn has not been subjected

to a secondary strike in this case does not mean therefore that the nature and extent of a secondary strike is so limited as to have no effect on the business of the primary employer. Nor does it mean that the applicant would not be able to influence Team Puma if it is pressured by its own employees.

47. Another consideration is that as a national trade union operating in the clothing and textile industries, it is quite conceivable that the first respondent might persist with secondary strikes in the Frame Textile Group and any other employer of its members who chooses to do business with Team Puma.

48. From the information before me, I cannot conclude that the secondary strike would have no effect on the primary

employer. In so far as the applicant is one of many suppliers of raw materials (through Berg River Textiles) to the primary employer, *prima facie* the effect may be less than the effect it has as the purchaser (through Bibette) of raw materials.

49. Although a direct nexus has been established between Berg River Textiles and Bibette with Team Puma, the nexus with other divisions of the applicant is indirect. A secondary strike at these divisions could exert pressure on the applicant to instruct its divisions having a direct nexus with Team Puma to cease doing business with the latter. That would have an effect on Team Puma, however significant or otherwise.

50. I accordingly find that there is a sufficient nexus between the applicant and Team Puma that would cause the secondary strike to influence collective bargaining between the latter and its employees. The nature of the proposed strike is a total work stoppage. As it would, on the applicant's version, be harmful to its business there is an incentive for the applicant to influence the primary employer.

51. The extent of the secondary strike is uncertain at this stage as

it is not known how many of the respondents will actually heed the call. Whether the applicant will succeed in influencing Team Puma calls for speculation. That, in any case, is not the depth to which I need enquire.

52. In all the circumstances, the applicant has failed to discharge the *onus* of proving that it has a clear right to prevent the respondents from participating in a secondary strike.
53. The application for urgent relief is therefore dismissed. The issue of costs is reserved. The parties are free to reschedule the matter for argument on that issue.
54. These are the full reasons for my judgment.

PILLAY D, J

Authorities referred to:

Arenstein v Secretary for Justice 1970 (4) SA 273 (T) at 281

Billiton Aluminium South Africa Limited v National Union of Metal Workers of South Africa 2001 22 ILJ 2434 (LC)

Commissioner for Inland Revenue v Delfos 1933 AD 242 at 254-5

Gelderblom 1962 (1) SA 497 (C)

GKN SA Chep (Pty) Limited v NUMSA 1997 (10) BLLR 1370 (C)

Government of the Islamic Republic of Iran v Berends 1998 (4) SA 107 (NM)

Kauesa v Minister of Home Affairs 1996 (4) SA 965 (NMS) at 974D-E/F

Majavu 1994 (4) SA 268 (CK)

Nyamakazi v President of Bophuthatswana 1992 (4) Sa 540 (BG)

Peter v Peter and Others 1959 (2) SA 347 (A)

Principal Immigration Officer v Bhula 1931 AD 323

Samanco Limited & Another v National Union of Metalworkers of South Africa 1999 20 ILJ 2941 (LC);

Seeley of South Africa (Pty) Limited and Others v PPAWU 1997 4 BLLR 421 (LC);

South African Clothing and Textile Workers Union v Free State and Northern Cape Clothing Manufacturers 2001 22 ILJ 2636 (LAC)

Volkskas Bank a division of ABSA Bank Limited v Peterson 1993 (1) SA 312 (CPD).

Devenish G E: Interpretation of Statutes Juta and Co Ltd 1992 at 59

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