IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

REPORTABLE
OF INTEREST TO OTHER JUDGES

CASE NUMBER: J2123/05

In the matter between:

CAPE GATE (PTY) LTD ***Applicant***

and

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA ***First Respondent***

INDIVIDUAL EMPLOYEES ***Further Respondents***

J U D G M E N T

KENNEDY A J:

1] The applicant originally sought and obtained from Pillay J an interim order interdicting a strike by its employees who are members of the first respondent, NUMSA 1.

2] On the return day, when the applicant sought a final order, after hearing argument, I granted the following order, with reasons to follow:

> "*1 It is declared that the industrial action by the individual respondents constitutes an unprotected and unlawful strike.*
>
> *2 The individual respondents are interdicted from embarking on or participating in such strike.*
>
> *3 The individual respondents are directed to comply with their conditions of employment.*
>
> *4 The first respondent is interdicted from promoting, inciting or encouraging the said strike.*
>
> *5 The first respondent is to pay the applicant's costs."*

3] My reasons for granting that order are set out below.

BACKGROUND FACTS

4] There is no dispute about the material facts. Indeed, the respondents filed no answering affidavits and the matter was argued simply on the applicant's founding papers.

5] The strike involves members of NUMSA employed by the applicant in its divisions known as Davsteel and Sharon Wire Mill, where it manufactures steel and wire products.

6] The applicant and its employees are subject to the provisions of collective agreements concluded in the Bargaining Council for the Metal Engineering Industry ("*the Bargaining Council*").

7] The parties to the Bargaining Council, which include NUMSA, negotiate wages and other conditions of employment on an annual

basis.

8] Prior to 1992, the parties to the Bargaining Council negotiated only minimum wages and conditions of employment. It was the practice of many employers within the industry covered by the Bargaining Council - including the applicant - wages above the minimum rates imposed in the Bargaining Council agreements. This was commonly the subject of plant level collective bargaining.

9] During 1992 the parties to the Bargaining Council agreed to a change in the dispensation which hitherto applied: it was now agreed that when the parties agreed to a percentage increase in the minimum wages prescribed in the Bargaining Council agreements, the same percentage rate of increase would be applied to the actual rates of pay granted in the previous year by individual employers such as the applicant.

10] It was further agreed that the Bargaining Council would be the sole

forum for negotiating matters contained in the so-called Main Agreement, which governs wages and other conditions of employment, and that no plant level bargaining would take place in respect of these matters. Later sections of this judgment will set out and analyse the effect of the relevant provisions in the Main Agreement.

11] In practice, as with other employers who paid actual wages in excess of the minimum wage rates, the applicant would implement increases in actual wages at the same percentage rate as the agreed increase for minimum wages in the Main Agreement concluded through the annual negotiation process. No plant level bargaining took place in this regard.

12] The occurrence which gave rise to the strike relevant to these proceedings was a decision taken unilaterally by the applicant early in 2005 to increase the wage rates for artisans at a rate in excess of the percentage rate agreed to for the increase of minimum and actual wages in terms of the latest Main Agreement, concluded in

the Bargaining Council.

13] The reason for this special increase for artisans was the applicant's need to address the high rate of resignations by artisans attributed to the fact that there was greater competition in the wider market place for their skills. The applicant considered that it needed to pay more attractive wages to artisans in order to retain their skills and attract new recruits.

14] The imperative to grant an increase in wages above the percentage rate agreed to in the Bargaining Council applied only to artisans and not to the other categories of workers ("*the non-artisans*"), in respect of whom there was no scarcity of skills or a high turnover rate. Accordingly, the decision to grant an extraordinary increase to artisans was not applied or extended to the applicant's non-artisan employees.

15] These steps were taken by the applicant unilaterally: there was no attempt to engage NUMSA in plant level collective bargaining.

16] NUMSA objected to this, demanding that the extraordinary increase granted to artisans should be extended to all other employees. The applicant rejected this demand and refused to enter into plant level negotiations with NUMSA.

17] This prompted NUMSA to refer a dispute to the Bargaining Council, complaining of what it referred to as a dispute of mutual interest and one involving discrimination. The outcome of the dispute which it sought was that "*all employees within the company [should] benefit equally without company selective approach"*.

18] The matter came for conciliation before Commissioner Koekemoer of the Centre for Dispute Resolution, appointed by the Bargaining Council. At the outset, the applicant's representatives raised an objection to the jurisdiction of the Bargaining Council to conciliate the dispute. The basis of the objection was in essence the same as that raised in these proceedings in the Labour Court - challenging

the lawfulness of the strike - which will be dealt with below. After hearing argument, Commissioner Koekemoer handed down a written ruling, rejecting the objection raised by the applicant and finding that the Bargaining Council did indeed have the necessary jurisdiction to conciliate the dispute. Thereafter the Commissioner issued a certificate to the effect that the dispute between the parties remained unresolved.

19] On the strength of this certificate, NUMSA gave notice to the applicant that its members would embark on strike action. The applicant contended that the strike would be unprotected. Attempts were made to persuade NUMSA not to proceed with the strike but these failed. The applicant accordingly brought the present application, initially for an interim order and now for an order in final terms.

CLAUSE 37 OF THE BARGAINING COUNCIL'S MAIN AGREEMENT

20] The applicant places reliance for its argument that the strike is unlawful and unprotected on clause 37 of the Bargaining Council's Main Agreement and s 65(1)(a) and (3)(a)(i) of the Labour Relations Act ("*the LRA*").[1]

21] Clause 37 of the Main Agreement reads as follows:

> "***37. LEVELS OF BARGAINING IN THE INDUSTRY***
>
> *1) Subject to sub-clause (2) -*
>
> ***(a) the Bargaining Council shall be the sole forum for negotiating matters contained in the Main Agreement;***
>
> ***(b) during the currency of the Agreement, no matter contained in the Agreement may be an issue in dispute for the purposes of a strike or lock out or any***

1 Labour Relations Act 66 of 1995

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conduct in contemplation of a strike or lock out;

(c) any provision in a collective agreement binding an employer and employees covered by the Council, other than a collective agreement concluded by the Council, that requires an employer or a trade union to bargain collectively in respect of any matter contained in the Main Agreement, is of no force and effect.

2) Where bargaining arrangements at plant and company level, excluding agreements entered into under the auspices of the Bargaining Council, are in existence, the parties to such arrangements may, by mutual agreement,

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modify or suspend or terminate such bargaining arrangements in order to comply with sub-clause (1). In the event of the parties to such arrangements failing to agree to modify or suspend or terminate such arrangements by the date of implementation of the Main Agreement, the wage increases on scheduled rates and not on the actual rates shall be applicable to such employers and employees until the parties to such arrangement agree otherwise.

3) *The provisions of this clause shall apply equally to any trade unions not party to this Agreement.*" (emphasis added)

SECTION 65 OF THE LRA

22] The provisions of the LRA of relevance for present purposes are to be found in s 65(1)(a) and (3)(a)(i). These provisions read:

> "*65(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) that person is bound by a collective agreement that prohibits a strike or lockout in respect of the issue in dispute;***
>
> ***(b) …***
>
> *(3) Subject to a collective agreement, no person may take part in a strike or a lockout or in any conduct in contemplation or furtherance of a strike or lockout -*

a) if that party is bound by:

(i) any arbitration award or ***collective agreement that regulates the issue in dispute****;…"* (emphasis added)

THE PARTIES' OPPOSING CONTENTIONS

23] The applicant contends in essence that the strike is prohibited and unprotected because NUMSA and its members are bound by the provisions of the Main Agreement which regulate the issue in dispute - being the determination of wages - and that agreement prohibits any strike in respect of that dispute.

24] It was contended, on the other hand, for NUMSA that:

- the Commissioner's findings on jurisdiction and the issuing of a certificate that the dispute of mutual interest remained unresolved - which findings and certificate

have not been taken on review - entitle NUMSA and its members to go out on strike and, in the absence of review, this Court cannot overturn the decision of the Commissioner; and

- in any event, the issue in dispute giving rise to the strike relates to actual wage increases at plant level and is distinct from the issue regulated in the Main Agreement, being minimum and not actual wage increase rates.

THE EFFECT OF THE COMMISSIONER'S RULING AND CERTIFICATE

25] It was submitted by Mr Lagrange, on behalf of NUMSA, that the Commissioner's ruling on jurisdiction and the certificate issued by him that the dispute remained unresolved should, in the absence of any review proceedings to challenge that ruling or certificate, be accepted as conclusive of the challenge raised by the applicant in

these proceedings.

26] I was referred to a judgment of Francis J in *Mittal Steel SA Ltd v Solidarity and Others*[2]. It held that the Labour Court has exclusive jurisdiction to determine whether a strike is protected and that the CCMA and Bargaining Councils do not have any jurisdiction to make a conclusive pronouncement on that issue.[3] It was also held that the mere fact that a certificate of outcome was issued by a commissioner does not mean that the strike action that follows would be protected and that the certificate does not prevent an applicant from approaching the court for an order to declare the strike as unprotected. It would then be for the Labour Court to decide whether there was procedural and substantive compliance with the provisions of the LRA and whether a collective agreement regulates the issue in dispute.[4]

2 Unreported judgment in case number J1655/05 dated 7 September 2005
3 Para 30 of the *Mittal Steel* judgment
4 Para 32 of the *Mittal Steel* judgment

27] Mr Lagrange submitted that the *Mittal Steel* judgment was clearly wrong and that accordingly it should not be followed. It was submitted that if the judgment were correct, it would appear to imply that any challenge to the jurisdiction of a commissioner conciliating a dispute over a matter of mutual interest must be referred to the Labour Court for determination in the first instance and that such a process would severely compromise the dispute resolution procedures of the LRA. It was further submitted that the decision in the *Mittal Steel* case was made without any reference to - and was contrary to - a decision of the Labour Appeal Court in *Fidelity Guards Holdings (Pty) Ltd v Epstein N.O and Others.*[5] *In that case, Zondo JP stated:*

> "*In conclusion I am unable to find that the court a quo erred in any way in dismissing the review application. In fact I am satisfied that the judgment of the court a quo is correct in upholding that as long as the certificate of outcome stands,*

5 (2000) 21 ILJ 2382 (LAC)

the CCMA has jurisdiction to arbitrate the dispute."[6]

28] It is important to have regard to the narrow issue that arose in the *Fidelity Guards* matter. It related to the jurisdiction of the CCMA to arbitrate a dispute in respect of which a certificate of outcome had been issued at the conciliation stage. It was held that once a certificate of outcome was issued by a commissioner at the stage of conciliation, in terms of the relevant provisions of the LRA the CCMA acquired jurisdiction to proceed to the stage of arbitrating the dispute. In the absence of any application to review the issue of the certificate of outcome, a party could not challenge by way of review an arbitration award on the basis that the dispute had been invalidly referred to the CCMA at the outset.

29] That is an altogether different situation to the present one. We are here concerned with the legal status of a strike. That requires compliance with the relevant provisions of the LRA, in particular s 64 and s 65. That was not the issue before the Labour Appeal

6 *Fidelity Guards* judgment, para 21

Court in the *Fidelity Guards* matter. Accordingly it cannot be regarded as authority for the proposition now advanced on behalf of NUMSA.

30] I am in complete (and respectful) agreement with the decision of Francis J in the *Mittal Steel* matter and the reasons set out therein.

31] The fact that the Commissioner dealt with and made findings on the same arguments now raised in these proceedings cannot be regarded as having any binding effect on this court. I agree with Francis J in the *Mittal Steel* matter that neither the CCMA nor the Bargaining Council and their commissioners have the necessary jurisdiction to determine whether a strike is prohibited or protected, particularly at the stage of an attempt to conciliate the dispute.

32] Nor does the issuing of a certificate of outcome have the effect contended for on behalf of NUMSA, namely that it would render a strike lawful, protected and immune from challenge in the Labour

Court.

33] I accordingly conclude that this Court is not precluded either by the Commissioner's ruling on jurisdiction or by the certificate of outcome from determining the legal status of the intended strike action.

STATUS OF THE STRIKE

34] The legal status of the proposed strike action, and whether it is prohibited or protected under the LRA, ultimately turns on whether the "*issue in dispute*" in relation to the strike is an issue or matter regulated by the Main Agreement.

35] Part II of the Main Agreement sets out a series of rates, tables and schedules. Clause 1 thereof deals specifically with wages and earnings. Under clause 1(1)(b), employees are entitled to be paid

not less than the actual rates that they were receiving immediately prior to the applicable date plus, as a guaranteed personal increase, an additional amount as set out in the Wage Tables. There are a number of provisos to the clause, paragraph (v) of which refers to the possibility of an employer granting general increases to all employees or to a category of employees "*in excess of the guaranteed personal minimum increases provided for in this agreement*". The clause requires the employer to consult with the trade unions of the employees before granting such an increase.

36] Mr Lagrange has submitted that the effect of these clauses is that they provide merely for minimum annual increases and minimum wages and do not deal with actual wages. He contended that the issue in dispute giving rise to the present strike does not concern minimum annual wage increases as regulated by the Main Agreement but rather the selective *ad hoc* determination of actual wages of artisans, without making a commensurate increase for non-artisans.

37] It is correct that the Main Agreement does not preclude an employer from granting an increase in excess of that required by the Main Agreement. But proper regard and effect must be given to the provisions of clause 37, which I have quoted above. It is in my view artificial to interpret that clause as allowing unions and their members to negotiate at plant level and strike over wage increases which are over and above those provided for in the Main Agreement itself. The whole purpose of clause 37 is to ensure that - in contract with the pre-1992 dispensation - there is no multiplicity of forums for negotiating what is regulated in the Main Agreement and that there is to be no strike in respect of the matters agreed to in that agreement. Of relevance here is the determination of wages. That is one of the "*matters contained in the Main Agreement*" as contemplated in clause 37(1)(a).

38] The objective underlying the clause is to ensure that negotiation of such matters takes place only at the level of the Bargaining Council

and in no other forum, such as at plant level. It is also to preclude any strike action over such matters while they continue to be regulated by the Main Agreement. The clause would make little sense if it had the effect now contended for on behalf of NUMSA, namely that where wage increases are determined in the Main Agreement, employees and their unions are free to agitate for further increases by way of plant level negotiation and ultimately strike action. This would be subversive of the objective of promoting collective bargaining at the level of Bargaining Councils and the effectiveness of their agreements. This would not accord with the clear and worthy objectives of the LRA. Accordingly the interpretation which is advanced on behalf of NUMSA cannot be sustained.

39] Under clause 1 proviso (v) in Part II of the Main Agreement, if an employer such as the applicant decides unilaterally to grant an increase over and above the increase laid down in the Main Agreement to a particular category of employees, it must consult

with the union representing that category. But this does not have the effect of entitling any other category, such as the non-artisans in this matter, to engage in collective bargaining at plant level with a view to obtaining a similar increase for themselves, and when that fails, to embark on strike action. This in my view is a clear violation of clause 37 of the Main Agreement.

40] The issue in dispute relevant to the present strike is what wage increase, if any, non-artisans should receive. That seeks to reopen a matter already regulated by the Main Agreement, for that determined, for the currency of the agreement, the matter of wage increases, in what was agreed to be the exclusive forum, namely the Bargaining Council.

CONCLUSION

41] I accordingly conclude that the proposed strike would be in

violation of clause 37 of the Main Agreement and is prohibited by s 65(1)(a) and (3)(a)(i). It was therefore appropriate to make the order referred to in the introductory section of this judgment.

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P M KENNEDY AJ
ACTING JUDGE OF
THE LABOUR COURT
JOHANNESBURG
14 December 2006

Date of Hearing: 9 November 2005

Date of Judgment: 21 December 2006