IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: J2080/07

In the matter between:

FORD MOTOR COMPANY OF SA (PTY) LTD **Applicant**
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And

NATIONAL UNION OF METALWORKERS OF SA **Respondent**

SECOND AND FURTHER RESPONDENTS **Second to further Respondents (Individual Respondents)**

JUDGEMENT

AC BASSON, J

1] This was an application to have an interim order granted on 7 September 2007 and extended confirmed. The Applicant in this matter (Ford Motor Company of SA (Pty) Ltd) brought an urgent application on 8 September 2007 to interdict the "*intended industrial action*"[1] (overtime ban) of its employees (identified as the individual

1 Founding affidavit ad paragraph 4 and the Notice of Motion ad paragraph 2.

Respondents). The Applicant also sought an order directing the Individual Respondents to comply with the conditions of employment and to work the overtime scheduled for Saturday 8 September 2007 and thereafter.

2] It was contended on behalf of the Applicant that this Court only needed to factually determine the following two questions: Firstly whether there was indeed an intended withdrawal of overtime by the Individual Respondents and secondly, whether the Respondents have complied with the provisions of section 64 of the Labour Relations Act 66 of 2995 (hereinafter referred to as the "LRA").

3] In essence it was the Applicant's case that the Individual Respondents' action by refusing to work overtime on 8 September 2007 or at any time thereafter as the Applicant may require in terms of clause B3 of the collective agreement currently in operation and governed by the National Bargaining Forum (hereinafter referred to as the "NBF agreement"), amounted to an unprotected strike.

RELEVANT FACTS

4] The Applicant's main business consists of the assembling of motor vehicles at Silverton Pretoria. The relationship between the Applicant and the Respondents is, *inter alia*, governed by the National Bargaining Forum Agreement (the NBF agreement).[2] This agreement was concluded on 1 July 2007 and will remain in operation until 30 June 2010. This agreement governs wages and conditions of employment and is applicable to all hourly paid employees in the automobile manufacturing industry. Both the Applicant and the First Respondent (hereinafter referred to as "the Union") are parties to this agreement. The Union represents almost 100% of the Applicant's hourly paid employees. The Individual Respondents are members of the union and are employed by the Applicant in the paint and body shop (excluding the J97 production line) at its premises.

5] The Applicant assembles motor vehicles for the local market and has an export contract to Australia. The Applicant has to compete with the Eastern Countries as well as certain European Markets and regards the export contract to Australia as its lifeline. The Applicant contended that if deadlines are not met, it will incur additional costs and penalties. The Applicant further contended that it is currently negotiating a tender

2 See the previous paragraph.

for the production of a certain Ford Bakkie to various overseas countries. In order to be successful for this tender, the Applicant must satisfy the relevant role players of its ability to deliver a quality product within the agreed time frames. Failure to work overtime when scheduled will place this tender at risk.

6] The Applicant employs approximately 2 200 hourly paid employees. This plant consists of a body and paint shop, final assembly, operations, material, planning and logistic departments, part and accessories, customer service operations and administration which works on a five day work week and operates on a two shift system with different start and exit times. The body shop used to operate on a 3 shift pattern and the paint shop on a 2 shift pattern.

7] During August 2007 the Applicant entered into an agreement with the shop stewards of the Individual Respondents in terms of which the body shop and the paint shop will operate on a two shift system. The agreement was communicated to all the employees including the Individual Respondents. At the same time a schedule of overtime to be worked for the remainder of the year was given to all the shop stewards. The Applicant contended that it was an operational

requirement of the Applicant that its employees work overtime from time to time and that the Individual Respondents have, with a few exceptions, always complied with this condition. It further contended that overtime had in fact been worked on the first scheduled Saturday (1 September 2007). The Applicant relied on Clause B3 of the NBF agreement in terms of which the following was agreed to:

> "**B3. Overtime**
>
> *3.1 The Parties agree that due to operational requirements there is a need to work overtime, which will generally be of a voluntary nature save where otherwise agreed. The Parties further agree that such overtime will not unreasonably be withheld*".

8] When the Applicant's operational requirements needed the working of overtime, a meeting would be scheduled with the shop stewards for purposes of notifying such need and scheduling the working of such overtime for the following Saturday.

9] A meeting was held on 4 September 2007 with the Union's shop stewards to schedule the working of overtime on the forthcoming

Saturday 8 September 2007. The Applicant contended that it was explained to the shop stewards that, because the Applicant was approximately 1500 units behind schedule, it was essential to work overtime. The overtime that was required for 8 September was 6 hours for the paint shop (from 07H00 – 13H00) and 8 hours for the body shop (07H00 – 15H00). It is the Respondents' case that the overtime was excessive. The Applicant argued that the requirement to work 6 and 8 hours overtime respectively every second week does not constitute excess overtime.

MEETING OF 6 SEPTEMBER 2007

10] A further meeting was held with the shop stewards on 6 September 2007. It is clear from the minutes of the said meeting that the union had informed the Applicant that the purpose of the meeting was to inform management to cease with immediate effect the scheduling of "excessive overtime" as it had a negative impact on their members. The Applicant was further informed that if it did not comply with the demand, the Union will declare a dispute within 24 hours and that it will be done in writing. The minutes of this meeting further records the following:

"●The interpretation of what the union said earlier, is one of threatening the company with industrial action.

●*It is a foregone conclusion that the union has made up their mind to embark on illegal and unlawful action."*

11] The union also dispatched a letter to the Applicant on 6 September 2007 in which it confirmed its demand that the Applicant cease overtime. The letter further states that *"[s]hould the company fail to respond to this demand, the union will therefore declare a dispute of mutual interest with [the] company*". The Applicant responded to the letter on the same day and stated the following: "*The Company's response to the demand is that it constitutes unlawful and unprotected strike action, and that the company reserves the right to use whatever remedies are available i.t.o the LRA. You are requested to urgently intervene and revert back to the writer not later than 13H00 today. Failure to intervene and normalize the situation, will leave us with no alternative but to approach the Labour Court on a urgent basis on Friday 07, September 2007 for urgent interim relief*."

12] It is clear from the papers that the Individual Respondents have not in

fact embarked on an overtime ban and that the urgent application was brought in anticipation of strike action which was to commence on 8 September 2007. It is the case for the Applicant that the Individual Respondents have expressed an "*intention"* to embark on an unprotected overtime ban on 8 September 2007 and that it was therefore entitled to the relief sought in the Notice of Motion. It was the case for the Respondents that the Individual Respondents have never expressed an intention to embark on an overtime ban. I will return to the question whether or not it can be concluded on the papers that there was an intention to embark on overtime. It was further the Applicant's case that the intended strike was unprotected and unlawful because the Respondents have not referred any dispute to the CCMA for conciliation. The Respondents contended that the Individual Respondents have never indicated any intention to embark on a strike on 8 September 2007 let alone an unprotected strike and that it was therefore not necessary to have complied with the pre-strike procedures as envisaged by the LRA. It was further the case for the Respondent that overtime is, in any event, only worked once the parties have "*negotiated"* on the issue and only if an agreement has been reached on the issue of overtime, will the employees be required to perform overtime. It was not disputed by the Respondents that the

overtime provided for in the collective agreement was voluntary but it was submitted that the only obligation that was placed on the Individual Respondents was that they will not withhold their assent to working overtime unreasonably. It was argued on behalf of the Respondents that the Applicant had *"requested"* the Individual Respondents to work overtime and that it was up to the individuals to agree or to reject the request provided that they will not withhold such permission unreasonably. In essence it was thus the case for the Respondents that there was no contractual obligation to work overtime and that the Applicant can therefore not compel the Individual Respondents to work overtime. In support of this contention reliance was placed on a plant level agreement in terms of which it is stated that the Applicant will "*consult*" with the union "*when essential overtime is required*". It was thus argued that the Applicant had no right to compel employees to work overtime simply because overtime had to be "*negotiated*" with the shop stewards. If the Applicant thus wanted the Individual Applicants to work essential overtime, the parties had to agree to work overtime and had to sign a document to that effect.

13] I am not in agreement with the Respondents' submission that the

Individual Applicants were not contractually required to work voluntary overtime. I am also not in agreement with the submission that overtime had to be "negotiated" everytime there was a need to work overtime. It is, in my view, clear from clause B3 of the NBF agreement that the parties have agreed that, due to operational requirements, there is a need to work overtime which will generally be of a voluntary nature. What is also clear from this agreement is that parties will work such overtime and that parties will not unreasonably refuse to work overtime. There is thus, in my view, clearly a contractual obligation to work voluntary overtime. The plant level agreement also appears to be consistent with this provision in that it requires that whenever "*essential"* overtime is required, a process of consultation will be followed. Neither these two documents require that the employer (including the Applicant) must "*negotiate*" with the shop stewards and agree on whether or not to work overtime. In this regard the Applicant contended that, before overtime is worked on a particular weekend, the Applicant will consult with the shop stewards in order to schedule and facilitate such overtime and that, in the event an employee is not able to work due to his or her personal circumstances, the employee will be relieved from working such overtime provided that such employee notifies the Applicant with 24 hours of his or her inability to

work overtime. I am therefore of the view that it is clear that employees must work voluntary overtime if there is an operational requirement and only those employees with a legitimate excuse will be exempted from working such overtime. I have perused the documentation (confirming the overtime arrangements and schedules) referring to "*essential overtime*" attached to the answering affidavit and it is clear from the first document dated 29 June 2007 in terms of which overtime was scheduled for Saturday 30 June 2007 and the second document dated 8 August 2007 in terms of which overtime was scheduled from 14 August 2007, that overtime was scheduled after consultation with the union. Both these documents were signed not only by representatives of the Applicant but also by a representative of the First Respondent. Both these documents are consistent with the Applicant's case namely that the union is consulted with a view of scheduling the overtime but that this did not imply that overtime could only be worked once the parties have reached an agreement to work overtime.

14] Having concluded that there exists a contractual term to work voluntary overtime, it will necessarily follow that a refusal to work voluntary overtime will constitute a strike (provided that there is

compliance with all the elements required for strike action).[3]

WAS THERE AN INTENTION TO EMBARK ON AN OVERTIME BAN?

15] Having accepted that the Individual Respondents were compelled to work voluntary overtime in terms of the collective agreement and the plant level agreement, and having accepted that it would constitute a strike if the Individual Respondents refuse to work voluntary overtime, it now needs to be considered whether the Respondents have in fact expressed an intention to embark on a voluntary overtime ban and thus refused to work as contemplated by the definition of a strike. Before turning to this point, I need to point out that it is clear that there is compliance with the requirement that the individual employees must act in a concerted manner and that there must be a demand (see the correspondence referred to *supra*.)

16] I have already referred to the fact that the Respondents deny having expressed an intention to embark on an overtime ban. The following facts viewed as a whole, however, clearly confirm, in my view, an intention to embark on an overtime ban:

3 The definition of a strike consists of three elements: (i) A refusal to work; (ii) concerted or collective action; and (iii) For a specific purpose.

(i) The letter dated 6 September 2007 in terms of which the union unequivocally demands that the Applicant should cease to schedule "excessive" overtime. This letter further unequivocally states that should the company fail to respond to this demand the union will declare a dispute of mutual interest with the Applicant.

(ii) Attached to the Applicant's replying affidavit is the referral to the CCMA of a mutual interest dispute. The First Respondent formulates its demand as follows: *"We demand that the company should cease to schedule excessive overtime.*"

(iii) The minutes of the meeting of 6 September 2007 from which it appears that it was a foregone conclusion that the union has made up its mind to embark on industrial action.

(iv) The Respondent's answering affidavit which states the following ad paragraph 13 thereof:

"It is clear from paragraphs 5.13 and 5.19 of the applicant's

> founding affidavit that the overtime which the applicant required of the respondents to work on 8 September 2007 was merely a request (in contradistinction to an instruction). That means that the applicant had the appreciation that the plant level agreement meant that the respondents were entitled either to accede to, or refuse, the request. ***In the present event, the respondents, as they were entitled to do, elected to reject the request.***" (Own emphasis.)

17] It is not patently clear from the letter dated 6 September 2007 that the Individual Applicants, whilst unequivocally expressing a demand that the company should cease to schedule "excessive overtime", were in fact also expressing an unequivocal intention to embark on an overtime ban. However, if regard is had to the Respondents' answering affidavit, it is clear that, on the Respondents' own papers that the Individual Respondents had intended not to work overtime on 8 September 2007. It is, therefore clear that the Individual Applicants had intended to embark on a voluntary overtime ban on Saturday 8 September 2007. In light of the fact that the dispute resolution procedures provided for by the LRA have not been followed, such action constituted unprotected strike action. I am further satisfied that

the Applicant will suffer irreparable damages if the unprotected industrial action is not interdicted and that the Applicant had no other satisfactory remedy available. The Applicant had endeavoured to resolve the dispute and had endeavoured to elicit the assistance of the union but to no avail. I am therefore of the view that the Applicant has made out a proper case for confirmation of the *rule nisi*. No reason exists why costs should not follow the result.

18] Accordingly the *rule nisi* issued on granted on 7 September 2007 is confirmed with costs.

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AC BASSON, J

FOR THE APPLICANT:

H Pienaar of NKAISEING CHENIA BABA PIENAAR & SWART INC

FOR THE RESPONDENT:

Adv Lengane

Instructed by: MOTAUNG INCI

DATE OF RETURN DATE: 28 SEPTEMBER 2007

DATE OF JUDGEMENT: 16 OCTOBER 2007