IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: J738/09

In the matter between:

METRO BUS (PTY) LTD APPLICANT

AND

SOUTH AFRICAN MUNICIPAL

WORKERS UNION OBO MEMBERS RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] **11**The Metro Bus, a company wholly owned by the City of Johannesburg seeks an order against the South African Municipal Workers Union (SAMWU) in following terms:

> *"1. That the rules of service and process provided for in the rules of this Court be dispensed with in order that this matter be heard as one of urgency in terms of Rule 8.*
>
> *2. Interdicting and restraining respondent and/or members of the respondent from calling on a strike and/or participating in a strike action scheduled to commence on 28 April 2009 in terms of a notice ("strike notice") issued by respondent dated 09 April 2009.*

3. *Declaring to be unprotected and unlawful the strike action called by respondent scheduled for commencement on 28 April 2009."*

Background to the application

[2] The issue giving rise to this application concerns two disputes which SAMWU had referred to the bargaining council for conciliation during February 2009. The two disputes were formulated in the referral form as follows:

> *"Our members want to be moved within the salary band based on years of service."*
>
> *"Our members want Ngcobo to be suspended pending a disciplinary hearing."*

[3] At the conciliation hearing which was held on 09 April 2009 Metro Bus raised two points *in limine.* The first point relates to the demand that members of SAMWU be moved within the salary based on years of service. Regarding this dispute Metro Bus contended that the bargaining council did not have jurisdiction to conciliate it because it is a matter falling within the competency of the national negotiation process and is intertwined to the salary increase or salaries in general. In other words SAMWU was not entitled to demand that the issue be negotiated at local level between it and Metro Bus.

[4] Although Metro Bus is not a member of the bargaining council, it by necessary extension, falls within the jurisdiction of the bargaining council. Therefore, according to Metro Bus the bargaining council does not have the national

competence to negotiate issues which can only be negotiated and dealt with at national level.

[5] In its replying affidavit the Metro Bus amplified its contention that the demand for the movement in the salary band could not be negotiated at the local level because that issue is vested in the central council at the national level in terms of clause 3.1.2 of the constitution of the bargaining council. Clause 3.1.2 reads as follows:

> *"to endeavour to prevent disputes arising, by the negotiation and conclusion of agreements on wages, conditions of employment and all matters of mutual interest to employers and employers and employees in local government industry."*

[6] Metro Bus further argued that an issue that is of a national nature can only be negotiated at local level if the local level has been delegated powers to do so in terms clause 3.1.15 read with clause 3.2 of the constitution of the bargaining council.

[7] In its answering affidavit SAMWU denies that Metro Bus does not have jurisdiction and authority to negotiate an issue relating to salaries and binds itself to an agreement that emanate from such negotiations. However, it accepts that minimum pay for general workers and annual increments are negotiated at the national level. It further contends in the answering affidavit that the issue relating to whether or not the salary progression can be negotiated at the entity level, such as Metro Bus is an issue that can only be resolved through the

provisions of section 24 of the LRA which means the Court has no jurisdiction to entertain such an issue. Section 24 provides that a dispute about the interpretation or application of a collective agreement may be referred for conciliation failing which to arbitration. Thus the Court would not have jurisdiction to entertain a dispute concerning the interpretation or application of a collective agreement.

[8] As concerning the demand that Mr Ngcobo be suspended, it was contended that the bargaining council could not conciliate over the matter because the demand is unlawful and that any compliance with it would amount to contravention of the Labour Relations Act pertaining to the unfair labour practice. It was submitted in this respect that the suspension of Mr Ngcobo would have constituted an unfair labour practice in that after investigating the matter management found that the allegations concerning corruption by Mr Ngcobo had no merit and it was for that reason that a decision was taken not to suspend him. That decision was apparently communicated to SAMWU.

[9] The demand to have Mr Ngcobo suspended because of the alleged corruption has a long history dating back to 2007. The complaint of Metro Bus is that after the outcome of the investigation and the decision not to suspend was communicated no issue was raised by SAMWU and neither did it take any available legal step to challenge the decision. Because of this Metro Bus could not understand why the demand was raised again in 2009.

[10] The demand for the suspension of Mr Ngcobo arose from the allegation that he had approved expenditure in respect of the expense that was incurred by one Calvin Mvubu, an employee of Metro Bus. This expense was incurred in buying lunch for certain members of the South African Police Service ("SAPS") who were allegedly involved in the investigating certain shop stewards of SAMWU. SAMWU alleges that the purpose of buying the lunch the SAPS members by Mvubu, was intended to entice the SAPS members to arrest and assault the shop stewards. It was on this basis that SAMWU contended, Ngcobo, committed misconduct which warranted the suspension and the disciplinary enquiry against him.

[11] The Metro Bus does not seem to deny the allegation that Mvubu had bought lunch for the SAPS but submits in its founding affidavit that Mvubu had an allowance for entertainment expenditure or for taking out clients or people on lunch. It also conceded although he did not know the circumstances surrounding the expenditure, Mr Ngcobo authorized its payment.

[12] SAMWU contends that Metro Bus has not conducted a proper investigation in relation to its demand that Mr Ngcobo be suspended for corruption. It further contends in its answering affidavit that its demand is not based on the suspension *"come what may"* but that the suspension be implemented in a manner that does not constitute an unfair labour practice. In this regard SAMWU relied on the decision of Van Niekerk J in the recent unpublished judgment of *City of Johannesburg Metropolitan Municipality v South African Local Bargaining Council (SALGB) & Others case number J60/09.* That case,

which is dealt with in more details later in this judgment, deals with whether or not a demand that an employee be suspended fairly is an unlawful demand.

Evaluation of the application

[13] In relation to the first demand Mr Sutherland for the Metro Bus argued that collective bargaining has to be conducted at the central level unless delegated to the local level in terms of the constitution of the bargaining council. He further argued that that it would be inappropriate and unlawful to make a demand on a single municipality to engage on a matter related to salaries. He did not in this argument draw a distinction between municipalities and entities established by municipalities which are run as independent entities and have their personality different from that of the municipality.

[14] Mr Sutherland did not take issue with the fact that in terms of section 24 of the LRA the Court did not have jurisdiction in relation to disputes concerning interpretation and application of collective bargaining agreements. However, if I understood him correctly the essence of his argument is that the Court should in the exercise of its inherent powers interpret the collective agreement of the bargaining council in the present instance, to determine whether Metro Bus has the power and authority to negotiate with SAMWU on the issue which is the subject matter of these proceedings. Part of this argument is that the Court should interpret the bargaining council agreement to determine whether it imposes a restriction on Metro Bus from negotiating with SAMWU on an item which is of a national nature.

[15] In dealing with the issue of whether or not the Court had jurisdiction to consider interpretation and application of collective bargaining. Basson J in *Denel Informatics Staff Association and another v Denel Informatics (PTY) Ltd (1999) 20 ILJ 137 (LC)*at para 14, held that:

> *"14 Once again, it is clear that the Labour Court does not acquire jurisdiction in terms of the Act to adjudicate a dispute concerning the interpretation or the application of a collective agreement as such dispute must be resolved by way of arbitration. It is thus not a matter to be determined by the Labour Court."*

The Learned Judge further emphasized the point made above and said:

> *". . . the Labour Court has no jurisdiction to entertain the alleged dispute about the application or the interpretation of the recognition agreement and such dispute must be dealt with in terms of the provisions contained in s 24 of the Act. . ."*

[16] The same approach was adopted in *IMATU v Northern Pretoria Metropolitan Substructure & Others (1999) 20 ILJ 1018 (T),* where the Court held that a High Court had no jurisdiction to adjudicate a dispute arising from the interpretation or application of a collective agreement. That decision was followed in *Fredericks and Others v MEC for Education and Training, Eastern Cape and Others (2001) 22 ILJ 2603(E).* However, the decision was overruled by the Constitutional Court in *Fredericks and Others v MEC for Education and Training, Eastern Cape and Others (2002) 23 ILJ 81 (CC),* not on the basis that

the principle enunciated in *IMATU's* case was incorrect but on the basis that section 24 of the LRA does not ousts the jurisdiction of the High Court to determine disputes that raise constitutional matters that are connected with collective agreements.

[17] *Fredericks* concerned an infringement of the rights of the applicants under ss 9 and 33 of the Constitution. Their claim was based on the administrative justice and equal treatment. The Applicants' contended that the Respondent did not act procedurally fairly in the administration of Resolution 3 of the Education Labour Relations Council, which the Court found to be a collective agreement, requiring an interpretation in terms of its dispute procedure.

[18] In *Ford Motors v NUMSA, unreported case number P32/07* this Court held that:

> *"49 In the interim order, I stated that whilst, I agree with the respondent that matters of interpretation and application should be referred to the CCMA or the Bargaining Council, there are instances where it may be necessary and incidental that the court has to interpret an agreement in order to determine whether the provisions of s65 of the LRA would apply."*

[19] In my view the interpretation and application of the collective bargaining agreement is not incidental in the present instance. The dispute in the present matter is whether or not the collective agreement applies to the Metro Bus. Whilst the collective bargaining agreement refers to bargaining at national and divisional levels there is no reference to enterprise bargaining. There is also no

express prohibition of bargaining at the enterprise level. Thus the fundamental issue that needs to be determined is whether or not the provisions of the bargaining council constitution governs collective bargaining at the Metro Bus including whether or not there are certain items for negotiations that are excluded from being subjects of negotiations at that level.

[20] I now turn to deal with the demand that Mr Ngcobo should be suspended. The same issue received attention in the recent *City of Johannesburg* the case which SAMWU relied on in support of its case. In that case Van Niekerk J, held that a demand by a union that an employer should comply with the requirements relevant to a fair preventative suspension was not unlawful.

[21] In dealing with the issue of whether or not the demand for suspension of the employee in that case was lawful Van Niekerk had this to say:

> *"But is this a lawful demand? I have previously expressed the view that an employer whishing to effect a fair preventative suspension must satisfy three requirements. (See Mosweu v Premier North West Province and others unreported J2622/08 06 January 2009). The first is that the employer must be satisfied that the employee is alleged to have committed a serious offence. The second requirement is that the employer must establish that the continued presence of the employee at the workplace might jeopardise any investigation into the alleged misconduct, or endanger the well-being or safety of any person or property. The third is that the employee must be given a hearing in the*

form of an opportunity to make representations before the decision to suspend is take."

[22] The Learned Judge expressly avoided answering the question of what might happen if the employer complies with the fair requirements relating to suspension but persist with the decision not to suspend the employee whose suspension has been demanded. The criticism of the judgment by Mr Sutherland seems to centre on this unanswered question.

[23] Mr Sutherland argued that the judgment in the *City of Johannesburg* was clearly wrong and should not be followed by this Court. His criticism is based on the uncertainty that a *bona fide* employer faces if he or she complies with the requirements of a fair suspension after receiving the demand but at the end thereof does not suspend the employee against whom the demand to suspend has been made. The difficulty with the approach adopted in that judgment, according to him, is because it is, decision and not result oriented. The problem with the decision oriented approach is the uncertainty that arises as to when it can be said that strike has ended.

[24] This problem arises when the employer complies with the requirements of a fair suspension but at the end as indicated earlier decides not to suspend. If the union rejects that decision it would, according to Mr Sutherland, entail the employer having to approach the Court to determine whether or not there has been compliance. This was contrasted with a case involving a wage demand. It was argued that in a wage demand dispute there is certainty as to when it can be

said that there has been compliance with the demand. The demand would according to this argument be met when the employer indicates to the union that it would meet the percentage increase as demanded made by the union.

[25] I do not agree with the above argument because the same uncertainty about when can it be said that there has been compliance with the demand by the employer does in certain instances arise even with other disputes of interest including wage disputes. The problem that may arise was illustrated by the example given by Mr Van der Riet for SAMWU. According to him the problem in wage disputes may arise in an instance where the union for example demands a 7% wage increase. The employer accedes to the demand but adopts a formula different to that which the union may have expected. The union may for instance contended that subjecting the 7% wage increase to taxation reduces the amount their members expect to take home after the increase and therefore insist in pursuing their industrial action even after the employer conceded to the demand. It may also arise in relation to how the 7% in this example may be applied to benefits and other deductions. The employer may in the same way be faced with having to approach the Court for a determination as to whether or not there has been compliance with the demand.

[26] In the light of the above discussion I find no basis to conclude that the judgment of Van Niekerk J in the *City of Johannesburg* is wrong. I accordingly align myself with the decision in that case and consider it to be binding on this Court.

[27] The question that needs to be answered is whether Metro Bus has complied with the requirements as set out above. As indicated earlier Metro Bus states that the matter was investigated and came to the conclusion that suspension was unwarranted. This decision was communicated to SAMWU in 2007. It was only in 2009, that the issue was resuscitated. In the answering affidavit SAMWU does not deny that the decision was communicated to it and that it never questioned or challenged the decision since 2007, until recently. In its answering affidavit SAMWU states that it denies that the investigation was properly done and that the behaviour of Mr Ngcobo can only be dealt with properly if a fair disciplinary inquiry is conducted against him.

[28] On the papers before me I conclude that Metro Bus did comply with the relevant requirements relating to a fair suspension and decided that suspension was not appropriate. The decision was not challenged at the time and therefore a reasonable inference to draw taking into account the time lapse is that SAMWU did not have issue with the manner in which Metro Bus dealt with the issue. For this reason the strike action based on this demand would be unprotected and therefore SAMWU is interdicted from embarking on a strike based on the demand that Mr Ngcobo be suspended would constitute an unprotected strike.

[29] The next issue to consider is whether or not Metro Bus has a right not to be faced with a strike arising from a demand concerning movement in the salary band. In other words does the proposed industrial action meet the requirements of section 64 and section 65 of the LRA. In its founding affidavit Metro Bus contends that the planned strike action does not comply with the requirements of

section 64 of the LRA because of the unlawfulness of the demand to have Mr Ngcobo suspended. There is no issue raised concerning compliance with the requirements of section 65 of the LRA. Section 65(a) of the LRA specifically prohibits a strike where there is a binding collective agreement that prohibits a strike or lock-out in respect of an issue in dispute.

[30] The relief prayed for by Metro Bus in its papers is for a final order. Thus to succeed it has to satisfy the requirements of a final interdict. The requirements for a final interdict as set out in *NUMSA and Others v Comark Holdings (Pty) Ltd* (1997) 18 ILJ 516 (LC) are - (a) clear right (b) an actual or threatened invasion of that right and (c) absence of any other suitable remedy.

[31] I have earlier indicated that this Court does not have jurisdiction to interpret collective bargaining agreements. There is no evidence that the Metro Bus has referred a dispute concerning interpretation and application of the collective agreement to any of the relevant dispute resolution bodies. In my view it is only once there has been a determination by an arbitrator that the collective bargaining agreement applies to Metro Bus that it can be said that Metro Bus has a right not to be faced with a strike arising from a demand related to wages.

[32] Mr Sutherland argued that in the alternative the Court should grant an interim order interdicting the strike. The requirements for an interim order are of course less burden some than those of a final order. All what is required in an interim order is amongst others to show the existence of a *prima facie* right that may even be in doubt. The first hurdle with the submission for the urgent application

is that this was not prayed for in the notice of motion neither was an application to amend the papers made. I am therefore enjoined to determine this matter on the papers before me. On the facts and the circumstances of this case I was not persuaded that the dictates of justice required me to go beyond what was pleaded in the papers.

[33] The evidence on the papers on the other hand reveals that the planed strike action complies with the definition of a strike as envisaged in section 213 of the LRA and also meets the procedural requirements of section 64 of the LRA. It would seem to me that the prohibition provided for under section 65 of the LRA would only arise once the arbitrator has made a determination that accord with Metro Bus's interpretation. However, as appears from the earlier discussion the same cannot be said of the second demand. Metro Bus having complied with the requirement for a fair suspension complied with SAMWU's demand and therefore, I am satisfied that it has been shown that Metro Bus has a right not to be faced with a strike based on this demand.

[34] It is therefore my view that Metro Bus has failed to show that it has a right not to be confronted with a strike because there is a binding collective agreement prohibiting bargaining on the issue in dispute at the enterprise level.

[35] Therefore I find:

(i) That a strike based on or including the second demand would be unlawful and unprotected.

(ii) SAMWU is entitled to embark on the planned strike action based on the first demand which concerns the demand that their members be moved within the salary band based on years of service. The strike action based on this demand would be lawful and protected.

[36] The above conclusion means that both parties have been partially successful and therefore ordinarily costs should be awarded on a 50/50 basis. However, because of the on going relationship between the parties I am of the view that costs should not follow the result.

[37] The following order is made:

(i) The application is dismissed in relation to the first demand, which concerns the movement within the salary band.

(ii) There is no order as to costs.

Molahlehi J

Date of Hearing : 21st April 2009

Date of Judgment : 28th April 2009

Appearances

For the Applicant : Adv R T Sutherland SC with Adv W R Mokhari

Instructed by : Werksmans Incorporated

For the Respondent: Adv J G Van Der Riet SC

Instructed by : Cheadle Thompson & Haysom Inc