IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

J 2436/07

In the matter between:

BENHAUSE NORTHWEST (PTY) LTD **APPLICANT**

and

NATIONAL UNION OF MINEWORKERS **FIRST RESPONDENT**

LUNGISA NDZEKU & OTHERS **SECOND RESPONDENT**

JUDGMENT

Introduction

1. The purpose and nature of this application was to obtain a confirmation of a *rule nisi* granted for an interdict as contemplated in section 68 (1) (a) of the Labour Relations Act 66 of 1995 ("the Act"). The *rule nisi* was granted by this court on 7 November 2007 against the first respondent and the individual respondents, who are employees of the applicant, on the basis that the strike which commenced in the morning of 7 November 2007, did not comply with the provisions of section 65 (1) (a) and/or (b) of the Act and the provisions of clause 10 and 11 of a collective agreement concluded by the parties on 14 June 2007. The respondents opposed the confirmation of the *rule nisi*.

Background facts

2. During August 2007, representatives of the applicant and those of the first respondent commenced with their negotiations on wages and other substantive terms and conditions of employment. Various meetings were held in an attempt to agree on those issues. In a meeting which the parties held on 8 October 2007, the first respondent declared a dispute, which it then referred to the Commission for Conciliation, Mediation and

Arbitration ("the CCMA") for conciliation. A conciliation attended by both parties was held on 29 October 2007 but the dispute could not be resolved. As a consequence Commissioner R. Mudau issued a certificate of outcome declaring that the dispute, concerning matters of mutual interest was unresolved.

3. On 2 November 2007 the first respondent issued a notice of a strike at the applicant's mining sites, stating that the strike would commence at 06h30 on 7 November 2007. The Operations Manager of the applicant one Mr P. Lightfoot issued a letter dated 5 November 2007 to the employees in which the applicant's latest proposals were explained. Various attempts were made by the parties to resolve the dispute and to avoid the commencement of the strike. The applicant issued a letter dated 6 November 2007 calling for a meeting of the parties to be held on 7 November 2007. In that letter it was indicated that if the discussions were unsuccessful to settle the dispute and the strike commenced, the applicant would approach this court to bring an urgent application to stop the strike. The bases for the application were outlined in the letter. The strike commenced in the morning of 7 November 2007 as planned and the applicant brought this application.

The Collective Agreement

4. On 14 June 2007 the applicant and the respondent concluded a collective agreement. At the time the dispute arose between the parties up to and include the period of the strike, the collective agreement was still in force and binding on the parties. The applicant placed reliance on clauses 8, 10 and 11 of the collective agreement in initiating the urgent application to stop the strike.

Clause 8

It deals with collective bargaining. In terms of it, annual negotiations in respect of wages and other substantive terms and conditions of employment for the following wage year, from 1 October to 30 September must be held in August. The parties initiate such negotiations by exchanging their proposals in writing. Negotiations are then to commence within 30 days after the receipt of such proposals. The duration and frequency of such meetings are a matter of agreement between the parties provided that no party is to unreasonably delay the holding of such a meeting.

Clause 10

It provides for dispute procedures and reads:

"10.1. Any party to the dispute about the interpretation or application of this or any other collective agreement entered into between the NUM and the Company may refer the dispute to the Company or the NUM. The Company and the NUM must the meet in an attempt to resolve the dispute. (sic)

10.2. If the dispute remains unresolved, NUM and the Company must appoint the third party to conciliate and arbitrate the dispute.

10.3. If the NUM and the Company fail to agree on who should conciliate and arbitrate the dispute within 30 (thirty) days of the referral, the director of the CCMA must appoint the conciliator.

10.4. The conciliator/arbitrator must first try to resolve the dispute through mediation. The costs of mediation shall be borne equally by the parties.

10.5. If the dispute remains unresolved, the conciliator/arbitrator must resolve the dispute through arbitration. The costs of arbitration shall be left to the decision of the arbitrator.

10.6. The conciliator/arbitrator may conduct the arbitration in a manner that the conciliator/arbitrator considers appropriate in order to determine a dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formality.

10.7. The conciliator/arbitrator may make any appropriate arbitration award that gives effect to the collective agreement."

4.13. Clause 11

"11.1. The parties agree not to support, instigate, encourage, incite, organize or take part in a strike or lock-out against each other on any issues that is contrary to the Labour Relations Act, a collective agreement or concerns an issue which parties have agreed to refer to the CCMA. (sic)

11.2. The Company shall be entitled to take such actions as it may deem necessary to deal with issues of misconduct, criminal conduct or serious breaches of this agreement resulting in injury, loss of life or damage to Company or private property during strike.

11.3. Parties agree to utilise the dispute process outlined in the clause 10 of this agreement prior to embarking on any industrial action.

11.4. The parties agree that it is imperative that the communication between the Company and the NUM be maintained during any industrial action.

11.5. to facilitate such communication, the NUM shall ensure that union officials make themselves available to assist the Company during

industrial action and that the NUM will provide the Company with the list of the available union officials and trade union representatives, either prior to or simultaneously with giving the Company 48 hours notice of such proposed industrial actions in terms of the Labour Relations Act." (sic)

The *rule nisi* application

Applicant's submissions

5. The strike was unprocedural, unlawful and unprotected and therefore the applicant had a clear right for the interdict it was seeking. Clause 10 of the collective agreement regulates, in addition to the provisions of the Act, any strike between the applicant, the first respondent and its members. It provides the parties with two distinct opportunities, a mediation and an arbitration meeting facilitated by a third party, to attempt to resolve the dispute. The obligations in terms of clauses 10 and 11.3 had not been complied with and utilised. In the premises, the strike was unlawful, unprocedural and unprotected as the parties had not complied with their contractual agreed obligations. The strike was further in conflict with the provisions of section 65 (1) (a) and/or (b) of the Act. The first respondent also failed to supply the particulars contemplated in clause 11.5.

6. If the unprotected strike was not interdicted, the applicant would suffer irreparable harm. The strike which would result in total unproductivity at the applicant's mining sites, would not only result in the destruction of the applicant; devoid the individual respondents of their job security, but would enable the applicant's clients to employ outside labour to continue with the mining activities and to cancel service agreements with the applicant. As such the balance of convenience favoured the applicant.

7. The applicant was left with no alternative remedy to stop the unprotected strike and the unlawful entry into the mining sites by the striking employees which would result in conflict and labour unrest.

8. Due to the urgency of the matter the applicant was asking to be granted a shorter period of the notice, instead of it giving the striking employees a 48 hours' notice, in terms of section 68 (2) of the Act.

9. The *rule nisi* application came before Potgieter AJ on 7 November 2007 and, as already indicated, he granted the *rule nisi*. The answering affidavit was only filed on 5 December 2007, in opposition to the final order. The return date was on 6 December 2007 extended to 28 February 2008.

Respondents' submissions

10. It was not true that the applicant had a right to approach this court in terms of section 68 (1) of the Act for an interdict because the strike complied with the requirements of the Act, was lawful and protected.

11. That clause 10 of the collective agreement regulated any strike between the applicant and the first respondent and its employee members was denied. Clause 10 regulated a dispute about the interpretation or application of any collective agreement between the parties. It had nothing to do with wages or a strike in respect of wages. It was admitted that the collective agreement was still in force and that the parties agreed to utilise the dispute process outlined in clause 10 prior to embarking on any industrial action. However, the agreement in clause 11.3 related to any industrial action in respect of any dispute referred to in clause 10 and not any other dispute. It also gave the parties a right to

follow clause 10 where it was applicable but not a duty to follow clause 10 procedures.

12. There can not be any industrial action after utilising the dispute process outlined in clause 10 as the process is one which, if utilised, would lead to the resolution of the dispute, either by agreement or through a binding arbitration award. The parties did not intend to do away with the right to strike over wages and clearly intended to retain the right to strike in terms of section 64 of the Act. The respondents did not comply with clause 10 as it was not applicable to the dispute and because the respondents were not obliged to comply therewith.

13. Should the court find that clauses 10 and 11 were applicable to the dispute, the arbitrator and not the court would then have jurisdiction to deal with the dispute. In that event the court would not have jurisdiction to pronounce on the interpretation or application of the collective agreement and consequently no jurisdiction to declare the strike as unprotected or to interdict the respondents from embarking on the strike.

14. The union officials were available to assist the applicant during the strike. The first respondent had already provided the applicant with a list of the available officials and trade union representatives at the commencement of the strike. They were the branch committee members who were appointed to facilitate communication between the union and its members, in all matters, including strikes.

15. The harm that would be suffered by the applicant constituted a necessary consequence of a legal and protected strike. There was no unlawful entry by first respondent's members. Nor was there any threat of any unlawful entry. The respondent neither entered nor threatened to enter the applicant's premises during the strike. Not only the balance of

convenience but also the provisions of the law dictate that the court should dismiss the application.

Further developments

16. The strike effectively ended on 9 November 2007. The applicant took the view that certain acts of its employees during the strike were constituting misconduct and it held two separate collective disciplinary enquiries. Some of the employees were found guilty and were dismissed on 11 November 2007. The first respondent referred a dispute relating to the dismissal of 11 employees for conciliation by the CCMA. There was a second referral made to the CCMA by the first respondent in connection with the contractual claims of the employees who had been dismissed. However the dismissed employees were re-employed on 13 November 2007. The dispute of the parties was finally resolved and a written settlement agreement dated 21 November 2007 embodies the terms of such settlement.

17. The applicant filed its replying affidavit on 5 January 2008 and the parties appeared before me on 28 February 2008 to argue what a final relief to be issued by court should be. The further developments to which reference has been made show that in fact the final relief sought has become academic. It became clear in the arguments presented that more than anything, the parties were concerned about a costs order as no settlement was reached in regard thereto.

18. In its founding and replying affidavits, the applicant stated that the first respondent represented 46% of the employees who took part in a strike. In its opposing papers, the first respondent chose not to dispute that part of the declaration by the applicant in its founding affidavit. In its replying affidavit the applicant stated that the 46% had decreased to 20% on 5

December 2007 when Mr Langabi deposed to the opposing affidavit. In respect of the decrease, the first respondent was not given a chance to respond thereto. From the undisputed figures, 54% of the employees went on a strike without a vein attempt at a compliance with the Act. According to Mr Hendrich Niemand, a site manager of the applicant, the papers for the application were served to the individual employees. The *rule nisi* appears to have also been served to the individual employees who were not represented by the first respondent. There was no appearance by or on behalf of the 54% individual employees to oppose this application.

19. In respect of the 46% and as the matter has become settled, I find the alternative suggestion by the applicant to be appropriate in the disposal of this matter and will accordingly not confirm the *rule nisi*. There is an ongoing relationship between the parties. It is in their interest that they stay committed to an amicable solution of their labour disputes. It should serve as a guide to the parties to point out that the provisions of clause 11.1 and 11.3 while they were agreed upon, remain unclear if they are peremptory or merely create a choice for the parties. The expression “shall be” as used in clause 11.2 or “may be” if appropriately used would have given the parties a clear revellation of their intention in this regard.

20. As a consequence, the following order shall issue:

    1. The *rule nisi* is confirmed in respect of the 54% employees of the applicant who took part in the strike.
    2. It is discharged in respect of the second to further respondents as constitute 46% of the employees of the applicant and were members of the first respondent on 7 November 2007.
    3. The employees in paragraph 1 of this order are jointly and severally liable to the applicant for the costs, including those of two counsel.

4. In respect of paragraph two of this order, no costs order is made.

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Cele AJ

APPEARANCES:

For the Applicant: ESJ van Groen SC

For the Respondent: E. S. Makinta