THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not reportable

Case no C 408/16

In the matter between:

CAPE GLOBAL CONSTRUCTION AND ENGINEEERING TRAINING CENTRE (PTY) LTD	Applicant

And

BUILDING INDUSTRY BARGAINING COUNCIL (CAPE OF GOOD HOPE)	Respondent

Heard: 8 July 2016

Judgment: 15 July 2016

JUDGMENT

VAN NIEKERK J

[1] The applicant seeks an interim order, pending the final determination of a demarcation dispute, preventing the respondent and its agents from what it contends are unlawful acts during the course of site inspections carried out at the sites of one of the applicant's clients, NMC (Pty) Ltd (NMC). These are my brief reasons for the order that is recorded below.

[2] It is not in dispute that the applicant and its employees are currently registered with the bargaining council established for the metal and engineering industries (MEIBC), and that the terms and conditions of employment of the applicant's employees are regulated by the agreements concluded in the MEIBC. There is currently a demarcation dispute pending between the parties. The issue to be determined in that dispute is whether the applicant's employee engaged at NMC sites fall under the jurisdiction of the respondent or the MEIBC. The demarcation hearing has been postponed to mid-October 2016. The respondent contends that the applicant's employees on NMC sites are subject to its jurisdiction, that they are required to be registered with the respondent, and that its collective agreements apply to them.

[3] The applicant contends that the respondent's agents conducting inspections at NMC sites have informed the applicant's employees that they cannot be registered with the MEIBC, that they are obliged to be registered with the respondent if they want to work on NMC sites, that they are currently not entitled to benefits and that in order to qualify for benefits, they must register with the respondent. It is not disputed that the respondent's agents have required the applicant's employees to complete what is referred to as a 'provisional registration' form. The applicant contends that the sole purpose of the respondent requiring its employees to complete the form is to procure the registration with the respondent and that this, in itself, is subversive and undermining of the pending demarcation process. It warrants mention that the registration form informs employees that the registration application can be

completed only once a copy of the relevant employee's identity document is received and all other information required to submitted and that to this end, employees are required to bring the form and their identity documents to the respondents office 'to receive your December leave pay'.

[4] I deal first with the question of urgency. The respondent contends that the application is not urgent, primarily on the basis that any urgency is self-created. Initial complaints regarding the conduct of the respondent and its agents were made as early as February 2016, when an undertaking was sought failing which the applicant indicated that it would consider approaching this court for an urgent interdict. Site inspections by the respondent continued during April, May and June 2016 and no application for an urgent interdict was filed in circumstances in which the applicant must have been aware of the inspections. The applicant contends that the matter is inherently urgent, given the ongoing nature of the harm. It relies particularly on a letter dated 17 June 2016 when the respondent was again requested to provide a written undertaking that it would not carry out inspections in an unlawful manner, failing which this application would be brought. The respondent's attorneys responded to that letter on 21 June 2016, stating that the allegations were unsubstantiated and seeking details that were, so the applicant contends, within the respondent's knowledge. The letter concludes with a statement to the effect that the respondent would continue to conduct inspections of building sites as it has done in the past, including NMC sites. On 22 June 2016, the respondent's attorneys addressed a letter to NMC reiterating its position that it would continue to do site inspections and, pending the demarcation, would 'not follow these through to arbitration', but that it would, in the event that the demarcation dispute was determined in its favour, hold the applicant and NMC jointly and severally liable for any payments due to it. The present application was filed on 1 July 2016.

[5] I am satisfied having regard to the ongoing nature of the harm that is alleged and the unequivocal refusal by the respondent during the last week of June to provide

the undertaking sought by the applicant, that this is not a matter where it can be said that urgency has been self-created. Clearly, the applicant would not be able to obtain substantial redress at any hearing in due course and in my view, this warrants the matter being treated as urgent. The fact that the applicant did not seek an expedited hearing as contemplated by the practice manual is not fatal. The present application was filed in circumstances where the court was in recess for some four weeks, and it is doubtful whether even an expedited hearing could be arranged before the recommencement of the demarcation hearing.

[6] The parties are in agreement that since the present application is one in which the applicant seeks interim relief, the principles set out in *Webster v Mitchell* 1948 (1) SA 1186 (W) are applicable. In essence, this requires that where a genuine dispute of fact arises on the papers, the applicant's version must be preferred.

[7] The only material dispute that arise from the papers are whether the respondent's agents have singled out the applicant's employees, separated them from other employees on-site and informed them that they cannot be registered with the MEIBC. The respondent does not dispute that its agents, in accordance with the standard operating procedure, interview employees and ask questions relating to the terms of employment. This information is recorded on a prescribed form which is signed by the employee concerned. The form provided to employees in the present instance is that which is described, as I have indicated above, as a 'standard provisional registration form' which the respondent avers is put to various uses, including the collection and confirmation of employee information. To the extent that the respondent avers that the forms are not handed to employees to procure their individual registration with the respondent or to require them to report at the offices of the respondent, that begs the question of the stated purpose of the form. The face of the form clearly indicates that its purpose is to secure the provisional registration of new employees, for the purposes of assessing arrear wages. Further, the document specifically directs

employees to bring the form, together with an ID document, to the respondent's offices 'to receive your December leave pay'. In my view, the terms of the document should be viewed from the perspective of the employee to whom the document is issued. I agree with Mr Leslie, who appeared for the applicant, that an employee is more likely than not to consider that the document amounts to something more than the mere capturing of information and that some action is required on the employee's part in relation to registration with the respondent and the receipt of benefits in the form particularly of leave pay.

[8] The applicant contends, in support of the *prima facie* right on which it relies, that until such time as the demarcation dispute is resolved, the respondent has no right to take steps aiming at procuring the registration of the applicant's employees with the respondent, since this is the very subject matter of the pending dispute. The apprehension of irreparable harm on which the applicant relies is one that amounts to an irremediable breach of its rights. In particular, the applicant contends that it and its employees have the right to carry on their activities free of unlawful harassment from the respondent. The applicant also relies on what it contends will amount to disruption, confusion and instability being sown by the respondent at NMC sites, with the prospect of labour unrest and mass resignations. Should the respondent be permitted to persist with its conduct, the applicant contends that it and its employees will be severely prejudiced and that on the other hand, should the relief sought be granted, given that the notice of motion is limited to interdicting unlawful conduct only, there will be no prejudice to the respondent. The respondent will be free to continue site inspections and perform its statutory mandate, but within the bounds of lawfulness. Finally, the applicant contends that it has no adequate, ordinary legal remedy available to it.

[9] At the outset, it should be emphasised that the applicant does not seek to prevent the respondent from lawfully carrying out its obligations in terms of the Labour Relations Act and in particular, does not seek an order preventing the

respondent from carrying out any site inspections at NMC sites or even issuing compliance orders against the applicant. The relief sought is narrow – the applicant seeks only to limit the conduct of the respondent's agents during site inspections which it contends exceeds the bounds of lawfulness. As I have indicated, much of the relief sought is not the subject of any material dispute of fact and would, if established, entitle the applicant to the relief that it seeks. To the extent that the respondent denies that its agents single out the applicants employees and separate them from other employees on-site and informed them that they cannot be registered with the MEIBC and that they are not permitted to work on NMC sites until such time as they are registered, given the applicable test, these disputes of fact must be resolved in favour of the applicant. It is likely, given the facts regarding the agents' conduct in requiring employees to register in order to receive benefits and the like that the agents would also have informed the employees that they must not be registered with the MEIBC and that they would not be permitted on NMC sites until they had registered with the respondent. I should mention in this regard that in the applicant's letter of demand dated 17 June 2016, it was specifically put to the respondent that its inspectors provided the applicants employees with registration forms and advised them that they must register themselves with the respondent. The response dated 21 June 2016 contains a categorical denial of these allegations, and a refusal to provide the undertaking sought on this basis. In these proceedings, in the answering papers and in particular in the supporting affidavits of various of the respondent's agents, it was confirmed that employees were required to complete the provisional registration forms and that copies of the completed forms were handed back to them.

[10] Put bluntly, unless and until there has been a demarcation in the respondent's favour, the respondent's agents have no business conducting themselves in the manner contemplated in paragraph 2 of the notice of motion. Of course, they are entitled (indeed obliged) to exercise their duties under the LRA and that they are entitled to carry out site inspections. What they are not entitled to do is to act

unlawfully. The prohibitory interdict sought by the applicant does no more than require the respondent's agents to act within the proper and lawful course and scope of their statutory duties. For the above reasons, in my view, the applicant is entitled to the relief it seeks.

[11] Finally, there is no reason why costs should not follow the result.

I make the following order:

1. Pending the final determination of the demarcation dispute between the respondent and the applicant before the CCMA under case number WECT 19390- 15:
   1.1. The respondent and/or its agents, in carrying out site inspection at NMC sites upon which the applicant's employees work, are interdicted and restrained from:
      1.1.1. victimising and/or singling out the applicant's employees by *inter alia* calling them together as a group separated from all other employees employed or engaged at the NMC site in question;
      1.1.2. informing the applicant's employees that they cannot be registered with the Metal and Engineering Industries Bargaining Council;
      1.1.3. informing the applicant's employees that they are obliged and/or required to register with the respondent;
      1.1.4. purporting to require and/or advise the applicant's employees to register with the respondent;
      1.1.5. furnishing the applicant's employees with application forms for registration with the respondent;
      1.1.6. informing the applicant's employees that they are not permitted to work or be present at the NMC sites until such time as they are registered with the respondent;

1.1.7. making any representation to the applicant's employees regarding their current entitlement to employment benefits, including but not limited to:

1.1.7.1. statements to the effect that the applicant's employees are not entitled to benefits, and

1.1.7.2. statements to the effect that the applicant is "stealing" or "robbing them" of their benefits; and

1.1.8. in any manner unlawfully disrupting the applicant's employees' activities on NMC sites and/or inciting or intimidating them in any way.

2. The respondent is to pay the costs of this application.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv. G Leslie, instructed by Assheton-Smith Inc.

For the respondent: Adv. C Bosch, instructed by Bowman Gilfillan Inc.