

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case no: D448/19

In the matter between:

MAHLE BEHR SA (PTY) LTD

Applicant

And

NUMSA AND FURTHER RESPONDENTS

LISTED ON ANNEXURE A

Respondent

Case no: D439/19

In the matter between:

FOSKOR (PTY) LTD

Applicant

And

NUMSA AND FURTHER RESPONDENTS

LISTED ON ANNEXURE X

Respondent

Heard: 19 March 2018

Delivered: 20 March 2018

JUDGMENT

GUSH J

- [1] The applicants in both the above matters applied as a matter of urgency for an order interdicting the first and further respondents from engaging in a strike.
- [2] It was common cause that the respondents in both matters had not conducted a secret ballot of members prior to engaging in the strike.
- [3] Before hearing argument in the matters I inquired from the parties whether the transitional provisions set out in section 19 of the Labour Relations Amendment Act Number 8 of 2018 were relevant to a consideration of the applications and whether the transitional provisions contained in the act

applied to the respondents. The amendment act came into operation on 1 January 2019.

[4] The transitional provisions set out in section 19 of the amendment act are as follows:

1. the registrar must, within 180 days of the commencement of this Act, in respect of registered trade unions ... That do not provide for recorded and secret ballot in the constitutions –
 - a. consult with the national office bearers of those unions ... On the most appropriate means to amend the constitution to comply with section 95; and
 - b. issue a directive to those unions ... As for the period within which the amendment to the constitution is to be affected, in compliance with the procedures set out in the amended constitution.
2. Until a registered trade union ... complies with the directive made in terms of subsection (1(b) and the requirements of section 95 (5)(p) and (q) of the Act, before engaging in a strike ... , must conduct a secret ballot of members.

[5] It became clear that it was also common cause that the respondent in both matters was a registered trade union that its constitution did not provide for a “recorded and secret ballot” to be held prior to engaging in a strike. It was also clear and common cause that the respondent’s did not comply with the requirements of section 95 (5)(p) or (q) of the Labour Relations Act 66 of 1995.

[6] In order to properly deal with the issue the applications were adjourned to 19 March 2019 to allow the parties to prepare argument on whether the provisions of section 19 (2) applied to the respondent and obliged it to conduct a secret ballot before engaging in the strike.

- [7] Section 95 (p) and (q) of the Act have, from its inception, required a trade union that applies for registration to include in its Constitution a provision:

that the trade union ... before calling a strike, must conduct a ballot of those of its members in respect of whom it intends to call the strike; and

that members of the trade union ... may not be disciplined will have the membership terminated for failure or refusal to participate in a strike if ... no ballot was held ... or majority of members who voted did not vote in favour of the strike.

- [8] It is so that section 67 (7) provides that the failure of a trade union to comply with a provision in its Constitution regarding a ballot may not give rise to or constitute a ground for any litigation affecting the legality of section conferred on the strikers. It is apposite to emphasize that section applies only to those trade unions who have complied with the requirements of section 95 with regard to the inclusion in their constitution of the requirement to ballot before engaging in a strike.

- [9] Mr. Purdon, on behalf of the respondents in both matters, argued, firstly, that the transitional provisions amounted to an infringement of the respondent's constitutional right to strike. Secondly, Mr. Purdon argued that the transitional provision could not apply to the respondents as the obligation to conduct a secret ballot arose only after the registrar had issued the directive.

- [10] As far as the first issue is concerned it appears clear from the transitional provisions that the right to strike is not limited. All that is required should a union not wish to be subject to the transitional provisions is for that union's constitution to essentially comply with the requirements of section 95 (5)(p). This provision has been a requirement since the inception of the Labour Relations Act 66 of 95. It is inconceivable that a trade union would have been

registered if its constitution at the time did not comply with the requirements of section 95(5). The section specifically provides that “the constitution of any trade union that intends to register must” comply *inter alia* with subsection 5.

[11] It is also simply so that in order to engage in a strike or that is required is for the union to conduct a secret ballot of members. That is the extent of the compliance the transitional provision requires.

[12] Mr Purdon’s second argument was premised on what he suggested was an issue related to the interpretation of the section. He suggested that the section should be interpreted to mean that the transitional provisions would only apply after the registrar had issued the directive and before there was compliance with the directive.

[13] In interpreting statutes the court is required to apply the accepted canons of interpretation. In this matter I am of the view that the provisions of section 19 are clear and unambiguous and the court is obliged to effect thereto.

[14] The purpose of the legislation is clear in that its purpose *inter alia* is to provide that before a union may engage in a strike it should conduct a secret ballot of its members. In addition to this provision and to regulate the interim position the transitional provisions require the holding of a secret ballot by a union (and employers organisation in respect of a lock out) prior to engaging in a strike. The requirement is peremptory and applies only to registered trade unions that do not include in their constitution the requirement of a ballot.

[15] To interpret the section as not applying to the respondents negates any suggestion that the transitional provisions will apply in the interim pending compliance.

[16] That being so I am satisfied that the transitional requirements apply to those unions whose constitutions do not provide for a “recorded and secret ballot” and that in the interim prior to complying with the requirements relating to a secret ballot they “must conduct a secret ballot of members” before engaging in a strike.

[17] This is a peremptory provision and until the respondents comply they may not engage in a strike.

[18] That being so and for the reasons set out above I am satisfied that in the absence of a secret ballot the respondents are not entitled to engage in the strike and I grant the following order:

- a. In the absence of the first respondent having conducted a secret ballot as required by section 19 of the Labour Relations Amendment Act 8 of 2018, in both matters, the respondents are interdicted from engaging in the current strikes.

D H Gush
Judge of the Labour Court of
South Africa

APPEARANCES:

In Case No 448/19

FOR THE APPLICANT:

Mr Haslop: Woodhead Bigby

FOR THE RESPONDENT:

Mr Purdon: Brett Purdon Attorneys

Case no: D439/19

FOR THE APPLICANT:

Ms Allen.

FOR THE RESPONDENT:

Mr Purdon: Brett Purdon Attorneys