REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no J 2301/13

In the matter between:

TRANSNET SOC LIMITED **APPLICANT**

and

NATIONAL TRANSPORT MOVEMENT **1st RESPONDENT**

INDIVIDUAL RESPONDENTS LISTED

IN ANNEXURES A & B **2nd AND FURTHER RESPONDENTS**

Application heard: 16 October 2013

Judgment delivered: 21 October 2013

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an urgent application for an interim order declaring a strike by the second to further respondents (the individual respondents) to be unprotected, and for other consequential relief. The applicant contends that the strike is unprotected because acceding to the first respondent's demand would compel it to breach the

terms of a collective agreement concluded with trade unions other than the first respondent. These are the brief reasons for the decision to which I have come.

Material facts

[2] The relevant facts are a matter of common cause. In November 2007, the applicant (Transnet) concluded a recognition agreement with a number of trade unions representing its employees. In terms of the agreement, and subject to certain interim arrangements, thresholds were fixed for recognition. The first respondent is not a party to the collective agreement; it is a breakaway from one of the signatory unions and was registered only in June 2012.

[3] The agreement draws a distinction between sufficiently representative unions defined to mean, after 30 September 2009, trade unions that represent 30% of employees in the bargaining unit and also 30% of employees in the bargaining unit in an operating division. A trade union is also sufficiently representative in a particular operating division if it meets the applicable threshold in that operating division. The bargaining unit is defined to include, with some exceptions, all permanent and fixed-term contract employees of Transnet. 'Operating Divisions' are defined to mean Transnet's businesses, including Transnet Rail Engineering and Transnet Freight Rail.

[4] Clause 4 of the agreement regulates recognition thresholds. Clause 4.1 provides that any union seeking recognition by Transnet must meet the threshold established by the definition of 'sufficiently representative union', i.e. 30%. In terms of clause 4.2, each operating division undertakes to recognise sufficiently representative unions as the representative of their members in that division, for so long as they maintain the prescribed level of representivity.

[5] Sufficiently representative unions have the rights, broadly speaking, of access to the workplace in accordance with s 12 of the LRA, deduction of union subscriptions in terms of s 13, time off in terms of s 15, disclosure of information in terms of s 16 and the election of shop stewards in terms of s 14. The collective

agreement does not deal directly with recognition for the purposes of negotiations on wages and other substantive conditions of employment – these take place in the bargaining council, where admission to the council is regulated by the council's constitution.

[6] In October 2012, the first respondent approached Transnet seeking organisational rights. It was agreed that a verification exercise would be conducted. In a report issued in December 2012, the Tokiso dispute resolution agency recorded that the first respondent had only 836 members in the engineering division, a number that fell far below the 30% threshold.

[7] During January 2013, the first respondent referred a dispute to the CCMA concerning organisational rights that it sought at Transnet Engineering and Transnet Freight Rail. The dispute was the subject of a conciliation meeting, and on 30 January 2013, the commissioner issued a certificate to the effect that the dispute remained unresolved. At the conciliation, Transnet resisted the first respondent's demand on the same basis that it opposes these proceedings, i.e. basis that it was a party to a binding collective agreement that regulated the issue of recognition, and that to accede to the first respondent's demand would amount to a breach of the agreement

[8] On 4 February 2013, the first respondent issued a strike notice, giving notice of its intention to strike in support of its demand for organisational rights at Transnet Engineering. On 12 February 2013, the strike was suspended. Between February and October 2013, various disputes were referred to the CCMA and the bargaining council regarding amongst other things, the application and interpretation of the recognition agreement. These referrals and the rulings made are not directly relevant to the present application.

[9] On 7 October 2013, Transnet received notice from the first respondent that it intended to resume the strike at Transnet Freight Rail, Transnet Rail Engineering 'and all other divisions of Transnet' on 11 October 2013. The notice records that

the strike action will continue '*until such a time that Transnet would have granted the organisational rights to NTM as well as the collective bargaining rights* (sic).'

The issue

[10] At the hearing of the application, it was common cause that the crisp issue in dispute is whether the strike is unprotected because it seeks to compel Transnet to perform what it contends to be an unlawful act, namely to breach a collective agreement that is binding on it. Assertions by the first respondent to the effect that it in fact met the 30% threshold established by the collective agreement were not seriously pursued.

The applicable legal principles

[11] The parties' submissions centered on the application of the judgment by the Constitutional Court in *National Union of Mineworkers of SA & others v Bader Bop (Pty) Ltd* (2003) 24 *ILJ* 305(CC). In that matter, the court has to decide whether the LRA must necessarily be interpreted to preclude trade unions that did not meet the statutory threshold from obtaining organisational rights, whether by way of agreement with the employer or through industrial action. The majority of the LAC had held that s 14 of the Act, read with s 21 and Chapter IV, precluded a union from striking in support of a demand that shop stewards be recognised unless the union was representative of the majority in the workplace. The court upheld the appeal and affirmed the right of a minority trade union to strike in support of a demand for organisational rights. In coming to the view that it did, the Constitutional Court drew on the ILO's Convention on Freedom of Association and Protection of the Right to Organise (No 87) and the Right to Organise and Collective Bargaining Convention 1949 (No 98). The court held that the conventions (both of which have been ratified by the Republic of South Africa), ordinarily interpreted, afford trade unions the right to recruit members and to represent those members at least in workplace grievances; and recognise the right to strike to enforce collective bargaining demands. The jurisprudence of the ILO's supervisory bodies suggested that a reading of the LRA which permitted

minority unions the right to strike over the issue of shop steward recognition would be more in accordance with the principles of freedom of association entrenched in international labour standards. Such a reading, held the court, would also avoid a limitation of the right to freedom of association contained in s 18 of the Constitution, and the rights of workers to form and join trade unions and to strike, as well as the right of trade unions to organise and bargain collectively, rights that are entrenched in s 23 of the Constitution.

[12] It would appear, on the face of it, that the decision in *Bader Bop*, establishing as it does the principle that a minority union is entitled to strike in support of a demand for organisational rights, ought to dispose of the application. But Adv. Cassim SC, who appeared for Transnet, urged me to distinguish the judgment on the basis that in the present instance, unlike *Bader Bop*, there is a binding collective agreement between Transnet and other third party unions that regulates the basis on which Transnet will extend organisational rights to all contenders. Put another way, the first respondent has no right to strike in respect of organisational rights since (1) Transnet has concluded an agreement that binds it in law to apply a threshold to all trade unions seeking recognition (2) the first respondent does not meet that threshold and (3) to accede to the first respondent's demand would therefore amount to a breach of the agreement.

Analysis

[13] The judgment in *Bader Bop* indicates that the majority union enjoyed the organisational rights regulated by part A of chapter III of the LRA. Whether it did so by virtue of a collective agreement, and in particular an agreement that established thresholds applicable in respect of the majority and any other unions, is not apparent, nor is it apparent that the rights demanded could have been granted by the employer without breaching any other obligations that it had in law.

[14] The principle established by *Bader Bop*, it seems to me, is that despite the fact that s 14 of the LRA reserves the statutory right to trade union representatives for

unions that singly or acting jointly represent the majority of employees in the workplace, a minority union may seek to acquire that right (and any other organisational rights reserved by the LRA for majority unions) through collective bargaining and ultimately, the exercise of the right to strike. Whether a collective agreement concluded between an employer and third party unions may limit the right to strike by a non-party union, in my view, is a question that must be answered by the terms of the agreement, read with s 64 and s 65 of the Act.

[15] Section 65 provides, amongst other things, that no person may take part in a strike if that person is bound by a collective agreement that prohibits a strike on the issue on dispute, or if that person is bound by a collective agreement that regulates the issue in dispute. In the present instance, the collective agreement regulates the acquisition and exercise of organisational rights only as between the parties to the agreement. The first respondent is not a party to the collective agreement. It is not bound by its terms. Secondly, the collective agreement does not appear to have been extended in terms of s 23 (1) (d) to bind those Transnet employees who are not members of any of the unions that are party to the collective agreement.[1] It follows that they too are not bound by its terms. That being so, for the purposes of s 65 (1) and (3), there is no binding collective agreement in respect of the issue in dispute that would preclude the first respondent from calling a strike in support of a demand for organisational rights, nor is there any bar to the first respondent's members participating in the strike. Although a dispute about organisational rights is one that may be referred to arbitration in terms of s 21, s 65 (2) (a) of the Act provides that a union may elect to strike in support of the issue, on condition that it may not exercise the right to refer the dispute to arbitration for a period of 12 months from the date of the strike notice.

[16] The applicant also relies on s 18 of the LRA to advance the argument that the first respondent has no right to strike over a demand for organisational rights.

[1] It is contended in the applicant's heads of argument that the agreement has been extended in terms of s 23 (1) (d), but there is no reference to that extension in the founding affidavit or the agreement itself.

Section 18 entitles an employer and a trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, to conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15, provided that any agreed threshold is applied equally to any trade union seeking the rights referred to. The collective agreement makes no direct reference to s 18, but clause 4.4 of the agreement provides:

> 'Any other registered trade union seeking recognition by Transnet must meet the thresholds in the definition of sufficiently representative union.'

It might be suggested therefore that notwithstanding that fact that the first respondent is not a party to the collective agreement, clause 4.4 constitutes an agreement such as that contemplated by s 18 of the LRA, and that the agreed threshold of 30% therefore binds the first respondent.

[17] I am not persuaded that s 18 read with clause 4.4 of the agreement serves to limit any exercise of the right to strike by the first respondent. First, s 18 contemplates an agreement between a single majority trade union and the employer, at least where the threshold agreement is not concluded in a bargaining council. The section refers to an agreement between 'an employer and a trade union…'. It specifically does not contain the qualifications incorporated in s 14(1) and s 16 (1), which specifically permits one or more unions acting jointly to make up the majority for the purposes of acquiring the right concerned. If it was the intention that a union could act jointly with others to fix thresholds applicable to other unions seeking organisational rights, it would have said so.

[18] In the present instance, it is common cause that the collective agreement was concluded between Transnet and four trade unions. Because it is an agreement concluded between an employer and more than one union (none of which, incidentally, is in its own right a majority union), it is not an agreement

contemplated by s 18, and does not bind the first respondent. Secondly, even if s 18 were to permit agreements between an employer and two or more minority unions acting jointly to bind non-party unions and fix thresholds that they are required to meet to gain the organisational rights referred to in sections 12, 13 and 15, there is no express limitation in s 64 or s 65 which would preclude a minority union demanding those rights from seeking to bargain collectively to acquire them, or from exercising its right to strike should the employer resist the demand. Given that this court is enjoined to adopt an interpretation of the LRA that is consistent with international labour standards and with the fundamental rights contained in s 23 of the Constitution, s 18 does not present a bar to the exercise of the right to strike in the present instance.

[19] In short: neither s 18 of the LRA nor the terms of the collective agreement concluded between Transnet and other trade unions serve to deny the first respondent the right to seek to bargain collectively and to strike in support of a demand for organisational rights.

[20] Finally, in relation to costs, this court, as a rule, and in the exercise of its discretion in terms of s 162 of the LRA, refrains from making costs orders in matters where the litigation concerns parties to a collective bargaining relationship, or where a costs order might prejudice that relationship. This case falls into that category.

For the above reasons, I make the following order

1. The application is dismissed.

André Van Niekerk

Judge of the Labour Court

APPEARANCES

For the applicant: Adv. N Cassim SC, instructed by Bowman Gilfillan Inc

For the respondents: Adv. S Matime, instructed by Mafuwane Attorneys