THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: J1063/21

In the matter between-

MACSTEEL SERVICE CENTRES SA (PTY) LTD **Applicant**

and

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA (NUMSA) **First Respondent**

THE INDIVIDUALS WHOSE NAMES APPEAR ON ANNEXURE "A" TO THE NOTICE OF MOTION **Second to Further Respondents**

Heard: **03 September 2021 (via virtual proceedings)**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 08 September 2021.**

Summary: **Urgent application – refusal to bargain dispute – strike is unprotected because of noncompliance with section 64(2) of the LRA – jurisdictional ruling did not render the Commissioner *functus officio* – exercising its powers in terms of the section**

158(1)(a)(iii) of the LRA this Court can direct the Commissioner to perform his duties and functions in terms of section 64(2) of the LRA and issue an advisory award.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] In this application the applicant (Macsteel) seeks an order declaring a strike by the first respondent (NUMSA) and second and further respondents which is set to commence on 06 September 2021 unprotected and, *inter alia*, interdicting the respondents from instigation, inciting and engaging in any unprotected strike, unlawful conduct aimed at interfering with the applicant's business or to damage its property.

Pertinent facts

[2] The fats in this matter are not controversial. Macsteel falls within the jurisdiction of the Metal and Engineering Industry's Bargaining Council (MEIBC) and so are its employees. It is also a member of the SA Engineers and Founders Association (SAEFA) which represents the interests of about 500 companies in the metal and engineering industries. The first respondent (NUMSA) has organised and represents majority of Macsteel's employees who are the second and further respondents in this matter. NUMSA and Macsteel are bound by the Constitution of the MEIBC which regulates, *inter alia*, collective bargaining in the metal and engineering industries; and, pertinently, the issues to be negotiated at the plant and industry levels and the dispute resolution procedures.

[3] On 22 May 2021, NUMSA served Macsteel with a letter to initiate plant level negotiations on its demands on various issues pertaining to its members' conditions of employment (substantive issues). Macsteel turned down the request and accordingly advised NUMSA to table its demands at the industry level.

[4] On 24 June 2021, NUMSA referred a refusal to bargain dispute to the MEIBC. On 12 July 2021, the matter came before Mr Imthiaz Sirkhot (Commissioner) for conciliation. SAEFA on behalf of Macsteel objected to the jurisdiction of the MEIBC mainly on the basis that NUMSA failed to comply with the provisions of the MEIBC Constitution and the Dispute Resolution Agreement. SAEFA contended that, even if Macsteel was not bound by the MEIBC's Main Agreement, NUMSA failed to comply with the Constitution of MEIBC which provides that the Secretary of Council, in consultation with the President, must decide whether a dispute constitutes a plant or industry level matter. If found to be an industry matter, negotiations initiated by Manco should precede a referral of that dispute to the MEIBC for conciliation.

[5] The commissioner upheld Macsteel's point *in limine* and found that the MEIBC had no jurisdiction to adjudicate the dispute. The basis for his findings was that NUMSA tabled its demands on substantive issued at plant level contrary to the procedural dictates of the MEIBC's Constitution and Dispute Resolution Agreement which require that they be negotiated at the industry level.

[6] NUMSA rejected the jurisdictional ruling, insisting that it is an advisory award despite its form. On 27 August 2021, NUMSA served Macsteel with a notice to commemce a strike on 06 September 2021. Macsteel, accordingly approached this Court for an order interdicting the strike.

Legal principles and application

[7] As the issue before this Court is, ultimately, a matter of statutory interpretation, it is as well to begin a consideration of the arguments of the parties with some reference to the Labour Relations Act[1] (LRA). Section 64 of the LRA provides:

> '**Right to strike and recourse to lock-out**
>
> (1) Every employee has the right to strike and every employer has recourse to lock-out if –

[1] Act 66 of 1995, as amended.

(a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and –

(i) a certificate stating that the dispute remains unresolved has been issued; or

(ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that

(b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless –

(i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or

(ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or

(c) in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or

(d) …

(2) If the issue in dispute concerns a refusal to bargain, an advisory award must have been made in terms of section 135(3)(c) before notice is given in terms of subsection (1)(b) or (c)…'

[8] Section 135(3) of the LRA empowers the Commissioner appointed to conciliate the matter to determine a process to attempt to resolve the dispute which may include:

(a) Mediating the dispute,

(b) Conducting a fact-finding exercise; and

(c) Making a recommendation to the parties, which may be in the form of an advisory arbitration award.

[9] The parties accept that since the dispute that was before the MEIBC relates to a refusal to bargain in terms of section 64(2) of the LRA an advisory award had to be made in terms of section 135(3)(c) before a notice to commence a strike could be given.

[10] Even so, a thorny issue seems to be the legal effect of the jurisdiction ruling made by the Commissioner. Macsteel contended that the jurisdictional ruling rendered the strike unprotected to an extent that the Commissioner found that MEIBC had no jurisdiction to entertain the referral. NUMSA, on the other hand, contended that this Court should look at the substance of the jurisdictional ruling and not merely its form. The essence of this contention is that, if regard is had to the substance of the Commissioner's findings, they are advisory in nature and not binding on the parties despite the label attached to ruling. To fortify this submission, reliance was placed on various decisions of the superior courts and pertinently the Constitutional Court judgment in *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others*[2] where the Constitutional Court held that:

> 'Assessing the materiality of compliance with legal requirements in our administrative law is, fortunately, an exercise unencumbered by excessive formality. It was not always so. Formal distinctions were drawn between "mandatory" or "peremptory" provisions on the one hand and "directory" ones on the other, the former needing strict compliance on pain of non-validity, and the latter only substantial compliance or even non-compliance. That strict mechanical approach has been discarded. Although a number of factors need to be considered in this kind of enquiry, the central element is to link the question of compliance to the purpose of the provision. In this Court O'Regan J succinctly put the question in *ACDP v Electoral Commissio*n as being

[2] 2014 (4) SA 179 (CC) at para 30

> "whether what the applicant did constituted compliance with the statutory provisions viewed in the light of their purpose".' (Emphasis added)

[11] It is however apparent from *Allpay* that the issue of whether there was compliance must be informed by the purpose of the statutory provisions, bearing in mind there is a distinction between peremptory and directory provisions. In the present instance, the purpose of the purpose of section 64(2) is stated in the Explanatory Memorandum to the LRA as follows:[3]

> 'There is a special procedure in respect of disputes over a refusal to bargain. As outlined in Chapter III, the Task Team proposes that there should be no legal duty to bargain enforced by the courts. It is accordingly proposed that disputes concerning the refusal to recognize a trade union or the withdrawal of recognition, or the refusal to establish a bargaining council or the resignation from a bargaining council should be thoroughly conciliated and referred to advisory arbitration before the resort to industrial action. The intervention of skilled mediators in these types of disputes has demonstrated that they can often be resolved without the resort to industrial action.' (Emphasis added)

[12] It is granted that, ordinarily, when it comes to mutual interest disputes referred in terms 64(1)(a), a conciliation hearing is not a precondition for a strike to be protected by the LRA as long as 30 days have elapsed since the referral of the dispute.[4] However, the converse is true when it comes to section 64(2). To hold otherwise would be inconsistent with the scheme of the LRA which dictates that a refusal to bargain dispute should be thoroughly conciliated and an advisory ward be issued in terms of section 135(3(c).

[13] So, the construction that NUMSA accords to provisions of section 64(2) untenable and, if upheld, would lead to impractical, unbusinesslike and/or oppressive consequences.[5] I agree, therefore, with counsel for the applicant, Mr Redding SC, that the dictum in *City of Johannesburg Metropolitan Municipality & Another v SA Municipal Workers Union & Others,*[6] which the

[3] Explanatory Memorandum to the LRA (1995) 16 ILJ 278.
[4] See: *City of Johannesburg Metropolitan Municipality & Another v SA Municipal Workers Union & Others* (2011) 32 ILJ 1909 (LC).
[5] See: *Natal Joint Municipal Pension Fund v Endumeni Municipality*. 2012 (4) SA 593 (SCA) at para 16 and 26, quoted with approval in *Ngubeni v The National Youth Development Agency and Another* (2014) 35 ILJ 1356 (LC) at para 12.
[6] *Supra* n 4 at para 15.

NUMSA referred to, is distinguishable as the Court in that matter dealt with section 64(1) dispute.

[14] In *Concor Projects (Pty) Ltd T/A Concor Opencast v Commission for Conciliation, Mediation And Arbitration and Others,*[7] confronted with similar facts, this Court, per Lagrange J, had the following to say on the effect of 64(2):

> 'When the second respondent handed down his jurisdictional ruling made by the second respondent, he should have issued an advisory award on Concor's refusal to negotiate with AMCU in terms of s 64(2). To date he has not done so and is still seized with the matter. Compliance with the subsection is a pre-requisite step that must be completed before either party can embark on protected industrial action. For this reason the strike embarked on by AMCU and its members is not protected until such time as the second respondent has discharged his function and issued the advisory award.'

[15] Equally, in the present instance, the strike by NUMSA and its members which is set to commence on 6 September 2021 is unprotected up until the Commissioner has discharged his duties and functions and issue an advisory award.

[16] NUMSA contended, in the alternative, that in the event this Court finds that the strike is unprotected solely because the Commissioner failed to issue an advisory award, it should exercise its powers in terms of, *inter alia*, section 158(1)(a) of the LRA and make any appropriate order; and/or section 158(1)(b) of the LRA and order compliance with section 64(2); and/or section 158(1)(g) and section 145 of the LRA in respect of reviews. In essence, NUMSA consents to the alternative interim relief sought by Macsteel in the Notice of Motion in respect of the granting of a temporary interdict subject to the MEIBC and the Commissioner being compelled to issue an advisory award as contemplated in Section 64(2) within 48hours and that such interim interdict be discharged upon the receipt of such advisory award.

[7] (2013) 34 ILJ 2217 (LC) at para 28.

[17] Macsteel outrightly rejected NUMSA's concession to an interim order, insisting on a primary relief sought in the Notice of Motion. Mr Redding submitted that, absent a formal application by NUMSA to review and set aside the jurisdictional ruling, the Commissioner is *functus officio*. I disagree. In *PT Operational Services (Pty) Ltd v RAWU obo Ngwetsana*,[8] the Labour Appeal Court (LAC) confirmed that the *functus officio* doctrine applies in administrative law and, pertinently, applies to Commissioners appointed by the CCMA and Bargaining Councils and explained its effect as follows:

> '[24] …In elementary terms, the effect of the *functus officio* doctrine in administrative law is that an administrative agency which has finally performed all its statutory functions or duties in relation to a particular matter subject to its decision-making jurisdiction has exhausted its powers and has discharged its mandate in relation to that matter. Consequently, such an agency is without further authority as far as that matter is concerned because it's duties and functions have been fully accomplished. Thus, an administrative agency which is *functus officio* is unable to retract or change its own earlier decision, unless it is authorised by its enabling legislation to do so.
>
> [30] … it is only after an administrative agency has finally performed all its statutory duties or functions in relation to a particular matter which is subject to its jurisdiction that it can be said that its powers or functions were spent by its first exercise. (Emphasis added)

[18] Obviously, in the present instance, the Commissioner refused to perform his duties in terms of section 64(2) read with section 135(3)(c) in relation to a matter that was subject to his jurisdiction solely on the basis of procedural technicalities. To my mind, it cannot be said that the Commissioner, by issuing the jurisdiction ruling, has exhausted all his powers and functions and, consequently, *functus officio*. The submission by Mr Niehaus, from the respondents' attorneys of record, that Macsteel's contention in this respect is

[8] [2013] 3 BLLR 225 (LAC); (2013) 34 ILJ 1138 (LAC) at para 24.

ill-conceived as it informed by a flawed reliance on the *functus officio* doctrine is on point and should be accepted.

[19] In the light of the fact that the Commissioner is still ceased with the matter, this Court is inclined to exercise the powers conferred upon it in terms of section 158(1)(a)(iii) of the LRA and direct the Commissioner to perform his duties and functions in terms of section 64(2). In my view, such an order is in accordance with the objects of the LRA to promote orderly collective bargaining and would obviate unnecessary interference the right to strike which is an integral part of the collective bargaining process.[9] In *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another,*[10] the Constitutional Court endorsed the following sentiments expressed by the LAC in *CWIU v Plascon Decorative (Inland) (Pty) Ltd*[11] on the purpose of the procedural requirements in section 64(1)(a):

> 'The arguments . . . proceeded, also in my view correctly, on the premise that a proper appreciation of the statutory provisions concerning strikes depends on their purpose. Mr van der Riet contended that the purpose of section 64(1)'s procedural requirements is to compel employees to explore the possible resolution of their dispute through negotiations before exercising their right to strike. The concept of a protected strike presupposes such negotiations. Once that purpose has been fulfilled, no further statutory object would be served by limiting the right to strike only to employees directly affected by the demand. Instead, the restriction envisaged would place a substantive limitation on the right of non-bargaining unit union members to strike for which the provisions of the statute offer no explicit or implicit support. I agree with this submission.

The Constitutional Court has itself emphasised the general importance of the right to strike:

> 'Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them

[9] See: *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 (CC); 2003 (2); [2003] 2 BLLR 103 (CC) at para 35.
[10] 2012 (6) SA 249 (CC); [2012] 12 BLLR 1193 (CC); (2012) 33 ILJ 2549 (CC) at para 75.
[11] [1998] 12 BLLR 1191 (LAC) at para 27-28.

> collectively with sufficient power to bargain effectively with employers. Workers enjoy collective power primarily through the mechanism of strike action.'
>
> The Court went [on] to point out that the importance of the right to strike for workers has led to its being entrenched far more frequently as a fundamental right in constitutions than is the right to lock out and that the two rights 'are not always and necessarily equivalent' (In re: Certification of the Constitution of the Republic of South Africa, 1996 1996 (10) BCLR 1253 (CC) at 1284–1285 (paragraph 66)). This is of course not to say that striking should be encouraged or unprocedural strikes condoned: but only that there is no justification for importing into the LRA, without any visible textual support, limitations on the right to strike which are additional to those the legislature has chosen clearly to express.' (Emphasis added)

Conclusion

[20] In all the circumstances, the strike by NUMSA and its members which is set to commence on 6 September 2021 stands to be declared unprotected for the reason that section 64(2) had not been complied with; the Commissioner be directed to perform his duties and functions in terms of section 64(2) within 3 days from the date of this judgment and order; pending compliance with the provisions of section 64(2), the second and further respondents be interdicted from participating in a strike either in respect of dispute pertaining to the refusal to bargain dispute before the MEIBC under case number MEGA57684; and the strike interdict shall automatically lapse upon compliance with section 64(2).

Costs

[21] Turning to the issue of costs, the parties did not pursue costs. In any event, the circumstances of this case dictate that each party should pay its own costs.

[22] In the circumstances, I make the following order.

Order

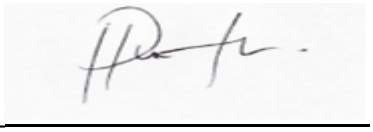
1. The strike by NUMSA and its members which is set to commence on 6 September 2021 is declared unprotected for the reason that section 64(2) of the LRA had not been complied with.

2. The Commissioner is directed to perform his duties and functions in terms of section 64(2) of the LRA within 3 days from the date of this judgment and order.

3. The second and further respondents are interdicted from participating in a strike in respect of dispute pertaining to the refusal to bargain dispute that is before the MEIBC under case number MEGA57684 up until and subject to compliance with the provisions of section 64(2) of the LRA.

4. The order in paragraph 3 above shall automatically lapse upon compliance with section 64(2) of the LRA.

5. There is no order as to costs.



P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Advocate A Redding SC
Instructed by:	Webber Wentzel Attorneys
For the respondents:	Mr M Niehaus from Minnaar Niehaus Attorneys