REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J2625/2014

OPTIMUM COAL MINE (PTY) LTD **Applicant**

and

NATIONAL UNION OF MINEWORKERS **Respondent**

Heard: **17 November 2014**

Delivered: **19 November 2014**

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] The applicant brought this application on an urgent basis to seek an order;

1.1 Interdicting and restraining the respondent (NUM) from calling for or taking part in a strike or any conduct in contemplation or furtherance of a strike by the Applicant's employees or at the applicant's workplaces;

1.2 declaring that the conduct of NUM or its members in calling for, taking part or in contemplation or furtherance of a strike against the applicant that is in support of a strike by employees employed at Koornfontein

Mines constitutes an unlawful and/or unprotected strike contrary to the provisions of section 66 (2) of the Labour Relations Act (The LRA);

1.3 ordering the NUM to take all reasonable measures to encourage its members not to participate or cease their participation in any strike against the applicant forthwith;

1.4 alternative to the above, issuing of the above orders as interim orders pending a return date.

Background:

[2] The applicant carries on the business of mining coal. It has major customers both locally and internationally to whom it supplies coal, with the bulk of its production being exported. Significantly, one of its major contracts is with Eskom, to which it is required to supply 460 000 tonnes of coal per month for the Hedrina Power Station.

[3] The applicant contends that Koornfontein Mines (Pty) Ltd is a separate colliery. It is common cause that Koornfontein has been in consultations with NUM over the retrenchment of its employees. Following Koornfontein's termination of the services of about 25 employees, NUM declared a dispute, resulting with a protected strike action at Koornfontein, which commenced on 17 October 2014. It is as a consequence of the strike action at Koornfontein that NUM seeks to embark on a secondary strike at the applicant in support of its members at Koornfontein.

[4] The matter initially came before the court on 27 October 2014 and was postponed *sine die* without an order of costs. The initial application was precipitated by a notice of secondary strike action issued by NUM on 20 October 2014 in support of the strike at Koornfontein Mine. The strike action at the applicant was scheduled to commence on 28 October 2014 at 06h00.

[5] Following the launching of the urgent application, NUM had then on 26 October 2014, caused the notice of strike action to be withdrawn, resulting in the matter before the court on 27 October 2014 being postponed *sine die*. On

11 November 2014, NUM had issued a second notice of secondary strike action. In the notice, NUM had indicated that the intended secondary strike was in support of fellow NUM members at Koornfontein Mine who are currently on strike, and that the secondary strike action would commence on 19 November 2014 at 06h00. This application was heard after the applicant had on 14 November 2014, filed a supplementary Notice of Motion in respect of the relief sought as above. NUM opposed the application.

The application:

[6] The parties had agreed that the matter is indeed urgent, moreso in view of the fact that the strike action is scheduled to commence on 19 November 2014 at 06h00. Section 66 (2) of the LRA provides that:

> *No person may take part in a secondary strike unless-*
>
> *(a) the strike that is to be supported complies with the provisions of sections 64 and 65;*
> *(b) the employer of the employees taking part in the secondary strike or, where appropriate, the employers' organisation of which that employer is a member, has received written notice of the proposed secondary strike at least seven days prior to its commencement; and*
> *(c) the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.*

[7] The applicant did not take issue with NUM's compliance with the requirements as set out in s66 (2) (a) and (b) of the LRA. Central to this application was whether the secondary strike action satisfied the requirements set out in s66 (c) of the LRA to deserve protection. Before dealing with that issue however, the applicant had also raised the point that insofar as NUM had withdrawn its initial notice of the secondary strike action, it had elected to abandon its rights to pursue the same action.

Issue of election:

[8] The applicant's main contention in this regard was that NUM was not entitled to issue a further notice of secondary strike in circumstances where it had effectively abandoned its rights to do so by unreservedly withdrawing the initial notice issued on 20 October 2014. The notice of the withdrawal of the secondary strike notice as issued by NUM on 26 October 2014 read as follows:

> '**Re: Withdrawal of Strike Notice**
>
> *We refer to the strike notice forwarded to you by our legal officer Phoka Maidi on 20th October 2013 at 17h43.*
>
> *We withdraw the notice. NUM will not commence with the strike action of this notice, that was supposed to commence on the 28th October 2014, at 06h00am Optimum Colliery'* (Sic)

[9] NUM's contention was that having been served with the initial application, it did not have time to take instructions and obtain all the relevant information to successfully oppose the application set down for 27 October 2014. In order to avoid an interim order being granted, it was advised to withdraw the strike notice in order to allow its legal representative to draft a proper answering affidavit. It denied that the notice was withdrawn unreservedly, and contended that there was no need for the withdrawal to state that its rights were reserved. It further contended that the applicant was well aware that a proper notice would be issued in due course; hence the application was not withdrawn but postponed *sine die.* Mr Jackson on behalf of NUM further submitted that there was no basis for a conclusion to be made that the right to strike was unequivocally withdrawn.

[10] Mr Redding on behalf of the Applicant placed reliance on the decision in *PSA v Minister of Justice*[1] for the proposition that in circumstances as such as these, and where NUM had withdrawn its initial notice unreservedly, it should

[1] 2001 (22) ILJ 2303 (LC)

be concluded that it had elected to waive the right to embark on a secondary strike action.

[11] In determining whether NUM had elected to waive or abandon its right to strike or is estopped from asserting the right to strike, it is taken into account that as is apparent from its notice of withdrawal, no mention was made that it reserved its rights in regards to any further or future actions. It is however my view that despite Mr. Jackson indicating that there was a dispute of fact as to the withdrawal of the notice, which dispute emanated from the communication between the parties' legal representatives leading to and subsequent to the withdrawal, there is no basis for a conclusion to be made that NUM had indeed elected to abandon its right to embark on a secondary strike in future.

[12] The above conclusion is fortified by the fact when the matter came before the court on 27 October 2014, NUM had already withdrawn the notice, and the parties had by agreement, postponed the matter *sine die*. If indeed it was the applicant's firm belief that the notice was withdrawn for all intents and purposes, it would not have made sense for it to simply agree to the matter being postponed *sine die*, as implicit in a postponement of that nature is that the matter could be re-enrolled at a latter stage.

[13] It was further common cause that the postponement came about as a result of the applicant's counsel's suggestion as is evident from the applicant's Supplementary Notice of Motion[2]. Other than the notice of withdrawal itself, nothing can be gleaned from NUM's conduct or omission to suggest that it had indeed waived or renounced its right to embark on future secondary strike action. This is a case where on the strength of the withdrawal of the notice, the applicant had presumed that the notice was unreservedly withdrawn when there was no basis for making such a presumption. Furthermore, it was common cause that the primary strike was still on-going, and the period within which the initial notice was withdrawn and the second one issued cannot be said to be of such a lengthy nature that the presumption of an unequivocal withdrawal can be justified. Furthermore, in view of the fact that the second notice was also in compliance with the provisions of section 66 (2) (b) of the

[2] Para 9 of the Supplementary Notice of Motion

LRA, the court is satisfied that the arguments surrounding a waiver, abandonment, election and or estoppel cannot be sustained.

Compliance with the substantive requirements of section 66 (2) (c):

[14] The only issue for determination is whether the secondary strike proposed at the applicant would comply with the substantive requirements of section 66 (2) (c), which requires the nature and extent of a secondary strike to be *"reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer"*.

[15] Proportionality is the yardstick in determining reasonableness as contemplated in section 66 (2) (c) of the LRA. This court in *SALGA v SAMWU*[3] held that the test required the harm caused to the secondary employer to be proportional to its impact or likely impact on the business of the primary employer. Van Niekerk AJ (as he then was) held that this required[4]:

> "*...weighing up two factors – the reasonableness of the nature and extent of the secondary strike (this is an enquiry into the effect of the strike on the secondary employer and will require consideration, inter alia, of the duration and form of the strike, the number of employees involved, their conduct, the magnitude of the strike's impact on the secondary employer and the sector in which it occurs) and, secondly, the effect of the secondary strike on the business of the primary employer, which is, in essence, an enquiry into the extent of the pressure that is placed on the primary employer".*

[16] Flowing from the above test, it follows that in this case, NUM must show on a balance of probabilities that the secondary strike at the applicant may have a possible indirect or direct effect on the business of Koorfontein Mine as the primary employer, making the secondary strike protected, and the applicant will have to endure the secondary strike and its consequences. In essence, section 66 (2) (c) only envisages that the secondary strike will have possible

[3] 2008] 1 BLLR 66 (LC).
[4] at para [16].

harm and indirect effect on the business of the primary employer. However, if NUM fails to show any possible direct or indirect effect, then the secondary strike will be regarded as unprotected and may be interdicted. As it was pointed out in *Sealy of SA (Pty) Ltd & Others v Paper Printing Wood & Allied Workers Union*[5], that there must be a nexus between the applicant and Koornfontein Mine, which was reasonable and had a possible impact on the applicant's business to influence the outcome of the primary strike. However, a mere nexus which does not have an effect on Koornfontein Mine's business is insufficient to permit a secondary strike[6].

[17] The crux of the applicant's averments in its founding and replying papers is that no contractual nexus or business relationship exists between it and Koornfontein Mine, and it is therefore unable to exert any influence or pressure in respect of the primary strike. The Labour Appeal Court in *SALGA v SAMWU*[7] had held that there was no requirement in section 66 of the LRA that the secondary employer should exert influence on the primary employer or that the secondary employer should have the capacity to exert influence on the primary employer in order to encourage it to compromise or capitulate to the demands of the workers. The reasonableness of the nature and extent of the secondary strike entails an enquiry into the effect of the strike on Koornfontein Mine. I intend following the approach of Steenkamp J in *Transnet SOC Ltd v SATAWU*[8] and that of Van Niekerk AJ (as he then was) in *SALGA v SAMWU* in consideration of the relevant factors in that regard.

(a) The duration and form of the strike:

[18] In terms of the notice issued, the secondary strike at the applicant is scheduled to commence on 19 November 2014 at 06h00. NUM anticipates that the strike will last for a period of two weeks ending on 3 December 2014, *'or as soon before the date as and when the demands of union members at Koornfontein are resolved'*. It is apparent that NUM also anticipates that the strike would be full-scale, and worst still for the applicant, the strike may last

[5] (1997) 18 ILJ 392 (LAC)
[6] Samancor Ltd & Another v National Union of Metalworkers of SA (1999) 20 ILJ 2941 (LC) at para 29
[7] (2011) 32 ILJ 1886 (LAC) at para 7
[8] (2013) 34 ILJ 1281 (LC)

until such time that the demands of its members at Koornfontein are met, which implies that the strike can last more than two weeks.

[19] During argument, Mr. Jackson had submitted that the two weeks period was reasonable as it would have the desired effect. However, no rational explanation was given as to the reason NUM had settled for the strike to take two weeks or beyond. The only explanation given was that the strike would not be unreasonable in that the applicant's shareholders being the holding company at Koornfontein mine are not affected by the current strike and would not suffer any loss, and that the strike will exert pressure on the holding company to attend to the demands of the union.

[20] The applicant had pointed out that the consequences of NUM and its members employed by the applicant participating in the strike was that the applicant would be severely prejudiced financially and faces the risk of losing contracts with customers and having to pay penalties arising out of contracts with both customers and suppliers. The applicant also estimated the financial loss per day at R12 million in turnover. This excluded the damage to its goodwill, and the fact that its business may be damaged. Other foreseeable consequences included the applicant having to scale down its operations.

(b) The number of employees involved in the secondary strike:

[21] NUM did not indicate the number of employees that would embark on the secondary strike at the applicant, but it is however anticipated that its members in the recognized bargaining unit would participate in the strike, effectively bringing the operations of the applicant to a standstill.

(c) The conduct of the employees:

[22] The conduct of the employees cannot be assessed at this stage. However, given the nature of strikes as we have come to experience them in our industries, the secondary strike could turn out to be peaceful or not. The interdict granted against NUM on 18 November 2014 under case number J2812/14 in respect of the current protected strike action at Koorfontein Mine might be indicative of the turn the secondary strike might take.

(d) The magnitude of strike's impact on secondary employer and the sector in which it is to occur:

[23] The applicant has always submitted that it is independent from Koornfontein Mine and the only connecting factor was that each had the same 100% shareholder, Optimum Coal Holdings (OCH). The applicant pointed out that the secondary strike would have the effect of retarding and disrupting its ability to operate and manage its business. The result thereof would be that the applicant would suffer a financial loss of about R12 million in turnover per day if unable to operate its business normally. NUM however views the consequences of the secondary strike as being the normal risks associated with every protected strike action.

The direct or indirect effect of the strike on the business of Koornfontein:

[24] There are factual disputes as to the nature of the relationship, if any, between the Applicant and Koornfontein. As already indicated, the Applicant has always maintained that there is no nexus between it and Koornfontein; that insofar as Koornfontein is concerned, the fact that the secondary strike would take place will have no material impact on Koornfontein as there is no business relationship between the two. The applicant insisted that the two do no supply each other with any services; are two separate mining companies and the one has no influence on the business of the other. The applicant further pointed out that the secondary strike would not have any effect on the business of Koornfontein Mines, on the latter's share price, or on the market sentiment in respect of the share price of OCH. To this end, it was argued that the proposed secondary strike was unreasonable and disproportionate in relation to the possible direct or indirect effect that it may have on Koornfontein's business.

[25] NUM on the other hand insisted that the applicant purchased Koornfontein in 2010 and was its holding company; that the applicant used Shanduka Coal to fulfill Koornfontein's contractual obligations; that the applicant, Koornfontein, and Shanduka Coal belonged to Glencore Group of Companies, and furthermore, that the applicant owned 100% share of Koornfontein.

[26] Although NUM raised a dispute in this regard, it appears to be apparent that Glencore Group of Companies is a UK based company with interests in local Glencore Operations, Shanduka Coal, Richards Bay Coal and OCH. OCH owns 100% of the applicant and 100% of Koorfontein Mine. The applicant had denied that Koorfontein and Shanduka fulfill each other's contractual obligations, or that it was a holding company of Koorfontein. It denied that it supplied Koorfontein's coal to its clients including Eskom or that its operations also included Richards Bay Coal. It had contended that Koorfontein's contract with Eskom included what is referred to as a 'Rectification clause', entitling it to source the services of any contractor in the event that it could not fulfill its obligations towards Eskom. Mr. Redding on behalf of the applicant contended that the disputes of fact were more apparent than real, and to the extent that a final order was sought, the *Plascon-Evans*[9] principles should be applicable. He however contended that in the light of the apparent factual disputes, the matter should be referred for oral evidence, and to that end, an interim order should be granted.

[27] Mr Jackson on behalf of NUM had contended that there was a nexus between the applicant and Koornfontein Mine in view of the fact that both were 100% owned by OCH. Even though this nexus is conceded by the applicant, the issue remains whether it was reasonable and had a possible impact on the applicant's business to influence the outcome of the primary strike. As already indicated a shareholding nexus on its own is not sufficient if it does not have an effect on Koornfontein Mine's business. In the light of the factual disputes raised, and which it was common cause were apparent, I am in agreement with Mr. Redding's submissions that in view of the alternative remedy of an interim order sought, such disputes cannot be resolved on the papers. Such disputes are further compounded by the uncertainty surrounding whether the applicant indeed supplies coal to Koornfontein, together with Shanduka Coal. Mr Jackson further conceded that the averments made by the applicant in its paragraph 5 pertaining to the relationship between Glencore operations, the applicant and Koornfontein Mine and the disputes of fact arising there from cannot be resolved on the papers.

[9] Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd. [1984] 2 All SA 366 (A)

[28] Mr Jackson on behalf of NUM had further submitted that in the light of the disputed facts, the Court is enjoined to invoke the provisions of section 66 (4) of the LRA, which provides that:

> *"(4) Any person who is a party to proceedings in terms of subsection (3), or the Labour Court, may request the Commission to conduct an urgent investigation to assist the Court to determine whether the requirements of subsection (2) (c) have been met.*
>
> *(5) On receipt of a request made in terms of subsection (4), the Commission must appoint a suitably qualified person to conduct the investigation, and then submit, as soon as possible, a report to the Labour Court.*
>
> *(6) The Labour Court must take account of the Commission's report in terms of subsection (5) before making an order."*

[29] NUM has not requested the CCMA to conduct an investigation in terms of section 66(4) of the LRA. In considering the most appropriate order in this case, it is taken into account that the matter is indeed urgent; that the disputed facts cannot be resolved on the papers before the court; that the considerations pertaining to the duration and form of the strike; the number of employees involved; their conduct even if anticipated; the magnitude of the strike's impact on the applicant; and the sector in which it occurs, the Court should request the Commission to conduct an urgent investigation to assist it in determining whether the requirements of subsection (2) (c) have been met. This obviously necessitates an interim order to be granted. Accordingly, the following order is made;

Order:

(i) NUM is interdicted and restrained from calling for or taking part in a strike or any conduct in contemplation or furtherance of a strike by the applicant's employees or at the applicant's workplace.

(ii) NUM is ordered to take all reasonable steps to encourage its members not to participate or cease their participation in any strike against the applicant.

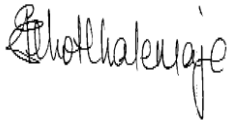
(iii) Orders (i) and (ii) as above are issued as interim orders pending the return date which is 30 January 2015. The parties are however entitled to anticipate an earlier date.

(iv) Pending the return date, or the anticipated earlier date, the Commission for Conciliation, Mediation and Arbitration is ordered in terms of section 66 (4) of the LRA to;

(a) Within 7 days of receipt of this order, conduct an urgent investigation to assist the Court to determine whether the requirements of section 66 (4) (2) (c) have been met.

(b) The CCMA is ordered to identify suitably qualified persons to conduct the investigation as indicated in (a) above, and to furnish the Court with a report on no later than 19 December 2014.

(v) Costs are reserved.



Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv A Redding SC
Instructed by:	Mervyn Taback INC
For the Respondent:	Adv. BM Jackson
Instructed by:	Finger Phukubje INC