CONSTITUTIONAL COURT OF SOUTH AFRICA

National Union of Metalworkers of South Africa v Trenstar (Pty) Limited

CCT 105/22

Date of judgement: 18 April 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday, 18 April 2023, the Constitutional Court handed down judgment in an application for leave to appeal against the respective judgments of the Labour Court and the Labour Appeal Court (LAC).

The application was brought by a trade union, National Union of Metalworkers of South Africa (NUMSA), on behalf of its members who are employed by the respondent. The respondent is Trenstar (Pty) Limited (Trenstar). Trenstar undertakes all the internal logistics of parts of the plant within Toyota South Africa Manufacturing (TSAM) in Durban. Its operation and employees are housed within the TSAM plant. The application results from NUMSA requesting, on behalf of its members, that Trenstar pay a once-off taxable gratuity of R7,500 per employee (the demand) in addition to their annual wage increase for the financial year of 2020.

Unable to reach agreement on the demand with Trenstar, NUMSA referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) for conciliation on 28 July 2020. After failed conciliation on the demand, NUMSA gave Trenstar notice that its employees would embark on a strike in support of the demand which would commence at 07h00 on 26 October 2020. The strike then endured for several weeks. On Friday, 20 November 2020, NUMSA notified Trenstar that the strike action would be suspended with effect from close of business (17h00) on that day and that its members would return to work at 07h00 on

Monday, 23 November 2020. NUMSA emphasised that although the employees would be tendering their services, this should not be construed as a withdrawal of the gratuity demand. On the same day, shortly after receipt of this notification, Trenstar notified NUMSA that it would impose a lock-out on its members effectively from 07h00 on Monday, 23 November 2020. The lock-out notice demanded that NUMSA's members abandon the gratuity demand and asserted that the lock-out was in response to the strike, making section 76(1)(b) of the Labour Relations Act (LRA) applicable. Section 76(1)(b) permits an employer to use replacement labour during a lock-out when the lock-out is "in response to a strike". NUMSA responded by contending that the use of replacement labour was impermissible as the strike had been "suspended", thus the lock-out was not in response to a strike. Trenstar disagreed, contending that the lock-out notice was served before the strike was suspended and that the strike was nevertheless not over, having only been suspended as opposed to terminated.

NUMSA approached the Labour Court for an order interdicting Trenstar from using replacement labour. NUMSA did not challenge the lawfulness of the lock-out but instead alleged that it was not in response to a strike. The Labour Court dismissed NUMSA's interdict application, reasoning that "strike" section 76(1)(b) qualified the type of lock-out during which replacement labour may be used; meaning that the mere suspension of the strike could not disqualify use of replacement labour. According to NUMSA, the Labour Court's judgment caused NUMSA's bargaining position to be hopelessly weak by allowing Trenstar to use replacement labour indefinitely without any negative commercial consequence. It consequently abandoned the gratuity demand.

NUMSA nevertheless appealed against the Labour Court's judgment to the LAC. The LAC dismissed the appeal. It concluded that the matter was moot and that the circumstances, including the conflict between the Labour Court's judgment under appeal and earlier Labour Court judgments, did not justify it nevertheless determining the legal issue.

In this Court, NUMSA submitted that the matter engaged the Court's constitutional jurisdiction as it concerned the interpretation of legislation giving effect to labour relations rights under section 23 of the Constitution, namely, the LRA. Further, that this Court's general jurisdiction was engaged as the interpretation of section 76(1)(b) is an arguable point of law of general public importance. On leave to appeal, NUMSA submitted that it had reasonable prospects of success on the merits because, despite the mootness of the matter, it was in the interests of justice for the interpretation of section 76(1)(b) to be clarified by this Court. It was important to those involved in collective bargaining in the labour field. Matters which give rise this legal issue will also generally be moot before they reach an appellate court.

On the merits, NUMSA submitted that the following judgments demonstrated the conflicting interpretations of section 76(1)(b) LRA. First, in *Ntimane and others v Agrinet t/a Vetsak (Pty) Ltd* [1998] ZALC 98; (1999) 20 ILJ 896 (LC), the Labour Court held that once a lock-out is categorised as defensive, its nature does not change to being offensive if the employees decide to end their strike. The exemption to the prohibition to use replacement labour accordingly continues to apply for so long as the employer persists in the lock-out or until the employees capitulate to the employer's demand. Second, by contrast, in *South African Commercial Catering and Allied Workers Union v Sun International* 2016 (1) BLLR 97 (LC), it was held that the exception to the prohibition of using replacement labour ceases to apply once the employees tender to return to work and are no longer on strike. NUMSA aligned itself with the latter case. On this interpretation, as soon as the strike ends, a lock-out that persists will be categorised as offensive and the use of replacement labour will accordingly be unlawful, as there is no longer a strike to which the employer is responding.

Trenstar opposed the application and submitted that the application should be dismissed as the issue was moot. It did not dispute this Court's jurisdiction but argued that an order would have no practical effect as the law is clear, and the issue has no importance to the parties or the industrial relations community at large. Trenstar further submitted that there was no merit to NUMSA's argument regarding the existence of conflicting judgments. Trenstar contends that there was no need for clarification as there is a factual distinction between the cases. The distinction being that in *Sun International* the strike had terminated, whereas in *Kings Hire CC* the strike was only suspended before the commencement of the strike action and the union had reserved the right to resume the strike.

In a unanimous judgment, penned by Rogers J, this Court held that its jurisdiction was engaged. It reasoned that this was a constitutional matter as it concerned the interpretation of the LRA. Further, the interpretation of section 76(1)(b) raised an arguable point of law of general public importance. This Court then granted leave to appeal, finding that it was in the interests of justice to do so. First, NUMSA had reasonable prospects of success on the merits. Second, the matter gave rise to legal issues that transcended the interests of the parties, as the proper interpretation of section 76(1)(b) has been subject to conflicting judgments, which the LAC has twice declined to address based on mootness. Those involved in collective bargaining should know the legal position on the use of replacement labour during a lock-out, and matters concerning the proper interpretation of section 76(1)(b) will typically be moot before reaching an appellate court.

On the merits, this Court addressed two legal issues. First, the distinction (if any) between a suspended and terminated strike; and second, the proper interpretation of "in response to a strike" under section 76(1)(b).

In relation to the first issue, this Court held that the LRA does not distinguish between a terminated and suspended strike. With reference to the definition of "strike" under the LRA, the Court found that it is a state of affairs occurring with a particular purpose. Its existence is determined by whether there is or is not a concerted withdrawal labour. Generally, employees who tender to return work by "suspending", instead of "terminating", their strike are signalling that they are neither abandoning their demand nor waiving their previously accrued unconditional right to strike. They reserve the right to withdraw their labour again in pursuit of their demand. The Court thus found that while an unconditional right to strike may exist during the period of suspension, a "strike" as defined in the LRA does not exist during that period. Accordingly, based on the facts of this matter, this Court found that the strike ended at 17h00 on Friday, 20 November 2020. The employees' absence from work as from 07h00 on Monday, 23 November 2020, was due to the lock-out implemented by Trenstar, not a strike. This Court further reasoned that Trenstar thus excluded the employees from the workplace in terms of a lock-out despite their tender of services, not because it had rejected the tender of services for being unacceptable or incomplete.

On the second issue, this Court acknowledged that "in response to a strike" is capable of taking on either of the meanings given by the conflicting interpretations in our labour law jurisprudence. This Court then considered the text, context, and purpose of section 76(1)(b). The right to use replacement labour depends on whether, at the relevant time, the employer's exclusion of workers from the workplace is an exclusion which is responding to a strike. A lock-out, like a strike, is a state of affairs occurring with a specified purpose. These factors, this Court held, suggested that for a lock-out to be in response to a strike the strike must still be underway at the relevant time.

This Court further considered that the right to strike is constitutionally protected, whereas employers' right to lock out does not enjoy constitutional protection. Based on the Court's jurisprudence, as guided by the injunction on it under section 39(2) of the Constitution to promote the Bill of Rights when interpreting legislation, it concluded that section 76(1)(b) must be interpreted to confine the lawful use of replacement labour to the duration of a strike. As the strike had ended by the time Trenstar implemented the lock-out, this Court found that the right to use replacement labour no longer existed.

This Court accordingly found that the appeal must succeed, concluding that the Labour Court had erred in dismissing NUMSA's application and that the LAC had

erred in not upholding NUMSA's appeal. Accordingly, this Court reversed the respective decision of the Labour Court and LAC on the merits. As the matter was moot, the Court held that it was not appropriate to substitute the relief granted by the Labour Court with the interdictory relief that had been sought by NUMSA before it. A substituted order in declaratory form would suffice. On costs, the Court found that it was appropriate that the parties should bear their own costs, despite this Court having reversed the respective decisions of the LC and the LAC. In support of its conclusion on costs, this Court reasoned amongst others that it had, at NUMSA's instance, dealt with the merits of this matter despite its mootness to clarify an important matter of principle.

This Court accordingly made an order, first, granting leave to appeal; second, upholding the appeal; third, setting aside the order of the LAC and substituting it with an order that Trenstar was not entitled to use replacement labour for the purpose of performing the work of any employees who were locked out by virtue of the lock-out declared by the respondent on 20 November 2020; and last, that the parties would bear their costs in this Court.