

**REPUBLIC OF SOUTH AFRICA****THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH****JUDGMENT**

Reportable

Case no: P99/14

In the matter between:

**MSC LOGISTICS (PTY) LTD****First Applicant****MSC DEPOT (PTY) LTD****Second Applicant**

and

**NUMSA****First Respondent****EMPLOYEES set out in the annexure to the****Notice of Motion Marked "X"****Second and Further Respondent****Heard: 16 May 2014****Delivered: 21 May 2014**

**Summary:** The notice of application referred to in section 68 (2) of the LRA consists of a notice of motion and founding papers. A letter informing the respondents of the applicant's intention to approach courts for appropriate relief does not suffice.

**Notice to interdict a secondary strike in terms of section 66 of the LRA.**

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## JUDGMENT

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LALLIE J

### Introduction

- [1] The applicants approached this Court on an urgent basis seeking a rule *nisi* interdicting the respondents from inciting and/or participating in a secondary strike called by the first respondent which was due to commence on 15 May 2014.
- [2] The first and second applicant operate in the logistics business and marine container industry respectively. They have operations in Port Elizabeth, Uitenhage and East London. On 9 May 2014, the first respondent served the applicants with a notice in terms of section 66 (2) (b) of the Labour Relations Act 66 of 1995 ("the LRA") that the second and further applicants would participate in a secondary strike from 16 May 2014. The secondary strike, is intended to support the first respondent's members working for the Transnet Port Terminals at Ngqura and Port Elizabeth ports who are on strike.
- [3] The applicants filed the current application on 14 May 2014 setting the application down for 14h00 the following day. On 15 May 2014, the matter was postponed to 16 May 2014 at 14h00 and the parties were ordered to file the answering and replying affidavits before it was heard. The strike was suspended pending the finalization of this application and costs were reserved. In the answering affidavit, the respondents raised a point *in limine* to the effect that the applicants' case was fatally flawed in that the applicants failed to comply with section 68 (2) of the LRA. Section 68 (2) required the applicants to have given the respondents 48 hours' notice of this application. The applicants denied and

sought to rely on the following letter which they forwarded to the first respondent on 13 May 2014:

'RE: NOTICE OF SECONDARY STRIKE

We act for MSC Logistics (Pty) Ltd and MSC Depots (Pty) Ltd

We have been given a copy of your notice of a secondary strike due to commence at our client's premises on 16 May 2014.

We are of the view that any secondary strike would not comply with section 66 (2)(c) of the LRA in that the nature and extent of the secondary strike is unreasonable in relation to any effect that it may have on Transnet Port Terminals.

We therefore ask you to confirm that your members will not participate in the secondary strike. We request this confirmation by close of business today, failing which we shall have no alternative but to approach the Labour Court on an urgent basis for appropriate relief.

This letter serves as notice of our intention to approach the courts as a matter of urgency.

Should you wish to discuss the matter please feel free to contact the writer on 082 454 1951.

Yours faithful'

- [4] Section 66 (3) provides that subject to section 68 (2) and (3) of the LRA the secondary employer may apply to the Labour Court for an interdict to prohibit or limit a secondary strike that contravenes subsection (2). Section 68 (2), provided as follows:

'(2) The Labour Court may not grant any order in terms of subsection (1) (a) unless 48 hours' notice of the application has been given to be respondent: However, the Court may permit a shorter period of notice if-

- (a) the applicant has given written notice to the respondent of the applicant's intention to apply for the granting of an order;
- (b) the respondent has given a reasonable opportunity to be heard before a decision concerning that application is taken; and
- (c) the applicant has shown good cause why a period shorter than 48 hours should be permitted.

[5] In *NASECGWU and Others V Donco Investments (Pty) Ltd*,<sup>1</sup> the giving of notice was held to be aimed at giving the recipient an opportunity to consider its position and decide on an appropriate response. I find the following dictum in *Automobile Manufacturers Employers' Organization v Numsa*<sup>2</sup> opposite:

'... The wording of the Act refers to a notice of application. A notice of application is generally a notice of motion together with supporting affidavits. In my opinion this is a construction which must be given to section 68 (3). A respondent, such as the union and other respondents in this case require to know what the case is that is being brought against them. They need to know whether they can oppose the case and they require more than simply the gist of the case. The applicant's attorney's letter of 26 August 1998 sets out the relief which is going to be claimed and the grounds but not the facts which are to be relied upon'.

[6] Section 68 (2) (a) refers to a notice of the application. I am of the view that 'notice of an application' in section 68 (3) has the same meaning as 'notice of the application' in section 68 (2). In giving notice in terms of section 68 (2) the applicants were therefore required to file a notice of motion with supporting affidavits in order to achieve the purpose for which the notice is given. The purpose being to afford the respondents a fair opportunity to consider and formulate their response to the notice.

<sup>1</sup> [2010] 3 BLLR 271 (LC)

<sup>2</sup> [1998] 11 BLLR 1116 (LC) at 1118 E-F

- [7] The letter the applicants seek to rely on is a response to the secondary strike notice. It expresses the applicants' view of the notice, seeks confirmation that second and further respondents would desist from participating in the secondary strike and conveys the applicant's intention to approach this Court on an urgent basis for appropriate relief. The nature of the relief is not disclosed. It also informs the respondents that the letter serves as notice of intention to approach the courts as a matter of urgency. It gives not details of the courts and the purpose for which they will be approached. The content of the letter does not fulfill the requirements of giving notice of the application. The respondents' averment that the applicants did not give notice in terms of section 68 (2) (a) is valid. The applicants also did not give reasonable notice as envisaged in section 68 (2) (b) as they gave the respondents less than 24 hours' notice. They also failed to show good cause why a period shorter than 48 hours should be permitted. I considered the applicants' submission to move the condonation application from the bar. The circumstances of this case required a proper condonation application which included affording the respondents an opportunity to decide whether to oppose it because section 68 has the potential of violating the respondents' constitutional right to participate in strike action.
- [8] Considerations of the law and fairness require that a costs order be granted against the applicants. The respondents have successfully opposed this application and fairness requires that they are not out of pocket as a result of defending this application.
- [9] In the premises, the following order is made:
- 9.1 The point *in limine* is upheld.
  - 9.2 The application is struck from the roll.
  - 9.3 The order granted on 15 May 2014 suspending the strike falls away.

9.4 The first and second applicants are ordered to pay the respondents' costs of this application including the costs reserved on 15 May 2014.



Lallie J

Judge of the Labour Court of South Africa

LABOUR COURT

**Appearances**

**For the Applicants: Advocate Buchanan SC**

**Instructed by: Chris Baker & Associates**

**For the Respondents: Mr Niehaus of Niehaus Attorneys**

*Water Court*