

# EMPLOYMENT ALERT

25 November 2013

## LIMITING THE RIGHT TO STRIKE BY COLLECTIVE AGREEMENT

In *Transnet SOC Limited v National Transport Movement Union* (as yet unreported J2301113, 21 October 2013) the Labour Court considered the question of whether a collective agreement concluded between an employer and third party unions may limit the right to strike by a non-party union.

The employer (Transnet SOC Limited) concluded a recognition agreement with a number of trade unions representing its employees. In terms of the recognition agreement any union seeking recognition should be sufficiently representative, which means the union must at least meet the threshold of 30%.

During October 2012, the union (National Transport Movement) approached the employer seeking to be granted organisational rights. A verification exercise concluded that the union fell below the 30% threshold.

The employer, in The Commission for Conciliation, Mediation and Arbitration (CCMA) and before the Labour Court, resisted the demand by the union on the basis that it (the employer) was a party to a binding collective agreement that regulated recognition, and to consent to the union's demand would amount to a breach of the agreement. On 4 February 2013 the union issued the employer with notice of its intention to embark upon a strike in support of its demand for organisational rights.

In addressing the issue, the Court first considered the Constitutional Court judgment of *National Union of Mineworkers of SA & Bader Bop (Pty) Ltd* (2003) 24 ILJ 305 (CC). The Court indicated that, on the face of the principle espoused in the Bader Bop judgment, a minority union is entitled to strike in support of a demand for organisational rights.

The employer argued that the present case was distinguishable from Bader Bop in that there was a binding collective agreement between the employer and other third party unions that regulated the basis upon which the employer extended organisational rights to unions.

In dealing with the employer's argument, the Court considered s65 of the Labour Relations Act, No 66 of 1995 (LRA) which provides 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 in dispute, or if the agreement regulates the issue in dispute. However, the union was not a party to the agreement.

The agreement had also not been extended in terms of s23(1)(d) to those employees who were not members of the unions that were party to the agreement. The Court therefore concluded that those employees were therefore not bound by the agreement.

The Court considered the employer's second argument, in terms of which reliance was placed on s18 of the LRA that provides that an employer and a majority trade union may conclude a collective agreement establishing the threshold of representativeness required in respect of the organisational rights referred to in s12, 13 and 15 of the LRA. The threshold should be applicable to any trade union seeking such rights.

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The Court indicated that, having regard to s18, it might be suggested that notwithstanding the fact that the union is not a party to the collective agreement, the threshold established constitutes an agreement as contemplated in s18.

The Court held that, when reading s18 with the agreement, it does not limit any exercise of the right to strike by the union. Firstly, s18 contemplates a single majority union and not numerous unions acting jointly, as in this matter. Secondly it was held that even if s18 permitted agreements between an employer and two or more minority unions acting jointly, there is no express limitation in the LRA (specifically s64 and 65) which would preclude a minority union demanding organisational rights through collective bargaining or from exercising its right to strike.

Accordingly, the strike was held to be lawful.

The proposed amendments to s21 of the LRA may allow a minority trade union to obtain organisational rights through the CCMA. The purpose of the amendments to s21 is to facilitate the granting of organisational rights to trade unions that are sufficiently representative, and to ensure that the unions that represent a significant interest can validly exercise key organisational rights.

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