IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA33/16

In the matter between:

VANCHEM VANADIUM PRODUCTS (PTY) LTD **Appellant**

and

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA obo MEMBERS **Respondent**

Heard: **22 November 2016**

Delivered: **08 December 2016**

Summary: Dispute concerning the binding effect of a main collective agreement between parties. Although employer excluded from the main collective agreement, evidence proving that parties by their conduct (referring matter to the bargaining council , deducting of monthly fees, payment to the funds…) seem to have assumed that employer bound by the main collective agreement. Moreover, subsequent collective agreements signed between parties incorporated terms of the main collective agreement. Appeal upheld and Labour Court's judgment set aside.

Coram: Tlaletsi DJP, Coppin *et* Landman JJA

JUDGMENT

TLALETSI DJP

[1] The crisp issue to be decided in this appeal is whether the respondent's members employed by the appellant ("the employees") are bound to the terms of the Main Agreement concluded between the parties to the Metal and Engineering Industries Bargaining Council ("the MEIBC"). The consequences of a finding that they are bound by the terms of the said Main Agreement are that the appellant has acquired the right to implement the lay-offs and short-time provided for in the Main Agreement. A finding to the contrary would mean that the appellant could not rely on the Main Agreement for the implementation of the lay-offs and short-time.

[2] This appeal emanates from motion proceedings launched in the Labour Court on urgent basis in which the respondent, a trade union acting on behalf of the employees who are its members, sought orders in the following terms:

> '2.1 That it be declared that the Respondent's lay-off of the Applicant's members as from Saturday, 12 September 2015 and/or its subsequent implementation of short time as from Saturday 2015, was unlawful;
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> 2.2 That the Respondent be ordered to:
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> 2.2.1 Forthwith allow the Applicant's members to return to the workplace;
>
> and/or
>
> 2.2.2 Pay the Applicant's members all wages forfeited as a consequence of the Respondent's aforesaid unlawful conduct.
>
> 2.3 That the Respondent pays the costs of this Application.'

[3] The Labour Court (per Nkutha-Nkontwana AJ) essentially found that the appellant's business operation was unambiguously excluded from the Main Agreement by Part 1 clause 1(3)(e) of the Main Agreement and, as such, its unilateral implementation of the lay-off and short-time provisions was unlawful and granted the orders sought by the respondent.

[4] In view of the limited issue to be decided, the concessions made on appeal and the view I take of this matter, it shall not be necessary to burden this judgment with a lengthy historical background that led to the dispute. It shall however suffice to state what follows.

[5] The appellant is a vanadium producer. Its production at the appellant's plant is dependent upon ore supply from the Mapochs Mine which together with its owner, Highveld Steel are under business rescue. Mapochs Mine ceased to operate during April 2015 and after a brief period of renewed operation, ceased its operations again on 9 August 2015.

[6] It is common cause that as at 9 August 2015, Mapochs Mine had surplus stocks of "lumpy" ore available to sell to the appellant. However, for the appellant to use the said "lumpy" ore it first had to crush and screen it at additional expense as it needed "fines" for its operations.

[7] Mapochs Mine was willing to reduce the price of "lumpy" ore by 50%. According to the appellant, if the employees agreed to a reduction of their total cost to company of 30%, the appellant would be able to carry on production, although still at a loss. As at September 2015, the appellant was incurring monthly losses of R49 million. The appellant's salaried staff, non-unionised employees and the trade union Solidarity agreed to the proposed wage reduction pursuant to consultation meetings held on 1 and 8 September 2015. However, the respondent did not respond to the proposal. This move left the appellant with no option but to implement the lay-off. The appellant also invoked a consultation process provided by section 189A of the Labour Relations Act 66 of 1995 (Act).

[8] The Main Agreement expressly limits the duration of a lay-off to a period of eight weeks. However, in this case the appellant could not resume production since the appellant remained without ore. As the plant remained dormant for several weeks, the appellant implemented short-time purporting to act as provided for in the Main Agreement. The short-time was implemented solely for the maintenance of the plant. The intention was that maintenance be done

without the appellant incurring its full wage liability since it was unable to produce.

[9] The appellant's worsening financial situation forced it into business rescue.

[10] In the Labour Court and in this Court, the appellant had two main contentions made by Mr GC Pretorius SC. The first was that the question, relating to whether it was bound by the Main Agreement as a whole, is *res judicata* because of an arbitration award issued by Commissioner Walele relating to a dispute between the parties which was referred to the Bargaining council, and because of a judgment of the Labour Court in a dispute between the same parties. The second main contention was, that all the terms of the Main Agreement were incorporated into the employment relationship between the appellant and the respondent's members as a result of a collective agreement concluded by them during January 2011 ("the January 2011 collective agreement') .

[11] Mr Niehaus, who appeared on behalf of the respondent, contended that the arbitration award and the judgment of the Labour Court, confirming the binding nature of the terms of the Main Agreement, dealt with different questions to the ones before the Court *a quo,* and were, in any event, decided erroneously. Further, that although the terms of the Main Agreement had been adopted by the parties in the January 2011 collective agreement, the collective agreement was subsequently cancelled by the respondent, resulting in the main Agreement ceasing to bind the parties.

[12] Part 1 Clause 1(3)(e) of the MEIBC Main Agreement specifically provides that excluded from its ambit are enterprises engaged in the production of iron and/or steel and/or ferro-alloys. Since the appellant's operations fell within these exclusions, the Main Agreement is not applicable to it. However, despite this exclusion, at least at the time of the award of commissioner Walele and the judgment of the Labour Court the parties in this matter seem to have assumed that the appellant was bound by the terms of the Main Agreement. This fact is evident from the approach adopted by the respondent in the proceedings which formed the subject matter of Commissioner Walele's

arbitration award, as well the judgment of the Labour Court by Van Niekerk J. In both these proceedings, the binding effect of the Main Agreement on the appellant was not challenged and, as such, those proceedings were decided on the assumption that the appellant was bound by the Main Agreement.

[13] It is common cause that on 7 January 2011, the appellant and the respondent concluded a collective agreement, termed "Agreement on Conditions of Employment". It is significant that the agreement states in clause 1 that:

> *'The MEIBC conditions of employment and related wage increase are applicable and negotiated centrally. And no employee will be worse-off in terms of the current actual rates and benefits unless stated in this agreement'*.

[14] This clause expressly makes the the provisions of the Main Agreement relating to the conditions, as well as those related wage increases, applicable to the parties. Clause 6 of the same collective agreement provides that future adjustments will be implemented annually on receipt of the collective agreement between the MEIBC and the related employers' organisations.

[15] Mr Niehaus, on behalf of the respondent, conceded that clause 1 indeed gave the appellant the contractual right to implement lay-off and short-time. However, the respondent's defence was that the aforesaid collective agreement is no longer applicable, because it was cancelled by the respondent in terms of s 23(4) of the Act by giving reasonable notice to the appellant. In this regard, the respondent relies on the letter dated 26 June 2012. In the letter, the respondent accuses the appellant of breaching the collective agreement and purports to cancel it. The alleged, unspecified breach was in writing contested by the appellant.

[16] The Labour Court seems to have accepted that the collective agreement was validly cancelled by the respondent and rejected the appellant's claim that it had a contractual right to implement the lay-offs and short-time. The Labour Court thereafter proceeded to consider other subsequent plant level agreements such as the Strike Settlement Agreement (concluded on 5 December 2012) and the Supplementary Conditions of Employment Agreement (which was signed and came into operation on 30 May 2014) and

concluded that the those agreements did not provide for the lay-offs and short-time.

[17] The difficulty confronting the respondent relating to the purported cancellation of the January 2011 collective agreement is that its cancellation is disputed. The notice of cancellation does not state in what respect the appellant had breached the collective agreement. In response to the notice, a letter was forwarded to the respondent on 6 July 2012 disputing any breach on the part of the appellant and, *inter alia*, stating that the parties are bound by the Main Agreement.

[18] There are objective factors that show that the parties are bound by the terms of the Main Agreement by incorporation in the 7 January 2011 collective agreement.

- The subsequent agreements concluded in 2012 and 2014, referred to above, evince a clear linkage with the Main Agreement. Clause 1.1 of the 2012 agreement provides that the parties have agreed that "variation of all conditions of employment contained in Annexure A shall be determined and be based on the terms and conditions of the signed MEIBC Main Settlement Agreement". Clause 4 of the Supplementary Conditions of Employment Agreement records that the agreement "must be read with the provisions of the Strike Settlement Agreement of 5 December 2012 which indicates that the Employees' conditions of employment must be linked to the Main Agreement of the MEIB".

- The appellant deducts monthly contributions of its employees and pays them over to the metal industry's benefit funds, including the Engineering Industries Pension Fund and Metal Industries Provident Fund.

- The respondent's members have repeatedly referred disputes to the MEIBC and have relied on the provisions of the Main Agreement in support of their disputes.

- The appellant has been issued with a Certificate of Registration dated 23 July 2015 which declares that the appellant has complied with the registration requirements of MEIBC. It is lamentable that the respondent's answer to the certificate is that the person who signed the certificate did so in a month in which he was serving a notice of termination of his services with the MEIBC thereby suggesting some irregularity without providing any sound basis for doing so.

- In 2011, the MEIBC's GRO Committee, a committee which deals with exemption applications, accepted that the appellant was bound by the Main Agreement and accordingly exempted the appellant from the wage increase for the year 2011/2012.

[19] I am therefore satisfied that the parties are bound by the terms of the Main Agreement. The Labour Court misdirected itself in finding to the contrary. The appeal should therefore be upheld. As regards costs, both parties submitted that costs should follow the result. I am persuaded that it would be according to the requirements of the law and fairness that costs follow the result of the appeal. The employment of two counsel is, in my view, justified. The Labour Court made no order as to costs. I see no reason to interfere with that decision and the dismissal of the application of the respondents in that court will not attract an adverse costs order.

[20] In the result, the following order is made:

a) The appeal is upheld and the order of the Labour Court is set aside and replaced with the following:

"The application is dismissed".

b) The respondent is to pay the costs of the appeal, including the costs of employing two counsel.

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Tlaletsi DJP

Coppin *et* Landman JJA concur in the judgment of Tlaletsi DJP.

APPEARANCES:

FOR THE APPELLANT:	Adv GC Pretorius SC and Adv HM Viljoen
	Instructed by Cowan Harper Attorneys
FOR THE RESPONDENT:	Mr Minnaar Niehaus of Minnaar Niehaus Attorneys