REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: J 2082-14

In the matter between:

NATIONAL UNION OF METALWORKERS ("NUMSA") obo MEMBERS	**Applicant**
and	
NATIONAL EMPLOYERS ASSOCIATION OF SOUTH AFRICA ("NEASA")	**First Respondent**
THOSE RESPONDENT'S LISTED IN ANNEXURE B TO THE NOTICE OF MOTION	**Second Respondent**

Heard: 29 August 2014

Delivered: 08 September 2014

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Summary: (Urgent application – interdicting lock-out - final or alternatively interim relief- no clear or prima facie right – application dismissed).

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an application or an urgent interdict to declare the continuing lockout by certain members of NEASA against members of NUMSA in order to compel them to accept the employers' demand to accept their proposal for a new wage agreement, as opposed to the agreement concluded in the Metal and Engineering Industries Bargaining Council ('the MEIBC') 29 July 2014. NUMSA on behalf of its members seeks final relief or, alternatively, interim relief.

[2] The application was launched on the 26 August to be heard on 29 August 2014. NEASA filed an answering affidavit on 28 August 2014 and a reply was filed shortly before the matter was due to be heard. An answering affidavit was also filed on behalf of one of the individual employer respondents, Springbok broom and brush company (Pty) Ltd. This company opposed its inclusion in the list of respondents on the basis that it was not registered as an employer falling within the scope of the MEIBC. At the hearing, NUMSA confirmed that it withdrew any claim for relief against it.

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Outline of events preceding the application

[3] Both NEASA and NUMSA are parties to the MEIBC. Negotiations for the extension and amendment of the main agreement for the industry commenced in March and on 30 May 2014 NUMSA referred a dispute to the council in terms of clause 2 (d) of ANNEXURE "E" to the constitution. NEASA was a party to the same negotiations.

[4] The dispute could not be resolved and a certificate of outcome was issued on 25 June 2014 following which NUMSA issued a notice of its intention to

commence protected strike action on 1 July 2014. The following day NEASA issued a notice of its intention to lockout employees participating in the action until such time as the unions agreed to its demands.

[5] On 29 July a three-year agreement settling the dispute was concluded between all the unions participating in the negotiations, including NUMSA, and all the employer organisations in the negotiations, save for NEASA and the Border Industries Employers' Association ('BEIA'). NUMSA's view is that the settlement agreement ended the dispute which it had referred. However, NEASA, which was not a party to the settlement, denies that the agreement settled its dispute with NUMSA, because NEASA's demands remained on the table.

[6] Under clause 20 of the settlement agreement, the parties agreed that the settlement agreement would be effective from 1 July 2014 and that it amended existing terms and conditions of employment of all employees covered by the main agreement. Clause 1 of the agreement dealing with its duration states:

> *"The signatories to this agreement have agreed the terms of a new MEIBC Collective Main Agreement to operate from 1 July 2014 for parties and, for non-parties, from the date of Gazettal and extension, to the period ending 30 June 2017."*

The applicants contended that the reference to parties in that clause is a reference to parties to the MEIBC, whereas NEASA claims that the reference to parties and non-parties refers only to the settlement agreement itself.

[7] Another provision in the agreements which must be mentioned is clause 19 which refers to section 37 of the main agreement. The pertinent provisions of section 37 of the main agreement read:

> *"(1) Subject to subclause (2)-*
>
> *(a) the Bargaining Council shall be the sole forum for negotiating matters contained in the Main Agreement;*
>
> *(b) during the currency of the agreement, no matter contained in the agreement may be an issue in dispute for the purposes of a*

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> *strike or lockout or any conduct in contemplation of a strike or lockout;...”*

Clause 19 of the settlement agreement provided that section 37 remains unchanged, subject to certain other provisions in the agreement which are not pertinent for present purposes.

[8] The day before the settlement agreement was concluded, NEASA gave notice of its intention to continue to lockout NUMSA members employed by its members.

[9] After the conclusion of the settlement agreement, steps were taken to formally adopt it as a collective agreement concluded under the auspices of the MEIBC as contemplated in section 31 of the Labour Relations Act, 66 of 1995 (‘the LRA’) and to request the Minister of Labour (‘the Minister’) to extend it to non-parties under section 32 of the LRA.[1]

[10] The first step was the convening of a Management Committe (‘Manco’) meeting of the MEIBC on 15 August 2014. At that meeting it was formally proposed that representatives should deliberate and vote on resolutions in terms of section 8 and 10 of the MEIBC constitution. For the purposes of

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[1] the provisions read:

> *"Section 31* ***binding nature of collective agreement concluded in bargaining council***
>
> *Subject to the provisions of section 32 and the Constitution of the bargaining council, a collective agreement concluded in a bargaining council binds-*
>
> *(a) parties to the bargaining council who are also parties to the collective agreement;*
>
> *(b) each party to the collective agreement and members of every other party to the collective agreement in so far as the provisions thereof applied to the relationship between such a party and the of such other party; and*
>
> *(c) the members of a registered trade union that is a party to the collective agreement and the employers who are members of a registered employers’ organisation that is such a party, if the collective agreement regulates-*
>
> *(i) terms and conditions of employment; or*
>
> *(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers."*

this matter are only the first and third resolutions are of interest. The first resolution entailed ratification of the settlement agreement as a collective agreement of the council. The third resolution was to instruct the general secretary to take steps to arrange a vote of all representatives of the council by post and/or facsimile on the basis that the total number of votes returned by post and/or fax by the return date of three calendar days from issuing the ballot would determine the outcome of the ballot. For a variety of reasons, some of which predate the conclusion of the settlement agreement, NEASA disputes the validity of this process and consequently the status of the agreement as a collective agreement of the council.

[11] It appears to be common cause that the total number of the principal representatives on the council is 88. After the ballot was conducted the voting results reported by the council were that of the 88 annual general meeting delegates, 66 were eligible to vote amongst the ballots received and the outcome was that 41 voted in favour of the resolutions with 24 against and one ballot was spoilt. The original report on the ballot was revised slightly following the receipt of two more ballot forms, but this had no effect on the overall result. Following the ballot result, on 25 August 2014 NUMSA advised NEASA that the continued lockout by its members was unlawful and sought an undertaking from NEASA that it would be lifted so that its members could tender their services. The letter also warned that if the undertaking was not forthcoming the union would approach a court for an interdict on an urgent basis.

[12] On 26 August, NEASA's attorneys of record were advised that NUMSA intended to launch the application and requested to be able to serve papers on NEASA and its members at the address. The applicant contends that initially this method of service on NEASA's members had been agreed to but NEASA's attorney of record later advised that they had no mandate to accept service of papers on behalf of the members. This necessitated service on individual members of NEASA of the application by NUMSA. In the answering affidavit deposed to by the National Collective Bargaining Coordinator, Mister J Swart, he advised that he had been informed by the following members that they were not presently locking out any employees: Venture Product CC, Midalpro (Pty) Ltd and

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Kingsley Engineering CC. In any event at the hearing, NUMSA confined its application for relief against individual members of NEASA to those members on whom it had successfully served the application.

The legal issues

Urgency

[13] It is true that the lockout has been in existence since the beginning of July 2014, though it might only have been more evident when the strike was called off. It is true that the application was brought on relatively short notice, but the union acted promptly in launching the application as soon as it believed that, by virtue of apparent adoption of the agreement by the MEIBC, the respondent and its members were now obliged to fall in line with that agreement. Moreover, the respondent had prior warning that the application was in the offing and was given an ultimatum to uplift the lockout failing which the application would be brought. In the circumstances, I am satisfied that the matter is urgent.

The legal status of the lockout

[14] In short, the applicant's argument on the substantive merits of its contention that the continuing lockout conducted by NEASA's members, which NEASA supports, is unprotected may be summarised as follows:

14.1 The settlement agreement resolved the dispute it had declared, which no longer existed.

14.2 The settlement agreement has now been adopted by the council and constitutes a collective agreement of the council.

14.3 Once the agreement was adopted, NEASA's demands became matters which are regulated by the main agreement and accordingly clause 37 now applies to them and consequently the continued lockout is in breach of that provision.

14.4 As such, the lockout is contrary to a collective agreement prohibiting such conduct and is contrary to section's 64 and 65 of the LRA.

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[15] In relation to the substantive merits of the case, NEASA responds with a number of alternative arguments namely that:

15.1 A collective agreement concluded in a bargaining council cannot bind anyone other than the parties to the agreement and their members unless the agreement is extended by the Minister in terms of section 32 of the LRA. As this has not yet been done, the agreement is not yet binding on NEASA and its members.

15.2 Even if it was possible for a collective agreement to be extended to non-signatories, the applicant has not made out a basis for such a case in its founding affidavit.

15.3 On a proper interpretation of clause 10 (3) of the council constitution that provision does not provide for a non-signatory member of the council to be bound by a collective agreement.

15.4 Lastly, the council had acted in breach of its constitution including clause 10 (3) and the ballot was manifestly invalid.

[16] Another argument also advanced by the respondent, independently of the points mentioned in paragraph 14.1 above, that even if the settlement agreement was binding on NEASA, clause 1 of the settlement agreement itself provides that non-parties would not be bound until the agreement is gazetted and extended by the Minister. Since NEASA contends it would be classified as a non-party in terms of that clause, it would not be bound by the very terms of the settlement agreement itself.

Has the applicant made out a case that NEASA is bound as a non-signatory to the settlement agreement?

[17] For the sake of convenience, the defences raised by the respondent, which are summarised in paragraphs 15.1 and 15.2 above are dealt with together.

[18] The essence of the applicant's claim that the agreement is binding on the respondent and its members is that a majority of council representatives having decided to adopt the settlement agreement as a collective agreement of the council in a ballot, that collective agreement is binding

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on the respondent and its members, by virtue of section 31 of the LRA, the crucial part of which reads: "*Subject to the provisions of section 32 and the constitution of the bargaining council, a collective agreement concluded in a bargaining council binds- (a) parties to the bargaining council also parties to the collective agreement*"

[19] In argument it was contended by NUMSA that if one has regard to the provisions of the council constitution and in particular clause 8 (13), it is clear that all that is necessary for a decision of the council is a majority vote. Clause 8 (13) states:

> *"No motion shall be considered unless seconded, and unless otherwise provided, all matters should be voted upon by show of hands and decided by a majority except in the case of elections, when the candidates up to the required number receiving the highest vote shall be declared elected."*

It was argued by the respondent that this could have absurd consequences. For example, a situation could arise in which all the employer representatives and one of the union representatives at a meeting voting in favour of a motion, which would then be carried as a decision of the council. However unwise that may be, that appears to be what the drafters of the council constitution had agreed upon and on the text of clause 8 (13) it is difficult to see how it can be read otherwise.

[20] Clause 10 (3) of the constitution deals with the conclusion of collective agreements, viz:

> *"Any proposals received relating to Agreements shall be dealt with in terms of the provisions of item (2) of Annexure E of this Constitution. When negotiations have clarified the issues upon which amendment of any existing agreement or the introduction of a new agreement is desired, the Management Committee shall arrange that a vote of all representatives of the Council shall be taken by post and/or facsimile upon the said proposals, placing the question or questions upon the ballot paper in such form as it may determine, together with the general question as to whether the proposals as a whole are accepted, provided that the total*

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number of votes returned by post and/or fax by the return date set by the Council, shall determine the outcome of the ballot provided that if the date of the next Annual General Meeting is within three months of the conclusion of such negotiations, the proposals shall be voted upon at the said Annual General Meeting and not by post/fax. Provided further that a vote may also be taken at a Special General Meeting where the Management Committee so decides."

A couple of observations can be made at this point about the provision. Firstly, it does not stipulate any other method for determining the outcome of the ballot which is in conflict with clause 8 (13). Moreover, adopting a collective agreement using the ballot mechanism is an alternative to taking the same decision at an Annual General Meeting or Special General meeting. Decisions in those latter forums would be subject to the provisions of clause 8 (13). On the face of it therefore, it seems that if a majority of council representatives who were eligible to vote do vote to adopt the agreement then it will become a collective agreement in terms of section 31 (a) of the LRA. To hold otherwise would suggest that a differently constituted majority could decide the matter if a ballot is conducted, instead of being tabled at a General Meeting of the council. There is no reason to suppose different rules for deciding a majority apply to a decision taken in a ballot.

[21] S 31 (a), states:

"Subject to the provisions of section 32 and the constitution of the bargaining council, a collective agreement concluded in a bargaining council binds-

(a) parties to the bargaining council who are also parties to the collective agreement"

(Emphasis added)

[22] Assuming for the moment in favour of the applicant that NEASA's attack on the validity of the ballot must fail, then the adoption of the settlement agreement as a collective agreement of the council by means of the ballot

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brings that agreement within the scope of section 31(a). The respondent contends that NUMSA made out no case that NEASA and its members are bound by the collective agreement. The nub of NEASA's argument is that the applicant bases its claim on the contention that the adoption of the settlement agreement as a collective agreement of the council, as contemplated by section 31(a) of the LRA, necessarily means that the respondent and its members are bound by it. NEASA contends by contrast that the effect of the section is merely that a collective agreement concluded in a bargaining council only binds the parties to that agreement and their members.

[23] I agree that it is clear from the wording of the provision that there is an additional prerequisite which must be met for a collective agreement concluded in a bargaining council to bind a party to that council: it must also be a party to that agreement itself. The applicant argued that simply because a party is a member of a council it is bound by its decisions. I agree in the normal course of council business that a decision properly taken by a majority of representatives in the council would then become a decision of the council and objectors would have to live with that decision, unless they were successful in mustering the necessary support to overturn it. The issue is whether collective agreements concluded in the council are treated differently from other decisions of the council.

[24] Section 31(a) stipulates specific circumstances under which a party to a council is bound by the provisions of a collective agreement concluded in that council. In principle, it is conceivable that a council constitution could contain an express provision having the effect of binding all members of the council to collective agreements concluded under its auspices, including non-signatory members. However, I was not alerted to any provision in the MEIBC constitution which can clearly be construed as automatically extending agreements concluded in the council to all parties to the council and their members. In my view, the mere fact that a collective agreement can be concluded by a majority of council members does not in and of itself constitute a proviso in a council constitution that qualifies the application of section 31(a). Rather, it simply means that a collective agreement adopted in this manner will be construed as a

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collective agreement concluded in a bargaining council, which will only be binding on the parties to it under that section.

[25] I was referred to the unreported version of the LAC decision in ***SALGA v IMATU and Others***[2] but that decision did not deal with the interaction between section 31 and a bargaining council constitution. The other case I was referred to was the decision in **Bravo Groups Sleep Products (Pty) Ltd & another v CEPPWAWU**.[3] That case is more in point. In that matter the respondent union represented 28.4% of the employee parties at the bargaining council. An agreement was concluded with the majority union in the council and a formal resolution was taken to apply to have the collective agreement extended to non-parties. CEPPWAWU was not a signatory to the agreement and proceeded to embark on strike action. The applicant employer in the matter sought to interdict the strike as unprotected. Amongst other reasons it relied on was the fact that the council had concluded the agreement by way of a majority vote and once it had adopted the collective agreement, the minority union and its members were bound by it because resolutions of the bargaining council are binding on all member parties.

[26] The relevant clause in the MEIBC constitution simply provided that all motions before the council would be decided by a majority vote. The clause dealing with the negotiation of collective agreements was silent on what happened in the event of a settlement of a union party not being a signatory to the agreement. As in this case, CEPPWAWU argued that until such time as the agreement had been extended by the Minister under section 32 of the LRA, it was not bound by it. Molahlehi, J concluded :

> *"[22] In my view, the constitution of the bargaining council makes no provision for automatic binding of collective bargaining agreements to parties which are not signatories to such agreements. According[ly] CEPPWAWU [and] its members not bound by the terms of the collective bargaining agreement which was signed by employer associations and NUFAWSA. It is thus*

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[2] (JA46/2012) [2014] ZALAC 2 (4 March 2014)

[3] [2009] 2 BLLR 114 (LC)

my view that there is no textual support of upon which the limitation to the right to strike can be justified in the present instance."

[27] An employer's right to lockout is not protected in the same way that the right of workers to strike is protected in terms of section 23 (1)(c) of the Constitution, and so I am not required to interpret the MEIBC constitution in a way that does not minimise the individual respondents' right to embark on a lockout, as in the *CEPPWAWU* case. However, in any event, I cannot find any textual support for the proposition that the bargaining council's constitution makes provision for automatically binding the parties to the council to a collective agreement they were not a party to which would render the normal consequences of section 31 (a) inapplicable.

Conclusion

[28] In light of the discussion above, I am of the view that until such time as the collective agreement is extended to non-parties by the Minister in terms of section 32 of the LRA or unless the respondent accedes to the agreement, neither it nor its members are bound by the provisions of the agreement. Consequently, the applicant cannot insist, for the time being, that the respondents are not entitled to pursue a protected lockout in support of their own demands.

[29] It must also be clear from the discussion above that I do not believe this is a case where the applicant might have a *prima facie* right though open to some doubt and it can be disposed of on a final basis.

Costs

[30] Both parties sought costs in the event they succeeded, and the respondent asked for the costs of two counsel. Although the matter could ultimately be decided without having to consider the entire panoply of issues raised by the respondent, it was an application which raised some complex issues and the costs of two counsel is justified.

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Order

[31] The matter is dealt with as one of urgency.

[32] The application is dismissed.

[33] The applicant must pay the first respondent's costs including the costs of two counsel.

R LAGRANGE, J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	H Van der Riet, SC instructed by Ruth Edmonds Attorneys
FIRST RESPONDENT:	A Freund, SC assisted by P Buirski and instructed by Anton Bakker Attorneys

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