

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO: J1212/11

In the matter between:

PLASTICS CONVERTORS ASSOCIATION
OF SOUTH AFRICA

First Applicant

and

ASSOCIATION OF ELECTRIC CABLE
MANUFACTURERS OF SOUTH AFRICA
(AECMSA)

1st Respondent

ASSOCIATION OF METAL SERVICE
CENTRES OF SOUTH AFRICA

2nd Respondent

BRIGHT BAR ASSOCIATION

3rd Respondent

CAPE ENGINEER'S AND FOUNDERS'
ASSOCIATION (SOUTH AFRICA)

4th Respondent

CONSTRUCTIONAL ENGINEERING
ASSOCIATION (SOUTH AFRICA)

5th Respondent

COVERED CONDUCTOR MANUFACTURER'S
ASSOCIATION

6th Respondent

ELECTRICAL ENGINEERING AND ALLIED INDUSTRIES' ASSOCIATION	7 th Respondent
ELECTRICAL MANUFACTURER'S ASSOCIATION OF SOUTH AFRICA	8 th Respondent
ELECTRONICS AND TELECOMMUNICATIONS INDUSTRIES' ASSOCIATION	9 th Respondent
FERRO ALLOY PRODUCERS' ASSOCIATION	10 Th Respondent
GATE AND FENCE ASSOCIATION	11 th Respondent
HAND TOOL MANUFACTURERS' ASSOCIATION(HATNA)	12 th Respondent
IRON AND STEEL PRODUCERS' ASSOCIATION OF SOUTH AFRICA	13 th Respondent
KWAZULU NATAL ENGINEERING INDUSTRIES' ASSOCIATION	14 th Respondent
LIFT ENGINEERING ASSOCIATION OF SOUTH AFRICA	15 th Respondent
LIFT ENGINEERING INDUSTRIES' ASSOICATION OF SOUTH AFRICA	16 th Respondent
NON-FERROUS METAL INDUSTRIES ASSOCIATION OF SOUTH AFRICA	17 th Respondent

PLUMBERS AND ENGINEERS BRASSWARE MANUFACTURES' ASSOCIATION	18 th Respondent
PORT ELIZABETH ENGINEERS' ASSOCIATION	19 th Respondent
PRESSURE VESSEL MANUFACTURER'S ASSOCIATION OF SOUTH AFRICA	20 th Respondent
RADIO, APPLIANCE AND TELEVISION ASSOCIATION OF SOUTH AFRICA (RATA)	21 st Respondent
REGRIGIRATION AND AIRCONDITIONING MANUFACTURERS' AND SUPPLIERS' ASSOCIATION	22 nd Respondent
SHEETMETAL INDUSTRIES' ASSOCIATION OF SOUTH AFRICA	23 rd Respondent
SA ELECTRO-PLATIN INDUSTRIES' ASSOCIATION	24 th Respondent
SA ENGINEERING AND FOUNDERS' ASSOCIATION	25 th Respondent
SA FASTERNERS MANUFACTURERS' ASSOCIATION (SAFMA)	26 th Respondent
SA REGRIGIRATION AND AIRCONDITIONING	

CONTRACTORS ASSOCIATION (SARACCA)	27 th Respondent
SA POST TENSIONING ASSOCIATION (SAPTA)	28 th Respondent
SA RUMP MANUFACTURERS' ASSOCIATION	29 th Respondent
SA REINFORCED CONCRETE ENGINEERS' ASSOCIATION (SARCEA)	30 th Respondent
SA VALVE & ACTUATOR MANUFACTURERS' ASSOCIATION (SAVAMA)	31 st Respondent
FEDERATED EMPLOYERS ASSOCIATION OF SA (FEOSA)	32 nd Respondent
NATIONAL EMPLOYERS ASSOCIATION OF SA (NEASA)	33 rd Respondent
CHEMICAL, ENERGY, PAPER, PRINTING WOOD AND ALLIED WORKERS ASSOCIATION (CEPPAWU)	34 th Respondent
METAL AND ELECTRICAL WORKERS' ASSOCIATION OF SOUTH AFRICA	35 th Respondent
SOLIDARITY MWU	36 th Respondent
UNITED ASSOCIATION OF SOUTH AFRICA	37 th Respondent
NATIONAL UNIION OF METAL WORKERS' OF SOUTH AFRICA (NUMSA)	38 th Respondent

S.A. EQUITY WORKERS' ASSOCIATION
(SAEWA)

39th Respondent

METAL ENGINEERING INDUSTRIES
BARGAINING COUNCIL
Respondent

40th

STEEL ENGINEERING FEDERATION OF
SOUTH AFRICA (SEIFSA)

41st Respondent

Date of Order : 3 July 2011

Date of Reasons : 18 July 2011

JUDGMENT

A.C BASSON J:

- 1] This application was brought in terms of section 68(1)(a)(i) of the Labour Relations Act 66 of 1995 ("the LRA") for an order declaring that the strike by

the employees of the applicant's members constitutes an unprotected strike. The matter was argued in Court on Sunday 3 July 2011. The Court dismissed the application for an interim interdict with costs. Argument was presented to the Court on behalf of the 34th respondent (the Chemical, Energy, Paper, Printing, Wood and Allied Workers Association (CEPPAWU); the 38th respondent (National Union of Metal Workers of South Africa – NUMSA); the 40th respondent (the Metal Engineering Industries Bargaining Council - MEIBC) and the 41st respondent (the Steel Engineering Federation of South Africa (SEIFSA)). No order was sought against the 41st respondent and it was merely cited as an interested party.

- 2] The crux of the dispute is the applicant's complaint that the Metal Engineering Industrial Bargaining Council ("the MEIBC") had failed to comply with the peremptory provisions of its Constitution and had failed to involve the applicant in a process of conciliation in respect of the industry dispute before it (the MEIBC) and in respect of which the MEIBC had issued a certificate of non-resolution. It was submitted that the failure of the MEIBC to comply with the compulsory provisions of clause 3(b)(ii) of the Constitution rendered the process "unlawful, unconstitutional and unfair resulting in the strikes in the plastic industry to be unprotected". It was therefore submitted that because of the non-compliance with section 64(3) of the LRA (which stipulates that employees need not comply with the provisions of section 64 (1) in order to strike if the parties to the disputes are members of a council and the dispute has been dealt with by that council in accordance with its constitution) the strike is unprotected insofar as the applicant's members are concerned. The

relevant provisions of the LRA provides as follows:

"64. Right to strike and recourse to lock out

(1) Every employee has the right to strike and every employer has recourse to lock out if-

(a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and-

(i) a certificate stating that the dispute remains unresolved has been issued; or

....

(b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, unless-

(i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or

(ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or

....

3) The requirements of subsection (1) do not
apply to a strike or a lock-out if-

(a)the parties to the dispute
are members of a council,
and the dispute has been
dealt with by that council
in accordance with its
constitution;”

3] The applicant’s complaint is therefore limited to the non-compliance with section 64(3) of the LRA in that the procedures contained in the Bargaining Council’s constitution were not followed. I will deal with this aspect in more detail herein below.

4] It is important to point out that the applicant does not seek to have the certificate of non-resolution of the dispute issued by the MEIBC on 30 June 2011 set aside. The Court therefore understood the argument not to be that the various union parties who are respondents to this application and who were part of the conciliation process which resulted in the issuing of the certificate of non-resolution, are not entitled to embark on (protected) strike action. What the applicant is arguing is that any strike in respect of **its members** will be unprotected as a result of the MEIBC’s non-compliance with clause 3 (b)(ii) of the Constitution. I will return to this argument herein below.

Brief background to the relevant facts¹

¹ In light of the fact that the facts were largely common cause, I have liberally relied on the heads of

- 5] The applicant was previously a member of the MEIBC but resigned in February 2011. However despite the applicant's resignation, its members' activities remain within the jurisdiction of the MEIBC. The applicant represents 320 members and the applicant's members employ approximately 21,185 (twenty one thousand one hundred and eighty five) employees.
- 6] The 38th Respondent (NUMSA) and the other unions who are parties to the MEIBC submitted their demands on 8 April 2011 for the conclusion of a collective agreement at the MEIBC. The demands included a wage increase of 13%, an extension of family responsibility leave and a total ban on labour brokers.
- 7] Wage negotiations for 2011 commenced on 4 May 2011 under the auspices of the Management Committee (MANCO) of the council. Numerous meetings were held until eventually deadlock was declared on 7 June 2011. On 13 June 2011 the MEIBC's MANCO met to decide on the process to be followed in light of the deadlock. It was agreed that this was an industry dispute and MANCO decided to establish a sub-committee to resolve the dispute. The sub-committee made up of representatives of the parties to the council (and to the dispute) met on 14, 21, 25 and 26 June 2011. The parties were unable to resolve the dispute. On 30 June 2011 a certificate was issued declaring that the dispute was unresolved. Only one union, namely NUMSA, has issued 48 hours' notice of the strike.
- 8] On 14 April 2011, at a MANCO meeting, NEASA attempted to table proposals
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- argument submitted on behalf of the 40th and 38th respondents in summarizing the relevant facts.

on behalf of the applicant. MANCO confirmed that the applicant was no longer a party to the MEIBC and therefore NEASA could not table proposals on behalf of the applicant. The applicant was therefore aware on 14 April 2011 that it would not be allowed to participate in the negotiations. NEASA withdrew the proposals tabled on behalf of the applicant as the applicant had resigned and therefore no longer a party to the negotiation process which involved only the parties to the MEIBC. However, despite the fact that the applicant had resigned, it is common cause that the applicant and its members remain within the registered scope of the Council albeit as a non-party to the MEIBC .

- 9] On 27 June 2011 the applicant forwarded a letter to the CEO of the MEIBC in which reference is made to the provisions of clause 3(b)(ii) of the Constitution. In this letter the applicant pointed out that the failure to conduct a conciliation meeting with the applicant as required by the Constitution will result in the strike being unprotected. The applicant further stated that the deliberations that have taken place under the auspices of the MEIBC will have no effect on non-parties. The MEIBC was requested by the applicant to follow the correct procedures in respect of the dispute as required by the relevant provisions of the Constitution.
- 10] NUMSA responded to the aforementioned letter and pointed out to the applicant that it was of the view that employees within the sector, including employees employed by the applicant's members, are entitled to embark upon strike action in support of the union's demands. NUMSA further pointed out

that it will oppose any attempt to discipline employees for engaging in any intended strike action.

- 11] As already pointed out, the applicant is not seeking to have the certificate of non-resolution issued by the MEIBC set aside. What it is challenging is the dispute resolution procedures (contained in the Constitution of the MEIBC and in a Dispute Resolution Agreement) that the Council has pursued in attempting to resolve the dispute that was referred to the MEIBC which culminated in a certificate of outcome which, according to the applicant, does not bind the applicant (and its members).

Clause 3 (b)(ii) of the (MEIBC) Constitution

- 12] As already pointed out, the applicant submitted that the negotiation and dispute procedures contained in Annexure “E” to the MEIBC Constitution provides that, in the case of a dispute involving a non-party to the Council, it is compulsory for the Management Committee of the MEIBC to refer the dispute to conciliation in terms of clause 7 of the Constitution. Because of the non-compliance with the provisions of clause 3(b)(ii) of the Constitution and in light of the fact that the industry dispute between the applicant (as a non-party) had not been referred to conciliation as required by said the provisions of the Constitution, the strike in respect of the applicant’s members will be unprotected in that it falls outside of the ambit of the certificate issued by the MEIBC on 1 June 2011. Clause 3(b)(ii) of Annexure “E” to the Constitution states as follows:

“The Management Committee shall use its best endeavours to settle the [industry] dispute and shall meet as often as it deems necessary for this purpose. In the course of its deliberations the Committee may give consideration to the following: -

....

(ii) Referring the dispute to conciliation in terms of sub-section 7 below, **provided that this shall be compulsory, in the case of a dispute involving a non-party to the Council.**”²

- 13] The respondents³ argued that the application has no merits and that it should be dismissed with costs. I will return to the respondents’ arguments in more detail hereinbelow

Legal framework

- 14] Collective bargaining can take place at various levels or forums. In this particular instance bargaining in respect of wages and other conditions of employment take place at industry level between unions on the one side and employer organisations on the other side. Collective bargaining further takes place under the auspices of the Bargaining Council (the MEIBC).
- 15] Bargaining Councils are established in terms of section 27 of the LRA. One of the functions of a Bargaining Council is to conclude collective agreements which will bind the **parties** to the collective agreement and those contemplated in section 23 of the LRA. A collective agreement may be extended by the Minister to any non-parties to the collective agreement that fall within its

² Court’s emphasis.

³ As presented on behalf of the 38th and 40th respondents.

registered scope (section 32 of the LRA). Should the parties to the Bargaining Council in casu conclude an agreement, the agreement may therefore be extended to the applicant in the circumstances as contemplated in section 32 of the LRA as the applicant, although it had resigned its membership from the Council (and therefore a non-party to the Council), still falls within the registered scope of the Council. In the present case there are approximately 5000 employers that are non-parties to the MEIBC but who may be affected by any extension of a collective agreement by the Minister in terms of section 32 of the LRA. Nothing, however, prevents an employer who falls within the registered scope of the MEIBC and who wishes to be involved in the process leading up the conclusion of the main agreement to be a member of an employers association which is party to the MEIBC.

Was there compliance with section 64(3)(a) of the LRA?

- 16] I have already pointed out that it was principally the argument on behalf of the applicant that, because the Council had not complied with section 64(3) of the LRA in that it did not refer the dispute in terms of its Constitution to conciliation, the strike involving the applicant's members will be unprotected.
- 17] I am not persuaded by this argument simply because the applicant was and is not a party to the dispute. The dispute is between the **parties** to the Council who are locked into negotiations in respect of the conclusion of the Main Agreement. It is furthermore, the parties to the negotiations who have deadlocked and in respect of which a certificate of non-resolution was issued by the MEIBC. Moreover, should the parties to the Council (and the dispute)

resolve the dispute by signing the Main Agreement the said agreement will not even be applicable to the applicant's members simply because they are **non-parties** to the **agreement**. As already pointed out, the agreement may be extended to non-parties by the Minister of Labour.

18] I am in agreement with the respondent's submission that it makes no sense to involve a non-party in the negotiations leading up to the conclusion of the new Main Agreement simply because non-parties by choice do not have any bargaining rights in this regard. The agreement is negotiated and concluded between the (negotiating) parties to the Council. Having said this it must be made clear that this does not mean that employees of non-members may not as a result embark on strike action in support of the dispute which could not be resolved during the negotiations under the auspices of the Bargaining Council. These employees fall within the scope of the Bargaining Council and as a result have an interest in the **outcome** of the negotiations. I will return to this issue herein below.

19] In deciding whether or not the MEIBC has not complied with the provisions of section 64(3)(a) of the LRA, it must first be considered whether clause 3(b)(ii) of the Constitution of the Bargaining Council compels the Management Committee to refer the dispute to conciliation and involve a non-party to the Council as argued on behalf of the applicant. I am not persuaded that this clause compels the Management Committee to do so. In the present circumstances no one has referred a dispute formally against the applicant. In other words, the applicant is not party to a dispute before the MEIBC. The

disputes that have been declared are between the disputed parties referred to in the declaration of the disputes. Consequently I am in agreement with the submission that this clause is not applicable in the present circumstances and that the Management Committee was therefore not compelled in terms of the Constitution to involve a non-party to the Council in conciliation. I am therefore not persuaded that the Council had not complied with section 64(3) of the LRA.

20] There is, in my view, an even more compelling reason why it is not necessary to involve a non-party in the negotiations about the Main Agreement and that is the fact that the applicant, even if it and its members were invited to participate in the conciliation proceeding, would not have been able to settle the dispute which is the subject matter of the strike simply because settling the dispute between the applicant and the relevant unions will not settle the dispute between the bargaining or negotiating parties to the Council. The applicant would be but one of the parties to the agreement.

21] I am further in agreement with the respondents' submission that it is simply inconceivable that the MEIBC would be required to conciliate disputes with approximately 5000 non-party employers before management and/or the unions may resort to power play⁴. I am further in agreement that such an interpretation would undermine the principles and purpose of sectoral bargaining as well as the Constitutional right of unions to strike. Such an interpretation would further be administratively and logistically impossible to

⁴ There are approximately 9000 employers falling within the scope of the MEIBC. There are about 330000 employees in the industry. 59% of the employees are parties to the Council in that they are members of employer organisations that are party to the Council.

carry out. A similar approach was followed by the Labour Court in *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v NUMSA and Others*⁵ where the Court held as follows in the context of the notice that has to be given to embark on a strike in terms of section 64 (1)(b)(i) of the LRA:

“...if the issue in dispute which is the subject matter of the strike is a matter which relates to a collective agreement to be concluded in a council, the notice is not required to be given to the employer but the council.

There must be a reason why the legislature decided to provide for exceptions to the general rule that the strike notice must be given to the employer. Insofar as exception is concerned, it must be because the bargaining Council must be taken to be a forum which is representative of the industry over which it has jurisdiction and if notice is given to the Council, it must be deemed to have been given to all employer within the Council. The other reason may well be that in the absence of the exception, notice would have had to be given, in a case such as this one, to thousands of employers individually. In that event, administratively and logistically not only would an industry-wide strike be a nightmare but also it would almost be impossible to embark upon.”⁶

Section 63(1) of the LRA

22] Even if I am wrong in finding that the Bargaining Council did not have to comply with its Constitution for the reasons given and even if it is found that the MEIBC had not complied with section 64(3)(a) of the LRA, it would in my

⁵ (1999) 20 ILJ 677 (LC).
⁶ Id at para [18] and [19].

view, in any event not follow that intended the strike by the employees employed by the applicant will be unprotected. In both *County Fair Foods (Pty) Ltd v Food and Allied Workers Union and Others*,⁷ and *SA Clothing and Textile Workers Union v Free State and Northern Cape Clothing Manufactures' Association*,⁸ the Labour Appeal Court was of the view that employees have an election either to comply with the statutory requirements or to comply with pre-strike procedures contained in a collective agreement. In *County Fair*, the Court held that the LRA contemplates situations where a party is exempted from complying with the procedures set out in section 64(1) of the LRA before striking or locking-out. Those situations are provided for in section 64(3) of the LRA. In such a case it is therefore not necessary for a disputing party to follow section 64(1) of the LRA. However, the Court made it clear that section 64(3) of the LRA does not preclude striking employees from following 64(1) of the LRA. According to the Court, it is clear that the LRA gives a party an election of either following a pre-strike procedure agreed to in a collective agreement or following the statutory procedure as laid down in section 64(1) of the LRA. Compliance with either procedure suffices to confer on employees the right to strike with the result that the strike will be protected.⁹

Can the employees of non-parties embark on strike action?

- 23] Employees who are employed by non-parties are entitled to go out on strike in order to promote sectoral collective bargaining and need therefore not refer individual disputes against employers who are non-parties to the Council in circumstances where these employers nevertheless fall under the Council's

⁷ (2001) 22 ILJ 1103 (LAC).

⁸ (2001) 22 ILJ 2636 (LAC).

⁹ See the summary as contained in the headnote.

jurisdiction. This approach gives effect to the majoritarian principal by recognising that a Bargaining Council exists because it has been established by a majority of employers and employees in the industry. A Bargaining Council is the representative of the industry over which it has jurisdiction¹⁰. It is therefore unnecessary and too cumbersome for every non-party to be joined to a referral before an industry-wide strike takes place. Equally, as long as the dispute has been dealt with by the Bargaining Council, all employees that have a material interest in the demands over which deadlock has been reached may strike. It further follows, in my view, that once the issue in dispute has been referred to a Council for conciliation (as was done in this case) every employee employed in the sector and who has a material interest in the outcome of the demands made by the union party to the Council may embark on a protected strike action. This approach, in my view, gives effect to the right to strike afforded to every employee in terms of section 64(1) of the LRA. See in this regard *Metal Box of SA Ltd t/a Molders v NUMSA and Others*,¹¹ where the Industrial Court held that all employees in the industry were entitled to strike including those employed by employers of non-parties to the Council because the Council had industry-wide jurisdiction. The Court rejected the submission that a non-party employer could rely upon the fact that no dispute had been referred against it specifically as a basis for it to interdict the strike. See also *Afrox Ltd v SACWU and Others*¹² where the Court also concluded that employees have the right to strike even though the employees were not part of the referral of the dispute for conciliation in light of the fact that the *issue in dispute* had been referred to conciliation.

10 See Tiger Wheels supra

11 (1993) 14 ILJ 152(IC)

12 (1997) 4 BLLR 375 (LC),

24] In conclusion, it was not disputed that the unions have complied with section 64(1) of the LRA. Consequently the strike will in my view be legal.¹³

The required strike notice

[25] In so far as it was submitted that the failure to give notice of the intended strike to the applicant, it is clear from section 64(1)(b)(i) of the LRA and the case law that it is sufficient to give notice to the Bargaining Council if the issue in dispute relates to a collective agreement to be concluded in a Council. In respect of non-parties it is likewise sufficient to merely give notice to the Bargaining Council. See the *Tiger Wheels*-case (supra). In that matter the employer was not a member of the Motor Industry Bargaining Council and had not been party to wage negotiations at the Council although the employer fell within the jurisdiction of the Council. It was contended by the employer that it was entitled to receive 48 hours' notice of the strike before its employees were entitled to embark on a protected strike. In that matter the strike was likewise in support of collective bargaining at sectoral level. The Court held that it would create administrative and logistic chaos if the unions were required to give every employer non-party notice of the strike. The Court found that once notice was given to the Council it must be deemed to be given to all employers who fall within the scope of the Council. The Court accepted that a Bargaining Council is the representative of the industry over which it had jurisdiction over and consequently if notice is given to the Council it must be deemed to be given to all employers who fall within the scope of the Council.¹⁴

¹³ See in this regard *Columbus Joint Venture t/a Columbus Steel v NUMSA* [1997] 4 BLLR 375 (LC); *County Fair Foods (Pty) Ltd v FAWU and Others* [2001] 5 BLLR 494 (LAC)

¹⁴ Above n 3 at para [19].

[26] In conclusion, the application is dismissed for the following reasons:

- i) The MEIBC did not contravene the provisions of section 64(3)(a) of the LRA because the applicant and its members are not involved in the dispute. Consequently it was not necessary for the MEIBC to have convened a conciliation meeting with the applicant in terms of the Constitution of the Bargaining Council.
- ii) Alternatively, even if this Court ought to have found that the MEIBC did not comply with section 64(3)(a) of the LRA, the union parties to the dispute have nonetheless complied with section 64(1) of the LRA. The issue in dispute had been referred to the MEIBC as is required by the LRA and a certificate of non-resolution had been issued. Consequently, once the unions have complied with this requirement, all employees falling within the jurisdiction of the Bargaining Council and who have an interests in the outcome of the deliberations on the bargaining council, are entitled to participate in the contemplated (protected) strike.
- iii) Notice has been served on the Bargaining Council in respect of the intended strike. The fact that non-parties have not been served with a notice to strike does not render the strike unprotected. As already pointed out it will result in an administrative and logistical nightmare to insist that all non-parties to the Council must be invited to the conciliation

process and to receive notice of the intended strike in circumstances where the Bargaining Council as the representative of the industry over which it had jurisdiction has received notice of the strike.

[27] In respect of costs, I am satisfied that costs should follow the result. Costs are therefore awarded in favour of the 34th, 38th and 40th respondents. As no order as to costs were sought in the Notice of Motion against the 41st respondent, I make no order as to costs in respect of this respondent.

AC BASSON J

Appearances:

For the Applicant : E Van Graan, SC. Adv A van der Walt

Instructed by : Geldenhuys Botha Attorneys

For the 40th Respondent : Adv. FA Boda
Adv. A Mosam

Instructed by : Gatoo Attorneys

For the 38th Respondent : Mr. Anton Roskam of Haffegée Roskam
Savage Attorneys