REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 2141/11

In the matter between:

NATIONAL EMPLOYERS' ASSOCIATION OF SOUTH AFRICA	**First Applicant**
PLASTICS CONVERTORS ASSOCIATION OF SOUTH AFRICA	**Second Applicant**
RIVERPARK CRANE HIRE CC	**Third Applicant**

and

MINISTER OF LABOUR	**First Respondent**
METAL AND ENGINEERING INDUSTRIES' BARGAINING COUNCIL	**Second Respondent**
FURTHER RESPONDENTS	**Third and further Respondents**

Heard: **25 October 2011**

Delivered: **9 November 2011**

VAN NIEKERK J

Introduction

[1] This is an urgent application in which the applicants seek an order declaring that Government Notice R 748, published in Government Gazette No. 34613 on 23 September 2011, is invalid and of no force and effect. The notice comprises an extension by the first respondent (the minister) of a collective agreement concluded on 18 July 2011 under the auspices of the second respondent (the bargaining council), to non-parties to the agreement. In the alternative, the applicants seek a rule *nisi* interdicting the bargaining council from enforcing the collective agreement as against those employers who are not parties to it, pending the finalisation of review proceedings to be filed.

[2] The first applicant is an employers' organisation and a party to the bargaining council. The second applicant is also an employers' organisation, but it is not a party to the council. The third applicant is an employer that is not affiliated to the bargaining council but falls within its registered scope. None of the applicants are parties to the collective agreement that is the subject of these proceedings; the first applicant because it refused to sign it, and the second and third applicants because they are not parties to the council.

[3] The third to fortieth respondents are trade unions and employers' organisations that are parties to the bargaining council. The forty-first respondent is the Steel Engineering Industries Federation of South Africa (SEIFSA), a federation of employers' organisations in the metal and engineering sector, and acknowledged by the Registrar of Labour Relations as having complied with s 107 of the Labour Relations Act (LRA).

The issues

[4] This application has aroused a great deal of interest, and generated enough paper to fill some 15 lever arch files, most of it irrelevant. It may be

prudent therefore to commence this judgment by stating that despite what is suggested in certain of the affidavits filed in these proceedings and in the press, the application does not concern the legitimacy of sectoral bargaining arrangements (either generally or in the metal and engineering sector in particular) nor does it directly concern the constitutionality or legitimacy of the provisions of s 32 of the LRA in the form of the minister's right to extend collective agreements concluded by bargaining councils to non-parties. The applicants do not seek to challenge the validity of the collective agreement itself; they accept that the signatories to the agreement are bound by its terms. Simply put, the applicants' case is that the extension by the minister of the collective agreement concluded under the auspices of the bargaining council is invalid; first, because some of the preconditions to extension established by s 32 of the LRA had not been met and secondly, because the meeting of the bargaining council in which it was resolved to request the minister to extend the agreement was invalidly constituted.

[5] Urgency aside, the key issues raised by the applicants in their application for a declaratory order can be summarised as follows:

a. Whether the extension complies with the provisions of s 32 of the LRA, and particularly –

    i. Whether the vote by the bargaining council to request the minister to extend the collective agreement was properly taken (this involves an enquiry into whether the bargaining council's decision-making structures were correctly constituted, subsequent meetings convened to ratify the decision, and into the scope of s 206 of the LRA);

    ii. Whether the collective agreement is void for vagueness;

    iii. Whether the exemption provisions in the collective agreement comply with s 32 (3) (f) of the LRA;

iv. Whether it was necessary for the minister, prior to any decision to extend the agreement, to allow non-parties who will be affected by the outcome the opportunity to make representations.

Urgency

[6] The bargaining council did not take issue with the question of urgency, but a number of other respondents represented at the hearing of the application contended that the matter was not urgent, or that any urgency that exists is self-generated. In essence, they contend that the first applicant had made its point about the invalidity of the composition of the bargaining council's management committee as far back as May 2011 and that it was aware that the agreement was likely to be extended, since the majority of the parties represented in the bargaining council had supported such a motion. The applicants on the other hand contend that the matter is complex, and that it required full and proper consideration prior to a decision to launch these proceedings and that it took some time to finalise the papers. They also contend that the deadline for applications for exemption from the terms of the collective agreement (the only manner in which a non-party may be excused from compliance with those terms) expires on 5 November 2011, and that the interests of certainty and clarity will be served by a determination of this application.

[7] While the applicants may be criticised for not filing the application at an earlier stage – they were aware from at least 23 September 2011 that the agreement had been extended - the period of delay in filing the notice of motion and founding affidavit (the papers were filed on 10 October 2011) is not so significant so as to justify a ruling that the matter is not urgent. As I have noted, the bargaining council has taken the view that the validity or otherwise of the extension of the collective agreement is a matter of some importance to all concerned, and that it was in the interests of all parties that the matter be heard. Given that the application was filed within a reasonable time after the applicants became aware of the extension of the agreement, the importance of the issue to the parties and the bargaining council's attitude to the issue of urgency, I am satisfied that the application should be heard on an urgent basis.

Factual background

[8] Collective bargaining in the metal and engineering sector has, for decades, taken place at industry or sectoral level, initially under the auspices of an industrial council (established in 1945) and since the promulgation of the LRA, the present bargaining council. The council is registered in terms of s 29 of the LRA, and is governed by a constitution that regulates the relationship between the parties to the council, who in turn comprise registered trade unions and employers' organisations. The constitution regulates the composition of regional councils, the composition of the council, and its annual general meeting of the council, one of the functions of which is the appointment of a management committee to run the council's day to day affairs. Regional councils are defined and allocated a specific number of seats. They are populated by nominees of member trade unions and employer organisations, on the basis of equal representation, or what might be referred to as a parity principle, this being fundamental to the council's governance and structures.

[9] During 2011, the union parties to the council referred a dispute about wages and other conditions of employment in the sector to the council. After an unsuccessful conciliation process, an industry-wide strike and subsequent intervention by mediators, a settlement was reached.

[10] On 18 July 2011, in a meeting of the management committee, SEIFSA and the trade union parties to the council signed a collective agreement resolving the dispute. Amongst other things, the agreement contains the wage increases to which employees will be entitled for the next three years, and various other amendments to the terms and conditions of employment. The first applicant, although it is party to the council, did not sign the agreement, nor did the thirty-fourth respondent, the Federated Employers Organisation of South Africa. At the same meeting at which the agreement was signed, a resolution was adopted to request the minister to extend the agreement to non-parties to the agreement, as contemplated by s 32 (1) of the LRA.

[11] On 21 July 2011, in accordance with the resolution adopted by its management committee, the bargaining council addressed a letter to the Department Labour in which it requested the minister to extend the contents of

the collective agreement to non-parties in the industry. On 23 September 2011, the minister published in the Government Gazette the notice that is the subject of these proceedings, which had the effect of extending the collective agreement, concluded under the auspices of the bargaining council, to non-parties to the agreement.

[12] To the extent that the applicants in these proceedings rely on various contraventions of the bargaining council's constitution, a dispute about the interpretation and application of the bargaining council's constitution has been referred to arbitration before an independent arbitrator. These proceedings are scheduled to commence on 10 November 2011. In the statement of case before the arbitrator, the applicant contends that the management committee, the regional councils and the council are all constituted in contravention of the applicable provisions of the bargaining council's constitution. *Inter alia*, the applicant contends that the management committee was not appointed at the last annual general meeting of the council as required, that the persons held out by the council to be members of the management committee have never been validly appointed as such, that the council itself has never been validly constituted, that there is no parity as required in relation to membership by employer and trade union representatives respectively on the management committee. The applicants contend further that the regional councils are improperly constituted and that as a consequence, the council itself is not validly constituted.

[13] Of course, the minister is not a party to the arbitration proceedings, and the first applicant does not seek in those proceedings to have the extension of the collective agreement set aside. However, there is an obvious overlap between the present proceedings and the arbitration process, at least to the extent that the applicants rely in these proceedings on the averment that the management committee meeting that resolved to request the minister to extend the collective agreement had no standing to make such a decision since it had not been appointed by the council as a management committee, and what they contend to be the invalid composition of the bargaining council's decision–making structures.

Legal principles

[14] Section 32 (1) of the LRA provides that a bargaining council may ask the minister, in writing, to extend a collective agreement concluded in the council to any non-parties to the agreement that are in the council's registered scope and are identified in the request. The request must be preceded by a meeting of the bargaining council at which one or more registered trade unions whose members constitute the majority of the members of the members of the trade unions that are party to the council vote in favour of the extension, and one or more employers' associations, whose members employ the majority of the employees employed by members of the employers' organisations that are party to the council, vote in favour of the extension.

[15] There are two categories established by s 32; the first in which extension is mandatory, the second in which it is discretionary. Only the first is relevant to these proceedings. The minister must extend the agreement if the preconditions established by s 32 (2) have been met, within 60 days of receiving a request to do so, by publishing a notice in the Government Gazette declaring that from a specified date and for a specified period, the collective agreement is binding on those non-parties specified in the notice. The conditions for extension are set out in ss (3), and read as follows:

> "*(a) the decision of the bargaining council to request the extension of the collective agreement complies with the provisions of subsection (1);*
>
> *(b) the majority of all the employees who, upon extension of the collective agreement, will fall within the scope of the agreement are members of the trade unions that are arties to the bargaining council*
>
> *(c) the members of the employers' organisations that are parties to the bargaining council will, upon the extension of the collective agreement, be found to employ the majority of all employees who fall within the scope of the collective agreement;*
>
> *(d) the non-parties specified in the request fall within the bargaining council's registered scope;*
>
> *(e) provision is made in the collective agreement for an independent body to hear and decide, as soon as possible, any appeal brought*

against –

(i) the bargaining council's refusal of a non-party's application for exemption from the provisions of a collective agreement;

(ii) the withdrawal of such an exemption by the bargaining council.

(f) the collective agreement contains criteria that must be applied by the independent body when it considers the appeal, and those criteria are fair and promote the primary objects of this Act; and

(g) the terms of the collective agreement do not discriminate against non-parties."

[16] I need also to refer to s 206 of the LRA, which deals with the effect of certain defects and irregularities. It reads as follows:

1) Despite any provision in this Act or in any other law, a defect does not invalidate-

a) The constitution or the registration of any trade union, registered employers' organisation or council;

b) Any collective agreement or arbitration award that would otherwise be binding in terms of this Act;

c) Any act of a council;

d) Any act of the director or a commissioner.

2) A defect referred to in subsection (1) means-

a) *a defect in, or omission from, the constitution of any registered trade union, registered employers' organisation or council;*

b) a vacancy in the membership of any council; or

c) *any irregularity in the appointment or election of -*

i) a representative to a council;

(ii) an alternate to any representative to a council;

(iii) a chairperson or any other person residing over any meeting of a council or a committee of a council; or

(iv) the director or a commissioner."

With that background, I turn next to consider the merits of the applicants claim to the primary relief that they seek.

The application for a declaratory order

[17] Section 158(1) (a) (iv) empowers this court to make declaratory orders. Neither the LRA nor the Rules of this court prescribe the circumstances in which such an order may be made. Section 19 (1) (a) (iii) of the Supreme Court Act, 59 of 1959, entitles the High Court, in its discretion, and at the instance of an interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential on the termination. The granting of a declaratory order is dependent on the judicial exercise by the court of its discretion, with due regard to the circumstances of the matter before it.[1] Section 19 (1) of the Supreme Court Act establishes a two stage approach – the first leg of the enquiry is concerned with whether the applicant has an interest in an existing, future or contingent right or obligation; the second is whether or not the order should be granted.

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1 See Farlam, Fichardt and Van Loggerenberg *Erasmus Superior Court Practice* (Juta) at A1-34

[18] Harms, in *Civil Procedure in the Superior Courts*, referring to *Director of Public Prosecutions v Mohammed NO* 2003 4 SA 1 (CC)), suggests that a declaratory order is not appropriate if there are other specific statutory remedies available (at A-26). In the present instance, the powers conferred on this court by s 158 (1) (g) afford the applicants a right of recourse. Whether the existence of an alternative statutory remedy is necessarily fatal to an application for a declaratory order appears to be open to some doubt. Herbstein and Van Winsen observe that the fact that remedies other than a declaration of rights are available is a consideration that the court must take into account in exercising a discretion as to whether or not to make a declaration of rights (see p 1437). On either account, it is clear that the availability of alternative remedies ought properly to be taken into account in the exercise of the discretion as to whether or not to grant a declaratory order. [2]

[19] I deal first with the requirement that the applicants demonstrate an interest in an existing, future or contingent right. In *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA), the Supreme Court of Appeal was concerned with a matter in which declaratory orders had been sought *inter alia* to declare the administrator's approval of certain development rights to be of full force and effect. The court concluded that the administrator's failure to take account of material information either not before him or left out of his reckoning had the consequence that the approval was *ultra vires* and invalid. The question that then arose was whether the Cape Metropolitan Council was entitled to disregard the administrator's approval and all its consequences merely because it believed that they were invalid and provided that its belief was correct. The court held the following:

> *In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our*

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2 *Trinity Asset Management (Pty) Ltd v Investec Bank Ltd* 2009 (4) SA 89 at paragraph [40]

> *law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside*. [3]

It seems to me therefore that unless and until the minister's decision is reviewed and set aside, as a matter of law, her decision stands, notwithstanding the issues raised and submissions made to her by the applicants regarding the validity of composition of the bargaining council's internal structures. Of course, this does not mean that in any arbitration proceedings initiated by the bargaining council to enforce the collective agreement, the validity of the extension of the agreement is immune from attack by way of a collateral challenge – on the contrary, a defence based on arguments about the validity of the extension of the agreement remains open to any non-party who is subjected to enforcement proceedings.

[20] In any event, in so far as the requirement of an existing right is concerned, the provisions of s 206(1) (c) of the LRA preclude the applicants, as least in as the relief they seek is directed against the minister, from relying on any irregularity in the appointment or election of a representative to a council effectively to invalidate any collective agreement or act of the bargaining council that would otherwise be binding in terms of the Act. It seems to me that s 206 was enacted specifically to protect processes against technical shortcomings and deficiencies in the functioning of bargaining councils. The ordinary grammatical meaning of s 206 (1)(b) read with ss (2)(c) immunises collective agreements and acts of bargaining councils from attacks on their validity on account of any irregularity in the appointment or election of any representative to a council, or any of its structures. The applicants' attack on the validity of an act of the bargaining council, at least that part of it premised on the failure by the bargaining council to comply with its constitution in so far as appointments to the management committee are concerned, is precisely the kind of attack envisaged by s 206. What s 206 means is that even if the council or its management committee were not constituted in accordance with its constitution when it requested the minister to extend the agreement, that defect does not invalidate the request, nor does it affect the validity of the agreement. It would

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3 At paragraph [26] of the judgment.

do violence to the plain wording of the section and its obvious purpose to find, as the applicants submit, that a distinction ought to be drawn between void and voidable acts, and that only the latter are contemplated by s 206.

[21] In short: For the purposes of the application for a declaratory order, the minister's decision is valid and enforceable until it is set aside by a court of law, and there is therefore no existing right in which the applicants have an interest. In any event, the assertion of any right that the applicants may have, to the extent that it is premised on the invalidity of any act by the bargaining council or any irregularity in any appointment or election of any representative to the bargaining council or any of its structures, any defects do not invalidate the extension of the collective agreement by virtue of the provisions of s 206.

[22] Even if I am wrong in coming to the conclusion that there is no 'right' for the purposes of the present application that pre-exists any setting aside of the minister's decision, the application stands to be dismissed on the basis that the applicants have failed to clear the second hurdle before them, i.e. that all of the facts and circumstances of the case require the exercise of a discretion in their favour. I come to this conclusion for two reasons. First, as I have noted, there is an alternative remedy open to the applicants. In effect, the substantive right to which they lay claim is a right to fair administrative action. The right of review under the LRA is available to the applicants on all of the grounds raised by the applicants in these proceedings relating to the vagueness of the collective agreement, the absence of fair criteria in relation the adjudication of appeals in exemption proceedings and the failure by the minister to afford non-parties a right to be hear prior to extending the agreement. Indeed, such an application is foreshadowed by the alternative relief sought in these proceedings.

[23] Secondly, the primary basis of the applicants' complaint, in the form of their contentions regarding the constitution particularly of the bargaining council's management committee, has been referred to arbitration in terms of the bargaining council's constitution, and those proceedings remain pending. In these proceedings, the applicants are in effect asking this court to make a final order as to validity of the composition of the council, regional councils and the management committee in circumstances where this is the substance of their statement of case before the arbitrator. The arbitrator's decision obviously does

not bind the minister, but to the extent that the resolution adopted by the bargaining council's management council is found to be invalid or that any subsequent attempts to ratify the resolution remains contested, it remains open to the applicants to attack the decision to extend the agreement on that or any other basis.

The claim for interim relief

[24] I turn next to the applicants' alternative claim for an interim interdict prohibiting the bargaining council from enforcing the collective agreement pending the outcome of a review to be instituted. The requirements for interim relief in this court are no different to those that apply in the High Court - a clear right or a right *prima facie* established though open to some doubt, a well-grounded apprehension of irreparable if the interim relief is not granted and the ultimate relief sought is granted, a balance of convenience in favour of granting interim relief, and the absence of an any other satisfactory remedy (see *Spur Steak Ranches Ltd v Saddles Steak Ranch* 1996 (3) SA 706 (C)). In proceedings such as the present, where interim relief is sought pending the finalisation of an application for review, it is also incumbent on an applicant to demonstrate some prospects of success in the pending application.

[25] I do not intend to canvass the applicants' prospects of success in any review application - for present purposes, this is a neutral factor. It seems to me that the application for interim relief can be disposed of on the basis of the balance of convenience and the absence of irreparable harm. It is not disputed that if the interim relief sought by the applicants were to be granted, a great deal of uncertainty and confusion would be caused in the industry; hundreds of thousands of employees would be affected by the differential in wage rates that would inevitably occur. Further, any harm to which the applicants are exposed is not irreparable. It amounts to no more than the risk of paying wages in advance. Moreover, if the applicants' complaints are found either in the pending arbitration proceedings or in any review application to be valid, there is the prospect that through a process of ratification or a subsequent extension of the agreement that the result that the applicants now seek to upset would in any event be achieved. On the other hand, if interim relief were to be refused pending a review that is ultimately successful, non-parties to the agreement

would be entitled to recover the value of any increase paid by way of set off against subsequent wage payments adjusted to suit. In any event, those of the first applicant's members who are not able to meet the terms of a collective agreement have the remedy of a an expedited application for exemption with a right of appeal ultimately to an independent panel. While the applicants have expressed their doubts about the efficiency of this process, the facts deposed to by the bargaining council appear to indicate that the system is not dysfunctional. In short: the balance of convenience favours the respondents, and the harm that would be caused by granting the interim relief that the applicants seek substantially outweighs the benefits that would be derived by what are at the end of the day two non-parties in an entire industry

[26] On this basis, in my view, the applicants have failed to make out a case for an interim order.

Costs

[27] Section 162 empowers the court to make orders for costs on the basis of the requirements of law and fairness. This requires the court, on a case-by-case basis, to have regard to all of the relevant facts and circumstances and to exercise a discretion as to whether a costs order should be granted, and if so, on what basis.

[28] In *National Union of Mineworkers v East Rand Gold and Uranium Ltd*, what was then the Appellate Division of the Supreme Court held that where the parties to a dispute were parties to a collective bargaining relationship, the court should consider any prejudice to that relationship that an order for costs against one of the parties might pose. In the present instance, the applicants and those of the respondents who have opposed the application are, in one way or another, parties to a collective bargaining relationship. The sub-text in this case is a dispute between the first applicant, other employer association that are party to the council and the council itself over issues that relate to the governance of the council. While these issues will shortly be the subject of arbitration proceedings, I have no doubt that whatever the arbitrator's decision may be, present disagreements are necessarily going to have to be resolved, one way or another. I am mindful that an adverse order for costs might

prejudice that process, and for that reason, in my view, it is fair that each party pays its own costs.

I accordingly make the following order:

1. The application is dismissed.

2. There is no order as to costs

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André van Niekerk
Judge

APPEARANCES

APPLICANT:	Adv AIS Redding SC, with Adv G Fourie, instructed by Anton Bakker Inc
FIRST RESPONDENT:	Adv T Motau SC, with Adv MJ Ramaepadi, instructed by the state attorney
SECOND RESPONDENT:	Adv RT Sutherland SC, with Adv A Mosam, instructed Gattoo Attorneys Inc
THIRD RESPONDENT:	Adv PJ Pretorius SC, with Adv T Bruinders SC and Adv A Snider, instructed by DLA Cliffe Dekker Hofmeyr Inc

THIRTY-SIXTH RESPONDENT: Mr MM Baloyi, MM Baloyi Attorneys

THIRTY-SEVENTH RESPONDENT: Adv J Grogan

THIRTY-NINTH RESPONDENT: Adv G Rautenbach SC, instructed by Haffegee Roskam Savage Attorneys