



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 860/13

In the matter between:

NATIONAL EMPLOYERS ASSOCIATION OF SOUTH AFRICA **1st Applicant**

PLASTIC CONVERTERS ASSOCIATION OF SOUTH AFRICA **2nd Applicant**

RIVERPARK CRANE HIRE CC **3rd Applicant**

and

MINISTER OF LABOUR FIRST RESPONDENT **1st Respondent**

METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL **2nd Respondent**

PARTIES TO THE AGREEMENT **3rd to 32nd Respondents**

BOARDER INDUSTRIAL EMPLOYER'S ASSOCIATION **33rd Respondent**

FEDERATED EMPLOYERS ORGANISATION OF SOUTH AFRICA **34th Respondent**

CAESAR EMPLOYERS ASSOCIATION **35th Respondent**

Decided in Chambers

Date delivered: 13 April 2015

LEAVE TO APPEAL JUDGMENT

WATT-PRINGLE AJ

Introduction

- [1] On 17 December 2014, my written judgment dated 12 December 2014 was handed down in the Labour Court (*“the main judgment”*). In that judgment I granted an order reviewing and setting aside the decision of the first respondent (*“the Minister”*) taken in April 2013 to extend the terms of a collective agreement to non-parties that fell within the registered scope of the second respondent (*“the Bargaining Council”*); declaring Government Notice R268 published in the Government Gazette No. 36338 on 12 April 2013 invalid and of no force or effect and ordering that the costs be paid by the Minister and the Bargaining Council, jointly and severally, the one paying the other to be absolved, including the cost of two counsel.
- [2] The Bargaining Council delivered a notice of application for leave to appeal against the main judgment on 23 December 2014; the National Union of Metal Workers of South Africa (*“NUMSA”*) delivered an application for leave to appeal on 15 January 2015 and a condonation application on 20 January 2015 and on 2 February 2015 the Minister filed a notice of application for leave to appeal, well out of time. The Minister has neither filed an application for condonation nor has the Minister made written submissions in accordance with Rule 30(3A) of the Labour Court Rules.
- [3] The first, second and third applicants (NEASA et al) opposed the application for leave to appeal and filed written submissions in terms of Rule 30(3A) on 30 January 2015. Both the Bargaining Council and NUMSA have also filed their written submissions in terms of Rule 30(3A).

[4] I do not consider it necessary to convene a hearing and have considered the applications for leave to appeal and submissions made pursuant thereto on the papers.

[5] The central findings of the judgment can be summarised as follows:

[5.1] The Minister's decision to extend a collective bargaining agreement to non-parties and the subsequent publication in the Government Gazette in order to give effect thereto was purportedly in relation to an agreement concluded in the Bargaining Council on 14 January 2013.

[5.2] No such agreement was ever concluded in the Bargaining Council. The agreement submitted for publication contained an "*explanatory note*" which amounted to a substantive amendment to the collective agreement which was validly concluded on 11 July 2011, in that the document submitted to the Minister purported to rectify a lacuna in the July 2011 agreement by specifying the wage spread between Grades A to H.

[5.3] There was furthermore no valid decision by the Bargaining Council to request the extension of the purported collective agreement to non-parties pursuant to Section 32(5) of the Labour Relations Act 66 of 1995 ("*the LRA*").

[5.4] Both the the Minister's decision and the publication of the purported agreement were accordingly *ultra vires* Section 32 of the LRA.

[5.5] The invitation by some of the respondents to suspend the effect of the declaration of invalidity could not be countenanced for the reasons given in the judgment.

- [6] It is in my view unnecessary to deal with every ground of appeal advanced by the Bargaining Council and by NUMSA. I have had regard to the Minister's notice of application for leave to appeal but strictly speaking, in the absence of an application for condonation, that application is not properly before me.
- [7] The Bargaining Council on the one hand contends that since the main application was heard shortly after the agreement had expired by effluxion of time, the matter was mute and the application should, for those reasons alone have been dismissed. On the other hand, the Bargaining Council without having made out any case to that effect on the papers, contends that any decision by the Court in its discretion not to ameliorate the order of invalidity will have dire consequences for those to whom the purported agreement was intended to apply and could result in industrial strife.
- [8] The Bargaining Council cannot have it both ways.
- [9] I will return to that aspect later in this judgment.
- [10] My reasoning in relation to the finding that no collective agreement was concluded on 14 January 2013 is simply this. There was a lacuna in the July 2011 collective agreement which at the time the Bargaining Council attempted to correct by means of an explanatory note as to what was intended in relation to the "*missing grades*". NEASA objected thereto and this precipitated an application for rectification. The application for rectification was opposed by the Minister who had by that stage already extended the agreement to non-parties and the Minister correctly took the view that rectification could not take place after such extension. The Minister's decision to extend that agreement to non-parties and the extension thereof was reviewed and set aside by this Court on 20

December 2012, thus opening the way for the Bargaining Council to persist in its application for rectification, but this apparently did not occur.

- [11] Instead, the Bargaining Council simply purported to make a decision at a meeting on 14 January 2013 to amend the July 2011 agreement in circumstances which, as the main judgment spells out, did not remotely comply with any notion of the conclusion of a collective agreement either as contemplated at common law, or according to the definition of a collective agreement in the LRA or indeed as contemplated in the Constitution of the Bargaining Council.
- [12] The “*collective agreement*” which was submitted by the Bargaining Council to the Minister for extension and publication was in terms referred to as a collective agreement concluded on 14 January 2013.
- [13] The Bargaining Council has failed to make any submissions which deal with the substance of the abovementioned finding, namely that the document submitted to the Minister, purporting to be an agreement concluded on 14 January 2013, was not what it purported to be in that there was no agreement concluded on 14 January 2013.
- [14] In its written submissions, NUMSA has accepted that no collective agreement was concluded on 14 January 2013, but contends that the document submitted to the Minister was in truth a collective agreement concluded in July 2011 which contained an obvious error, which was simply “*corrected*”. There are two obvious difficulties with this approach. The first is that although there was an obvious error in the July 2011 agreement, its correction was not of the order of the correction of a patent error (such as an error in calculation) in that it is not possible as a matter of interpretation to “*fill in*” the missing grades. This much

was recognised by the Bargaining Council itself when it launched the substantive application for rectification of that agreement.

[15] A second difficulty with NUMSA's submission is that the Minister was clearly mislead into believing that the parties to the Bargaining Council had concluded an amended agreement which corrected the error in the July 2011 agreement, when in fact this had not occurred.

[16] As for the absence of any valid decision by the Bargaining Council to request the extension of the collective agreement to non-parties, the Minister relied upon a "postal vote" hastily undertaken after the Minister had published her possible intention to extend the "agreement" to non-parties and invited submissions in response thereto. Assuming that I need make nothing of that anomaly, the Bargaining Council's contention that an email invitation to those entitled to vote on the issue which gave them no more than a few hours to do so constituted a "postal vote" is deplorable, but in keeping with the generally slip shod manner in which the entire matter of the July 2011 collective agreement has been handled by the Bargaining Council.

[17] In my view there is no reasonable prospect that the Labour Appeal Court will give its imprimatur to such a sham.

[18] In various submissions made in this application it was urged upon me that the decision not to suspend the declaration of invalidity would defeat the primary objects of the LRA relating to collective bargaining.

[19] In making these submissions, the applicants for leave to appeal appear to view this question only from one perspective, namely that the extension of collective agreements to non-parties *per se* gives effect to one of the primary objects of the

LRA. These submissions ignore the fact that Section 32 of the LRA poses strict requirements which must be fulfilled in order for the Minister validly to make a decision to extend collective agreements to non-parties which, as I found, fundamentally failed in at least two respects.

[20] The decision by van Niekerk J on 20 December 2013 to suspend the effect of his orders reviewing and setting aside the earlier extension of the July 2011 agreement was with respect perfectly understandable in that the Bargaining Council was given an opportunity to put its house in order and the Minister an opportunity to exercise her discretion on the matter of sufficient representivity in terms of Section 32(5), if appropriate.

[21] Had the Bargaining Council properly put its house in order and the Minister been presented with a valid agreement, a valid request to extend the agreement and sufficient representivity, the agreement may validly have been extended, but this did not occur.

[22] The parties have not spelt out the form or effect of an order which this Court may have made in the main judgment ameliorating the declaration of invalidity, nor was it suggested how the Bargaining Council could retrospectively rectify the deficiencies in the process which led to that order being granted.

[23] In essence, an order suspending or ameliorating the declaration of invalidity would only have been of any assistance to the Bargaining Council if the effect thereof was that both the *“14 January 2013”* collective agreement and the extension thereof would stand and the Bargaining Council could proceed to enforce compliance to the extent that this has not already occurred.

- [24] In my view, in the absence of a validly concluded agreement amending the July 2011 agreement in order to fill in the missing grades, or an order for rectification which may have the same effect, it would constitute a substantial deviation from the principles on which collective bargaining is based if this Court nevertheless gave an order which give effect to the “*agreement*” and its purported extension, and would do more to defeat the primary objects of the LRA than the order as it stands is likely to do.
- [25] Put otherwise, the objects of the LRA concerning collective bargaining are best served by insisting at least on substantial compliance with the statutory requirements and safeguards set forth *inter alia* in Section 32 of the LRA.
- [26] It has also been urged upon me that there was substantial compliance with Section 32. It is trite law that substantial compliance does not mean lack of compliance. It means compliance in substance if not exactly in form. Absent rectification of the July 2011 agreement for which no case is made out and no relief claimed in the main application, there is simply no basis on which to conclude that the missing wage grades were agreed upon as a matter of substance if not as a matter of form. It follows that when the Bargaining Council submitted a document which purported to be an agreement concluded on 14 January 2013 and which catered for the missing grades, this was neither an agreement in substance nor in form and there was no substantial compliance with the requirements of Section 32.
- [27] The decision not to suspend the order of invalidity is discretionary in nature and the parties have not in my view pointed to any basis in which an appeal court would be entitled to interfere in that decision, if so minded.

[28] It follows that in my view there are no reasonable prospects of another Court reaching a different conclusion.

[29] NUMSA's application for condonation was not opposed by NEASA et al.

[30] I make the following orders:

1. NUMSA's application for condonation is granted.
2. The applications for leave to appeal to the Labour Appeal Court against the judgment dated 12 December 2014 are dismissed;
3. The cost of this application, including the costs occasioned by the employment of two counsel, are to be paid by the Bargaining Council and NUMSA, jointly and severally, the one paying the other to be absolved.

CE Watt-Pringle, AJ
Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicants: AIS Redding SC and GA Fourie

Instructed by: Attorneys Anton Bakker Inc

For the First Respondent: P Kennedy SC and MJ Ramaepadi

Instructed by: Attorneys State Attorneys

For the Second Respondent: N Cassim SC, F Boda, V September

Instructed by: Attorneys Patelia-Cachalia Attorneys

For NUMSA: Messrs A Roskam and L Davis

Instructed by: Attorneys Haffegge Roskam Savage Attorneys