REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1298/12

In the matter between:

NUMSA obo its members	**Applicant**
(as listed in annexure "A")	
and	
VIDEX WIRE PRODUCTS (PTY) LTD	**First Respondent**
K DRISCOLL	**Second Respondent**
MEIBC	**Third Respondent**

Heard: **8 October 2015**

Delivered: **28 October 2015**

Summary: Review – LRA s 158(1)(g) – whether demands of union members were strikeable – question whether issue in dispute covered by Main Agreement of Bargaining Council.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, NUMSA[1], seeks to have an arbitration award reviewed and set aside in terms of s 158(1)(g) of the LRA.[2] The commissioner[3] held that the union members' demands in terms of the Main Agreement governing them constitute demands for remuneration and/or productivity bargaining which may not be negotiated outside the Bargaining Council.[4] Therefore NUMSA may not strike over those issues.

Background facts

[2] The union and the employer are bound by the Consolidated Main Agreement for the Metal and Engineering Industries Bargaining Council. More specifically, they are bound by the agreement reached at national level over remuneration and productivity bargaining. The company argues that the union's members may not strike over those issues at plant level during the period of the agreement; the union contends otherwise. Clause 37 of the main agreement reads as follows:

> "**37. LEVELS OF BARGAINING IN THE INDUSTRY**
>
> (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 strike or lock-out or any conduct in contemplation of a strike or lock-out;
>
> c. any provision in a collective agreement binding an employer and employees covered by the Council, other than a collective agreement concluded by the Council, that requires an employer

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[1] The National Union of Metalworkers of South Africa.

[2] The Labour Relations Act, Act 66 of 1995.

[3] The second respondent, Ms K Driscoll.

[4] The Metal and Engineering Industries Bargaining Council (MEIBC), the third respondent.

or a trade union to bargain collectively in respect of any matter contained in the Main Agreement, is of no force and effect.

(2) Where bargaining arrangements at plant and company level, excluding agreements entered into under the auspices of the Bargaining Council, are in existence, the parties to such arrangements may, by mutual agreement, modify or suspend or terminate such bargaining arrangements in order to comply with subclause (1). In the event of the parties to such arrangements failing to agree to modify or suspend or terminate such arrangements by the date of implementation of the Main Agreement, the wage increases on scheduled rates and not on the actual rates shall be applicable to such employers and employees until the parties to such arrangement agree otherwise."

[3] Annexure D to the Main Agreement provides:

"Subject to the provisions of clause 37 of the Main Agreement, an employer, his employees, any employee representative body and any trade unions representing the affected employees may, by mutual agreement, enter into voluntary negotiations to conclude a productivity agreement with the objective of achieving measurable improvements in productivity performance and work life at company level in terms of the principles and guidelines contained in this Annexure."

[4] The issue of production targets has been a contentious one for a number of years. NUMSA sent a letter to the company setting out their demands (or proposals). For the sake of understanding those demands, and whether or not they are covered by the main agreement, they are worth quoting in full:

"<u>RE: STANDARD FOR PRODUCTION TARGETS</u>

Further to our previous discussions pertaining the above, please find herewith our proposals in respect of production targets:

1. We submit that all members are paid per hour, and not per the targets.
2. We submit that production targets must not be linked to the hourly rate.
3. We submit that failure by employees to reach the production targets should not result in disciplinary action.
4. We submit that production targets should be based and/or calculated on the sliding scale.

5. We propose that there should be a daily amount which employees will receive for reaching the production targets.
6. We propose that in case the employee did not reach targets he/she will forfeit certain amount of money percentage of daily targets money based on the sliding scale [*sic*].
7. We propose that in case the employees reach daily targets prior to knock off time, such employee should have option to knockoff continue to work as overtime.
8. We propose that any increase to production targets must be subject to negotiations between the union and company.
9. We propose that production targets be dealt with by the accredited professionals with good reputation in general and SABS in particular.
10. We put on record that the production targets must not violate basic human rights and health and safety rules and regulations.
11. We propose to meet with yourselves [*sic*] on either 13/04/2011 at 12h00 or on 20/04/2011 at 10h00 to discuss about this matter including procedural and recognition agreement."

[5] The parties could not reach agreement. The union referred a dispute to conciliation at the bargaining council. They characterised it as a matter of mutual interest in terms of s 64 of the LRA. Conciliation failed and the Council commissioner issued a certificate to that effect. He ticked the box that indicated that, if the dispute remains unresolved, the union could call its members out on strike.

[6] The company responded to the demands set out in the union's letter, but still the parties could not agree. The union issued a notice that it would embark on a protected strike within 48 hours in terms of section 64 of the LRA. The union reiterated the 10 demands set out in its earlier letter. It added a new demand that "five grade structure must be benchmarked by the highly paid artisans" but subsequently withdrew it.

[7] The company's attorneys sent a letter to NUMSA advising them that the strike would be in support of productivity bargaining; that that was an issue covered by the main agreement; and that, hence, the strike would be unprotected. They further pointed out that the company had not agreed to

negotiations on productivity bargaining in accordance with Annexure D to the Main Agreement. They asked NUMSA to give an undertaking to stop the strike.

[8] NUMSA refused. The company launched an urgent application in this Court. The Court granted an interdict stopping the strike pending a referral to arbitration of the following question:

> "Whether the union demands in terms of the Main Agreement constitutes [*sic*] demands for remuneration and productivity bargaining which may not be negotiated outside the Bargaining Council and if so whether the union may strike over the issue."

[9] The arbitrator answered the question in the affirmative and ruled that the union and its members "may not strike over the issues".

<u>The award</u>

[10] The commissioner was guided by the remarks of the LAC in *Northern Cape Forests*[5] that the interpreter of a collective agreement should, in addition to applying the ordinary rules of interpretation, also ask the question whether the interpretation accords with the objectives of the LRA. Those objectives include providing a framework for collective bargaining; and to encourage collective bargaining at sectoral rather than plant level. "The negotiating and setting of wage increases, the minimum wages assigned to each job category and the terms and conditions of employment are thus at the heart of collective bargaining and a bargaining council."

[11] The company had argued that the union's demands were essentially in support of more money. In particular, NUMSA demanded an additional payment of R150 per day for meeting production targets; but their other demands did not fall away. The arbitrator considered those demands. She concluded that the demands do indeed pertain to issues which are governed by the Main Agreement. The real demand was for an increase of workers' wages and this may only be negotiated nationally under the auspices of the Bargaining Council.

[5] *Northern Cape Forests v SA Agricultural & Allied Workers' Union* (1997) 18 *ILJ* 971 (LAC).

<u>Review grounds</u>

[12] The applicant submits that the award is reviewable because the arbitrator “committed misconduct in that she rendered an award which no reasonable decision maker could render”. Both parties argued the review application on the basis of that reasonableness test set out in *Sidumo*[6], even though the application was launched under s 158(1)(g) rather than s 145 of the LRA.

[13] Mr *Ngako* submitted that the real dispute between the parties pertained to production targets and target incentives, and that those issues are not governed by the main agreement. NUMSA’s main demand was that “there should be a daily amount of money which employees will receive for reaching the daily targets”, being R150 per day. That, he argued, is not covered by the main agreement.

<u>Evaluation / Analysis</u>

[14] On the evidence before the arbitrator, she correctly found that the company had assigned a daily production target to the workers. It paid them the hourly wage whether they reached the target or not. The union’s demands, including the demand for R150 per day if they reached the target, would mean extra money in their pockets. The arbitrator’s finding that their demands were for “an amount of money in addition to the normal hourly rate, for no additional work”, is not unreasonable. Neither is the following conclusion:

> “[T]he additional amount is related to a particular aspect of … employment and has the single effect of increasing the [workers’] wages. This in my view places the demands within the ambit of the Main Agreement”.

[15] The arbitrator applied the facts on the evidence before her to the provisions of the Main Agreement. She concluded that the demands amounted to a demand for higher wages; that this could only be negotiated nationally under the auspices of the Council; and that, therefore, the union and its members could not strike over those demands.

[6] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

That conclusion is not so unreasonable that no other commissioner could have come to the same conclusion on the facts before her.

[16] In support of his argument, Mr *Ngako* referred to a judgment of the Labour Appeal Court in *Unitrans*[7] in which the LAC held that the fact that the union could not strike over one issue governed by a collective agreement, did not prevent them from striking over another discrete issue. That proposition is certainly correct. But that judgment was followed by a more recent one[8]. In *Unitrans (2)*, the LAC held on the facts of that case that a demand relating to wage disparities was one that would lead to increased costs for the company; that it was subject to collective bargaining; and thus that it "stood outside the confines of the area of a protected strike as defined by the Labour Appeal Court."[9]

[17] The same considerations apply to this case. The arbitrator's finding that the union's demands were essentially for more money, and that it formed the subject matter for collective bargaining under the auspices of the Council, is not so unreasonable that no other arbitrator could have come to the same conclusion.

Conclusion

[18] The arbitrator's conclusion is not so unreasonable that no other commissioner could have come to the same conclusion on the facts before her. The award is not open to review.

[19] Concerning costs, I take into account that there is an ongoing relationship between the parties and that the issues in dispute may well form the subject of collective bargaining in months to come. In law and fairness, I do not consider a costs order to be appropriate.

Order

The application for review is dismissed.

[7] *Unitrans Fuel & Chemical (Pty) Ltd v TAWUSA* [2011] 2 BLLR 153 (LAC) [*Unitrans (1)*].

[8] *TAWUSA v Unitrans Fuel and Chemical (Pty) Ltd* [2015] ZALAC 24 (24 June 2015) ["*Unitrans (2)*].

[9] *Unitrans (2)* para [33] [per Davis JA].

Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Xolisa Ngako of Ruth Edmonds attorneys.
FIRST RESPONDENT:	Greg Fourie Instructed by Cliffe Dekker Hofmeyr.