THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J 554/19

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA OBO MEMBERS **Applicant**

And

PLASTIC CONVERTORS ASSOCIATION OF SA **First Respondent**

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL **Second Respondent**

Heard: **18 April 2019**

Delivered: **14 May 2019**

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant (NUMSA) approached this Court on an urgent basis for an order *inter alia,* declaring a lock-out not to be in compliance with the provisions of Chapter IV of the Labour Relations Act[1](LRA). The matter was set down for hearing on 20 March 2019, on which date the parties agreed to postpone the matter to 18 April 2019 and further agreed to the filing of affidavits in the application.

[2] The First Respondent (the Respondent) took issue with urgency. I do not intend to deal with the issue in any detail as this Court has a discretion and in exercising that discretion, I am inclined to deal with the matter notwithstanding the objections regarding urgency. I am of the view that it is in the interest of the parties that the matter be decided without delay.

Brief history

[3] The dispute between the parties has a long and peculiar history and it is necessary to provide a brief summary thereof to give context to the dispute and this application.

[4] The National Industrial Council for the Iron, Steel, Engineering and Metallurgical Industries was founded in 1944. In 1994 it was registered as a bargaining council under the LRA and its name was changed to that of the Second Respondent (MEIBC). Several industries fall within the scope of the MEIBC, including the plastics industry.

[5] The Respondent is an employers' organisation which falls within the plastics industry, as defined in the certificate of the MEIBC's registration, and it is a member of the MEIBC.

[6] For many years the employers in the plastics industry had argued that their industry does not fit neatly into the general scope of the MEIBC and that the employers and the unions within the said industry should negotiate separately. In June 2008, the parties to the MEIBC concluded a collective

[1] Act 66 of 1995 as amended.

agreement confirming their in-principle commitment to the establishment of a plastics chamber under the auspices of the MEIBC.

[7] A Plastics Negotiating Forum (PNF) was established on 10 September 2013 as a separate negotiating chamber, operating under the auspices of the MEIBC. It was for the exclusive negotiation of terms and conditions of employment within the plastics industry. The first meeting of the PNF took place on 4 October 2013 under the auspices of the MEIBC and the parties present agreed on terms of reference, which were adopted at a subsequent meeting of the MEIBC's management committee (MANCO). NUMSA was not party to this.

[8] During May and June 2014 negotiations in the PNF took place and a collective agreement regulating terms and conditions of employment in the plastics industry was concluded. The agreement remained in force until 30 June 2016.

[9] On 6 July 2016 the Labour Appeal Court (LAC) delivered judgment[2] wherein it declared *inter alia* that the PNF was a duly established and exclusive negotiating chamber for the plastic sector within the MEIBC. This brought a long-running dispute to an end. The effect of the judgment was that the plastics industry was recognised as a separate sub-sector within the MEIBC, that was able to regulate its own affairs through collective agreements.

[10] During August 2016 the Respondent initiated negotiations in terms of the MEIBC Constitution (the Constitution) for the conclusion of a new collective agreement to comprehensively regulate the terms and conditions of employment applicable in the plastics industry. The Respondent tabled a comprehensive draft agreement for the bargaining parties' consideration and negotiation meetings were held between October 2016 and May 2017.

[11] The negotiations resulted in a collective agreement titled 'Consolidated 2016/2021 Plastic Industry Agreement' (the Consolidated Agreement) which was signed by six employers' organisations. On 17 May 2017, the MEIBC's

[2] *Plastic Converters Association of South Africa (PCASA) v National Union of Metalworkers of South Africa* (2016) 37 ILJ 2815 (LAC).

MANCO adopted the Consolidated Agreement as a collective agreement of the council. The said agreement only binds the parties to the agreement and as NUMSA has not signed the agreement, the parties remained in dispute over the terms and conditions of employment for NUMSA members in the plastics sector.

[12] On 15 June 2017 NUMSA declared a formal dispute under cover of a letter titled 'Notice of dispute on wages and other substantive issues – PNF negotiations 2017'. After the plastics employers' organisations lodged a point *in limine* to declare that the dispute was invalid, NUMSA withdrew the dispute.

[13] On 27 July 2017, NUMSA sent another letter with revised demands. The demands included *inter alia* that the wages and terms and conditions of employment for workers in the plastics industry should be the same as those in the rest of the industry covered by the MEIBC's Main Agreement (the Main Agreement) and should be regulated by the said agreement. After an extended period of negotiation and mediation, the demands were not agreed to.

[14] On 27 February 2018, NUMSA declared a deadlock on the demands it had tabled for negotiation at the PNF. It is undisputed that the deadlock was a two-way street in that the employers' organisations refused to accept NUMSA's demand for the conclusion of a collective agreement based on the terms of the Main Agreement and that NUMSA on the other hand and at the same time, refused to accept the employers' organisations' demand that the agreement should be based on the terms of the Consolidated Agreement. The gist of the dispute is which of the two documents should form the basis of the agreement on terms and conditions of employment to be concluded between the parties.

[15] On 7 March 2018, NUMSA referred the dispute to the MEIBC for conciliation. Its demands were clarified in a letter dated 29 June 2018. After conciliation failed, the dispute remained unresolved and NUMSA issued a strike notice on 9 October 2018 for strike action to commence on 15 October 2018.

[16] On 12 October 2018, the Respondent launched an urgent application in this Court to declare the strike action unprotected. The matter was argued on 17 October 2018 and on 19 October 2018 this Court (per Moshoana, J) concluded that the strike action was protected and the application was dismissed. The Court identified the true issue in dispute to be the demand to conclude a new collective agreement.

[17] Members of NUMSA have engaged in protected strike action since 15 October 2018. On 24 October 2018, the Respondent, on behalf of its members, gave notice to NUMSA's members of the intention to institute a lock-out and the lock-out was indeed instituted with effect from 26 October 2018.

[18] It is evident from the lock-out notice issued in terms of section 64(1)(c) of the LRA that the lock-out was in response to NUMSA's members strike and to compel them to agree to the Respondent's demands. The Respondent's demand was that NUMSA and its members agree to the conclusion of a collective agreement adopting the provisions of the Consolidated Agreement and once agreeing to those, to support a request to the Minister of Labour to extend the agreement to non-parties.

[19] NUMSA's case is that between the period October 2018 and March 2019 hundreds of its members returned to work and they were not required to accede to the demands as set out in the lock-out notice. This is disputed by the Respondent on the basis that the deponent to the founding affidavit has no personal knowledge of these allegations and that it constitutes hearsay and also because the deponent failed to identify the employees returning to work or the employers allegedly permitting them to return. The issues disputed by the Respondent were not addressed in NUMSA's replying affidavit.

[20] On 1 March 2019 NUMSA had addressed a letter to the Respondent and advised that it had called off the strike with immediate effect, that the demands underlying the strike were unconditionally abandoned and that the lock-out was unprotected in that several issues in the Consolidated

Agreement had not been referred to conciliation and are different to those that NUMSA had referred to conciliation.

[21] In response the Respondent advised that unless NUMSA accedes to the Respondent's demands, the parties remain in dispute and the lockout remained operative. The Respondent's case is that calling off the strike, does not terminate the negotiations and the fact that NUMSA's members are no longer striking in pursuit of their demands, is just that.

[22] NUMSA subsequently approached this Court for relief on the basis that the lock-out is unlawful and unprotected.

The relief sought

[23] NUMSA seeks an order declaring that the lock-out is not in compliance with the provisions of the LRA. NUMSA's case is that the lock-out is unlawful and unprotected in that several of the employer's demands have not been referred to the MEIBC for conciliation.

[24] The Respondent's case on the other hand is that the demand that NUMSA agrees to all the terms of the Consolidated Agreement formed part of the negotiation and conciliation processes and as the demand has not been acceded to, the Respondent's members are engaging NUMSA and its members in economic power play in the ongoing collective bargaining process in pursuit of its demands. As such, the lock-out is protected.

Analysis

NUMSA's novel point

[25] NUMSA raised a novel proposition in argument relating to the distinction between the status of strikes and lock-outs. The gist of the argument is that a far stricter standard of compliance is to be applied to a lock-out than to a strike.

[26] NUMSA's point of departure on the merits of the case and in support of its novel point is the statement made in *TAWUSA v Public Utility Transport*

Corporation[3]*(TAWUSA)* that *'Given that the Constitution and the LRA do not accord the right to strike and recourse to lock-out similar status, one cannot equate the two.'*

[27] On this basis NUMSA's case is that strike cases dealing with sections 64(1) and 64(3) of the LRA are not applicable in the case of a lock-out, particularly to the extent that those cases made reference to the need to read the said sections as broadly as possible so as not to impermissibly limit the right to strike. NUMSA's case is that in considering whether a lock-out is protected, the Court must require strict compliance with the procedural requirements set out in sections 64(1) and (3) of the LRA.

[28] The statement made by the Constitutional Court in *TAWUSA*[4] must be considered in the context within which it was made and the one sentence referred to cannot be read in isolation. The entire content of paragraph 67 of *TAWUSA* should be considered. It reads as follows:

> 'Our decision in *Moloto* to permit employees who did not issue a strike notice to embark upon a strike follows the deliberate scheme and design of the Constitution and the LRA. The same cannot, however, be said to apply to the recourse to lockout. As Professor John Grogan points out, employers have recourse to a number of "weapons" to end a dispute:
>
> 'Under the common law, employers could exercise power against employees through a range of 'weapons' such as dismissal, employment of alternative or replacement labour, unilateral implementation of new terms and conditions of employment, and the exclusion of employees from the workplace."
>
> Striking is one of the few powerful tools in the hands of employees. Not permitting employers to lock-out all employees, but only those whom the employer has attempted to conciliate with under section 64(1), does not blunt the weapon of the employer. Instead, it promotes the fair and orderly resolution of labour disputes. Given that the Constitution and the LRA do not accord the right to strike and recourse to lock-out similar status, one

[3] [2016] 6 BLLR 537 (CC) at para 67.
[4] Id n 3.

> cannot equate the two. Hence my view that the Labour Appeal Court's conclusion was flawed'. (Footnotes omitted)

[29] Paragraph 67 of *TAWUSA* made specific reference to paragraph 43 of *Moloto*[5] which reads as follows:

> 'The right to strike is protected as a fundamental right in the Constitution without any express limitation. Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning. The procedural pre-conditions and substantive limitations of the right to strike in the Act contain no express requirement that every employee who intends to participate in a protected strike must personally or through a representative give notice of the commencement of the intended strike, nor that the notice must indicate who will take part in the strike'. (Footnotes omitted)

[30] In *Moloto*[6] it was held that the right to strike must not be limited by imposing a requirement not provided for in the LRA in the context that there is no requirement that every employee who wants to participate in a strike, must personally or through a representative give notice of the intended strike.

[31] In *TAWUSA*[7] and within this context, the Constitutional Court held that employees who did not issue a strike notice, were permitted to embark upon a strike, but that the same cannot be said to apply to the recourse to lock-out.

[32] It is within this context that the Constitutional Court held that a strike and a recourse cannot be equated.

[33] In *TAWUSA*[8] it was also held that:

> 'This Court has previously recognised that the right to "collective bargaining between the employer and . . . [employees] is key to a fair industrial

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[5] *SATAWU and Others v Moloto and Another NNO* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177.

[6] Ibid.
[7] *Supra* n 3.
[8] Id n 3 at para 46.

> relations environment". The LRA is concerned with the power imbalance between the employer and employees. It sanctions the use of power by employers and employees, but only as a last resort, and only after the issue in dispute between the parties has been referred for conciliation. Collective bargaining therefore implies that each employer-party and employee-party has the right to exercise economic power against the other once the issue in dispute has been referred for conciliation, and only if that process fails in one of the manners described above.'

[34] It is an accepted principle that parties in a collective bargaining relationship have the right to exercise economic powerplay tactics against the other. A lock-out is one of the tools that the LRA provides to an employer in order to resolve disputes between an employer and employees. Section 213 of the LRA defines a lock-out as—

> 'the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of that exclusion'.

[35] The purpose of a lock-out in terms of section 213 is to compel employees whose trade union is party to certain negotiations to accede to an employer's demand. Its object is to end a stalemate reached as a result of an impasse in negotiations between employer and employee in respect of matters of "mutual interest".

[36] In my view there is no merit in the novel point argued by NUMSA. Not only does *TAWUSA*[9] (read holistically) not support or promote an approach or interpretation that requires a stricter compliance with the provisions of sections 64(1) and (3) of the LRA in the event of a lock-out, but the LRA also does not make such a distinction. To interpret the LRA to impose such a distinction, may undermine the process of orderly collective bargaining. I can see no reason to impose a stricter compliance in the event of a lock-out.

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[9] *Supra* n 3.

Compliance with the provisions of the LRA

[37] The crisp issue is whether the Respondent's lock-out is protected or not.

[38] NUMSA's case is that the lock-out is unprotected for non-compliance with section 64(1)(a) of the LRA in that the issue in dispute was not referred to conciliation. This is so because in the negotiations leading up to the section 64(1) referral, NUMSA had demanded that the employer organisations agree that the provisions of the MEIBC Main Agreement be made applicable to the plastics sector. The employer organisations demanded that NUMSA assent to the Consolidated Agreement. There are differences between the two agreements going beyond the differences in rates of pay.

[39] NUMSA referred a dispute to the bargaining council on 7 March 2018, with the issue in dispute being the demand that the employer organisations agree to apply the provisions of the Main Agreement. The Respondent has not referred a dispute and the Respondent's demand that NUMSA assents to the Consolidated Agreement, was not referred to conciliation.

[40] Beyond the dictates of section 213, the circumstances under which an employer may resort to a lock-out are further refined in section 64(1) of the LRA.

[41] Section 64(1)(a) of the LRA provides:

> '(1) Every *employee* has the right to strike and every employer has recourse to *lock-out* if—
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> (a) the *issue in dispute* has been referred to a *council* or to the Commission as required by *this Act*, and—
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> (i) a certificate stating that the *dispute* remains unresolved has been issued; or
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> (ii) a period of 30 days, or any extension of that period agreed to between the parties to the *dispute*, has elapsed since the referral was received by the *council* or the Commission.'

[42] Section 64(1) envisions a multi-staged process. It states under which circumstances industrial action may take place; that is, when may employees exercise their right to strike as well as when may an employer have recourse to a lockout.

[43] The LRA defines "issue in dispute" in relation to a strike or lock-out as "the demand, the grievance, or the dispute that forms the subject matter of the strike or lock-out". A resolution of a dispute can be reached only between adversaries. As a matter of logic, then, there must be a dispute between an employer and employees or their trade union before a lock-out is instituted[10].

[44] *TAWUSA*[11] confirmed that the dictates of section 64(1)(a) are clear. No industrial action can be undertaken until there has been an attempt at conciliation. This provision also makes pertinent that an "issue in dispute" arises prior to a matter being referred for conciliation. Only once a dispute has arisen can it be referred to a bargaining council for conciliation. Moreover, industrial action can only be taken in the event that an attempt at conciliation fails, either because a certificate by the bargaining council states that the issue in dispute remains unresolved, or because a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the bargaining council. Referral to conciliation is not merely a perfunctory procedural step that has to be complied with in order to obtain a licence to lock out or to embark on a strike. The object of section 64(1)(a) is to bring together the parties at the negotiations, and encourage them to seek solutions to issues of mutual interest, thereby reinforcing a collective bargaining culture[12].

[45] However, the LRA provides in section 64(3) that the requirements of section 64(1) do not apply to a strike or a lock-out in certain circumstances and relevant to this application is section 64(3)(a) which provides that:

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[10] *Supra* n 3 at para 32.
[11] *Supra* n 3.
[12] *Supra* n 3 at para 45.

> ‘ (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;

[46] The Respondent contends that the lock-out complied with the procedure set out in the MEIBC Constitution and because of the provisions of section 64(3)(a) of the LRA, section 64(1) finds no application. Even if the issue in dispute had not been referred to conciliation, the lock-out was still protected by virtue of section 64(3)(a) of the LRA.

[47] NUMSA accepted that it must demonstrate non-compliance with both sections 64(1)(a) and 64(3)(a) of the LRA to succeed on the merits.

Compliance with section 64(3)(a) of the LRA

[48] NUMSA declared a formal dispute on 7 March 2018 in terms of clause 2(d) of Annexure E to the Constitution.

[49] The Respondent’s case is that during the negotiation leading up to the referral of the dispute on 7 March 2018, and more specifically the first facilitated negotiation held on 27 February 2018, NUMSA tabled its demand that the parties should conclude an agreement on the same terms as the Main Agreement. In turn, the Respondent presented a counter-demand that NUMSA should accept the terms contained in the Consolidated Agreement. The negotiations resulted in a deadlock.

[50] The Respondent’s case is that conciliation meetings took place on 24 – 25 April and 10 -11 May 2018. NUMSA disputed that the said meetings constituted conciliation as contemplated in section 64(1) of the LRA as the said meetings were held under clause 3(b) of the MEIBC Constitution, in circumstances where there was no compliance with clause 3(a).

Compliance with clause 3 of the MEIBC Constitution

[51] The obvious question that leaps out at this point is whether there was indeed compliance with clause 3(a) of the Constitution.

[52] NUMSA declared a dispute on 7 March 2018 in terms of clause 2(d) of Annexure E to the Constitution, which provides that if negotiations have not been resolved, any party to the negotiations may declare a dispute by notice in writing to the Council. Industry disputes, such as this one, are to be processed in accordance with clause 3 of the Constitution.

[53] Clause 3(a) stipulates that in the event that the secretary, in consultation with the president of the Council decides that a dispute declared in terms of clause 2(d) is an industry matter, he/she shall arrange for the MANCO to meet within 14 days of the declaration of such dispute, for purposes of considering the matter.

[54] Clause 3(c) of the Constitution provides that if the dispute has not been settled within 30 days from the date on which it was referred to the MEIBC, any party to the dispute shall be entitled to pursue whatever means are available in the LRA to process the dispute.

[55] Initially NUMSA's case was that no such meeting took place within 14 days of 7 March 2018, when the dispute was declared, but it was subsequently corrected in a supplementary affidavit wherein it explained that a MANCO meeting was indeed held on 19 March 2018, which was within 14 days of the declaration of the dispute.

[56] In my view there is no merit in NUMSA's case that there was no compliance with clause 3(a) of the Constitution for a number of reasons. Firstly, MANCO indeed met within 14 days of the declaration of the dispute.

[57] Clause 3(a) of the Constitution requires of MANCO to meet within 14 days for purposes of considering the matter. Evidently the matter was considered on 19 March 2018 and the parties agreed to convene a special MANCO to decide on the best option to deal with the dispute. Clause 3(a) does not require that the matter be finally disposed of by MANCO on the first occasion it meets (within 14 days of declaration of the dispute), it requires that the matter be considered, which it clearly was.

[58] Secondly, it is evident from the minutes of the MANCO meeting of 19 March 2018 that the PNF dispute submitted in terms of clause 2(d) was discussed and that the parties had agreed to convene a special MANCO on 10 April 2018 to consider the options to deal with the dispute.

[59] Further evident from the said minutes is that numerous NUMSA delegates attended the MANCO meeting on 19 March 2018 wherefore they were party to the agreement that a special MANCO be convened to deal with the dispute.

[60] NUMSA's case is that because the MANCO meeting of 19 March 2018 did not debate the dispute and did not consider the options set out in clause 3(b)(i)-(iv) of the Constitution but simply agreed to convene a special meeting on 10 April 2018 to discuss the issue, there was no compliance with the Constitution. This complaint is equally without merit considering the wording of clause 3(b) of the Constitution.

[61] Clause 3(b) of the Constitution provides that MANCO should use its best endeavours to settle the dispute and shall meet as often as it deems necessary for this purpose and in the course of its deliberations, it may give consideration to the options set out in clause 3(b)(i)-(iv). This clause does not support NUMSA's case that the consideration of the available options to resolve the dispute should have happened within 14 days or on the first occasion that the matter was considered. Clause 3(b) clearly envisaged not only a single meeting as it provides for MANCO to meet 'as often as deemed necessary' for the purpose of resolving the dispute.

[62] Clause 3(b)(ii) of the Constitution provides that MANCO may refer the dispute to conciliation in terms of clause 7. Clause 7 provides that a dispute may be referred to conciliation and any appointed conciliator must determine a process to resolve the dispute, which may include mediating the dispute, conducting a fact finding exercise or making a recommendation to the parties, which may be in the form of an advisory arbitration award.

[63] On 10 April 2018 a special MANCO meeting was held to discuss the NUMSA dispute and following consideration of the options set out in clause

3(b)(i)-(iv) of the Constitution, MANCO decided that the dispute should be mediated over a two-day period under the guidance of a senior commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA).

[64] Commissioner Derrick Hilligenn was mandated to endeavour to resolve the dispute.

[65] The Respondent's case is that conciliation meetings took place on 24 – 25 April and 10 -11 May 2018. During the said meetings NUMSA tabled its demand that the terms of the Main Agreement be agreed on and the Respondent, on the other hand, tabled its counter-demand that an agreement on the same terms as the Consolidated Agreement be concluded. No agreement could be reached.

[66] An advisory arbitration award was issued on 7 June 2018.

[67] NUMSA disputed that the said meetings constituted conciliation as contemplated in section 64(1) of the LRA as the said meetings were held under clause 3(b) of the MEIBC Constitution, in circumstances where there was no compliance with clause 3(a).

[68] I have already found that there was compliance with clause 3(a). The parties agreed to follow a conciliation process, as provided for in clause 3(1)(b) read with clause 7 of the Constitution and there is no basis to find that the meetings held did not constitute conciliation, as is provided for in the Constitution.

[69] The referral process mandated by the LRA did take place. The issue in dispute was referred to the MEIBC where the conciliation efforts occurred in terms of the Constitution and were unsuccessful.

[70] Clause 3(c) of the Constitution provides that if the dispute has not been settled within 30 days from the date on which it was referred to the MEIBC, any party to the dispute shall be entitled to pursue whatever means are available in the LRA to process the dispute.

[71] In short: the dispute was referred to the MEIBC in accordance with the provisions of the Constitution, both parties tabled their demands and the dispute was conciliated as provided for in the Constitution.

[72] The Respondent's demand, made in response to NUMSA's demand emerged in the negotiation process and was part of the conciliation process. It will be artificial to find that the demands constitute separate disputes that must be conciliated separately. There are no two separate disputes but two facets of a single dispute. The Respondent's counter demand equally formed part of the dispute that was conciliated. As the dispute remained unresolved, the parties acquired the right to strike and to lock-out.

[73] As there was compliance with section 64(3)(a) of the LRA, section 64(1) does not find application *in casu.* Even if section 64(1) applies, there was compliance with the provisions of the LRA in that the dispute was conciliated.

[74] The lock-out complies with the provisions of the LRA and cannot be declared unlawful or unprotected. The application has to fail.

Costs

[75] In awarding costs this Court has a wide discretion. In my view the interest of justice will be best served by making no order as to costs, having regard to the ongoing collective bargaining relationship between the parties and the prospect of prejudice to the relationship and the successful resolution of the current dispute, should an order for costs be made.

[76] In the premises I make the following order:

Order

1. The application is dismissed;

2. There is no order as to costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances

For NUMSA:	Advocate C Orr
Instructed by:	Cheadle Thomson & Haysom Attorneys
For the First Respondent:	Advocate G A Leslie
Instructed by:	Anton Bakker Attorneys