

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH**

CASE NO. P516/02

In the matter between:

**EAST CAPE MASTER BUILDERS AND
ALLIED INDUSTRIES ASSOCIATION**

First Applicant

**ELECTRICAL CONTRACTORS AND ALLIED
INDUSTRIES ASSOCIATION (EASTERN CAPE)**

Second Applicant

and

**THE BUILDING INDUSTRIAL BARGAINING
COUNCIL (SOUTHERN AND EASTERN CAPE)**

First Respondent

**AMALGAMATED UNION OF BUILDING TRADE
WORKERS OF SOUTH AFRICA**

Second Respondent

NATIONAL UNION OF MINE WORKERS

Third Respondent

JUDGMENT

NDLOVU AJ

Factual background:

[1] This is an application for the winding up of a bargaining council known as the Building Industrial Bargaining Council (Southern and Eastern Cape), the First Respondent herein (“the Council”) in terms of section 59(1)(b) of the Labour Relations Act 66 of 1995 (“the Act”). The application was launched jointly by the East Cape Master Builders and Allied Industries Association (the First Applicant herein) and the Electrical Contractors and Allied Industries Association (Eastern Cape) (the Second Applicant herein) - collectively referred to hereafter as “the Applicants”. The Amalgamated Union of Building Trade Workers of South Africa (the Second Respondent herein) and the National Union of Mine Workers (the Third Respondent herein) - collectively referred to hereafter as “the Unions” were, together with the Applicants, parties to the Council.

[2] There was a collective agreement to which both the Applicants and the Unions were parties, but which lapsed on 30 September 2001 (“the collective agreement”). It was common cause that the collective agreement could only be extended by consent of all parties. The Applicants opposed the extension. This impasse then gave rise to the dispute between the parties which culminated in the present application.

What the Applicants contended:

[3] The Applicants submitted that whilst they desired to bargain collectively with the Unions they wished to do so in another forum, not the Council. They submitted that valid grounds existed which justified the conclusion that the Council was not able to function in terms of its mandate and that such inability to function could no longer be remedied. For this reason, they submitted, the Council fell to be wound up in terms of Section 59(1)(b) of the Act. Their grounds included the following submissions:

3.1 The number of active employees in the building industry and timber trade within the jurisdiction of the Council had decreased dramatically over the past few years due to an acute shortage of new, alteration and maintenance work. This fact was based on the Council’s General Secretary’s Report of August 2001 (“the Report”). In order to maintain the infrastructure and services and to retain the staff component the number of employees had to be at least between 12 000 and 12 500. However, it was observed that during January 2001 the number of employees had dropped below 7 000. This had then resulted in significant losses to the employers.

3.2 It was significant that although the Report was admissible as emanating from the Council (of which the Applicants and the Unions were members) the Unions chose not to deal with the content thereof and instead to regard it as hearsay and outdated. It was the first time that such objections were made about the Report, of which the Unions had been in possession since 31 August 2001.

3.3 The CCMA subsidised the Council in respect of conciliation and arbitration only at R450 per closed case. As a result, employers and employees were forced to pay the difference between the subsidy and the actual cost. It was not disputed that the subsidy of the CCMA was a fraction of the actual cost of performing the total dispute resolution function. The Applicants' members, in order to comply with the collective agreement were then faced with the task of financing the enforcement thereof against defaulters.

3.4 It was not possible to monitor the due compliance with the collective agreement. Previously the Council had employed more agents (presumably in terms of section 33 of the Act). However, due to financial constraints it had retrenched some of its staff. As a result only two agents remained, one being responsible for the Eastern Cape and the other for the Southern Cape. This factor further contributed in the Council's inefficiency in the administrative running of its affairs. One of the recommendations of the Report was that the Unions had to assist by running help desks because most of the complaints were from their members. The Unions had not been forthcoming with assistance in this regard.

3.5 Over a period of 19 months the net assets of the Council had shrunk by some R2.3 million. Liabilities increased by R600 000 over the same period. The Council was clearly operating at a loss. It was therefore important that it acted responsibly in respect of funds administered by it. The Applicants' intention was that after liquidation the funds would be preserved. They stated that the only factor delaying the "insolvency" of the Council was a holiday fund consisting of approximately R7million of unclaimed holiday pay which was used to subsidise the income of the Council.

3.6 In other provinces bargaining councils either closed down, were wound up or the employer parties withdrew and formed informal bargaining forums with representative trade unions. In the Applicants' view the latter was the most viable option to be adopted in the present instance.

What the Respondents contended:

[4] The Unions, on the other hand, submitted that although they acknowledged

that the Council was not functioning to its full potential (leaving aside the question of which party was at fault for that situation) the Applicants had not made out a case for the winding-up of the Council. This was because neither of the two requirements stipulated in Section 59 of the Act had been met, on a proper consideration of all the facts; namely, that the Council was unable to function and that such inability could not be remedied.

[5] The Unions further argued that if the Applicants were unhappy with the situation as it existed in the Council then it was open to the Applicants simply to terminate their participation in the Council.

The legal position:

[6] The Council was established in terms of section 27 of the Act. Section 27(1) provides as follows:

“(1) One or more registered trade unions and one or more registered employers’ organisations may establish a bargaining council for a sector and area by -

(a) adopting a constitution that meets the requirements of section 30; and

(b) obtaining registration of the bargaining council in terms of section 29.”

[7] In terms of section 29(11)(c) the Council was registered for the magisterial districts of Albany, Alexandria, Bathurst, Humansdorp, Port Elizabeth, Queenstown and Uitenhage (in the eastern Cape); and Beaufort West, Calitzdorp, George, Joubertina, Knysna, Ladismith, Mossel Bay, Oudtshoorn, Riversdale and Uniondale (in the southern Cape).

[8] The powers and functions of a bargaining council are set out in section 28(1), namely:

(a) to conclude collective agreements;

(b) to enforce those collective agreements;

(c) to prevent and resolve labour disputes;

(d) to perform the dispute resolution functions referred to in section 51;

(e) to establish and administer a fund to be used for resolving disputes;

(f) to promote and establish training and education schemes;

(g) to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any

similar schemes or funds for the benefit of one or more of the parties to the bargaining council or their members;

(h) to develop proposals for submission to NEDLAC or any other appropriate forum on policy and legislation that may affect the sector and area;

(i) to determine by collective agreement the matters which may not be an issue in dispute for the purposes of a strike or a lock-out at the workplace;

(j) to confer on workplace forums additional matters for consultation;

(k) to provide industrial support services within the sector; and

(l) to extend the services and functions of the bargaining council to workers in the informal sector and home workers.”

[9] The Council adopted a constitution which provided, among other things, as follows:

“9.3 Subject to the provisions of section 56 of the Act, any registered trade union or registered employers’ organisation who has members actively engaged in the building industry, as defined, may apply in writing for admission as a party on such conditions as the Council may determine : Provided that -

9.3.1 in the case of a registered trade union it has at least 15 per cent of the employees who must be actively engaged in the building industry within the registered scope of the Council, as members when application is made : Provided further that, a list of the names and identity numbers of the members of the trade union is submitted to the Council and which list shall be certified by the auditor of the trade union;
...

9.4 Any party may withdraw from the Council on giving three (3) months notice in writing to the Secretary provided that no such notice shall take effect before the expiration of agreement which is, at that stage in force, and provided further that such party and its members shall remain bound by the provisions of any such agreement until the expiration thereof.”

[10] On the issue of winding-up, section 59(1) provides as follows:

“(1) The Labour Court may order a council to be wound up if -

(a) the council has resolved to wind up its affairs and has applied to the Court for an order giving effect to that resolution; or

(b) the Registrar of Labour Relations or any party to the council has applied to the Court and the Court is satisfied that the council is unable to continue to function for any reason that cannot be remedied”.

[11] The Act, therefore, confers a discretionary power on the Court to grant or refuse the winding of a bargaining council. Clause 31 of the Council’s constitution lays down the procedure to be followed in relation to a winding-up

by a resolution in terms of section 59(1)(a), which, however, is not pertinent to the present instance. The Application is founded on section 59(1)(b).

[12] It tends to follow then, on the plain reading of subsection (1)(b), that in order for an application for the winding-up of a bargaining council to be successful it must be proved that:

12.1 The bargaining council is unable to continue to function;

12.2 The reason for its inability to function cannot be cured.

[13] The question arises as to who must demonstrate to the Court the bargaining council's incurable inability to function. Indeed, applications for the winding-up of a bargaining council are akin to motions for the winding-up of any other juristic corporate entities. In such applications the onus is on the applicant to **“demonstrate (among other things)... that the ground for winding-up exists upon which the applicant relies; an application, the allegations in support of which are deficient ... , with the result that the Court could not grant a winding-up order on the basis of them even if they were to be established, should be dismissed by the Court”**. (*Pearson v Magrep Investments (Pty) Ltd 1975 (1) SA 186 (D) at 187-188* - cited by *Meskin: Henochsberg on the Companies Act*, Volume I, Issue No.17, at page 713, in his commentary on section 346 of the Companies Act 61 of 1973, as amended).

[14] The wording of section 59(1)(b) is quite clear and unambiguous. It is either **“the Registrar of Labour Relations or any party to the Council”** which applies for the winding-up of the bargaining council. However, the process does not end there. An applicant party must further satisfy the court that the council was, indeed, **“unable to continue to function for any reason that cannot be remedied”**. In other words, an applicant under section 59(1)(b) must allege and prove both the requirements mentioned in that section against the bargaining council concerned.

[15] Regarding the first leg of the test for the winding-up of a bargaining council (namely, that the council was unable to function) it was not, in my view, sufficient for a party to such bargaining council merely to show that the bargaining council was not functioning efficiently. That party must sufficiently

demonstrate that the council was unable to function and that such incapacity was of a permanent nature. The test was an objective one.

[16] The powers and functions of bargaining councils in terms of section 28(1) are, to my mind, sufficient indication of the legislature's clear intention of the high regard which it placed on these institutions. Indeed, the Court has also echoed similar sentiments in this regard. In *Adonis vs Western Cape Education Department* [1998] 19 ILJ 806 (LC) at 813. paragraph [22], the Court (per Mlambo J) stated the following:

"The drafters of the new Act realized the vital role played by bargaining councils previously known as industrial councils. Because of this realization the new Act provides for the continued existence of these institutions".

[17] In *Public Servants Association and Another vs Public Service Coordinating Bargaining Council* [2001] 22 ILJ 1878 (LC) the Court (per Francis AJ, as he then was) stated:

"Once a bargaining council is established, it has an autonomous existence as a separate juristic person. Its existence can only be ended by a decision taken in terms of its own constitution, its winding-up in terms of ss 59 and 60 of the LRA or the cancellation of its registration in terms of s 61 of the LRA. If it was the legislature's intention that the respondent could take a decision no longer to have certain chambers designated as bargaining councils, the LRA would not have had detailed provisions relating to the forming and winding-up of bargaining councils" (at page 1887, paragraph 43)".

And that:

"The legislature was clearly mindful of the rights of members of a council as well as those of third parties. If this were not so, s 59 would not have been enacted. If respondent were to be able to terminate the existence of a council by its decision, the aim and object if (sic) section 59 which revolves around the protection of members and creditors, would be circumvented. The legislature clearly cannot have been taken to have intended such an anomalous result (at page 1889, paragraph 54)".

[18] It follows, accordingly, that the Court should apply strict scrutiny in determining an application for winding-up under section 59(1)(b), although the standard of proof would remain the same, namely - the balance of probabilities. The Court should not, therefore, lightly grant the application.

[19] Although section 59 (in the same way as do the Companies Act and the Close Corporations Act 69 of 1984 as amended, in respect of companies and close corporations, respectively) does not provide for a peremptory interim relief procedure (in contrast with section 10 of the Insolvency Act 24 of 1936 in respect of insolvent estates) it is traditional practice for an applicant in a liquidation application to seek, initially, a provisional winding-up order before the final order. But there is no legal prohibition to seeking final relief from the outset, as the Applicants have done - albeit the test being relatively more stringent as compared to interim relief. In a final relief instance the applicant would only succeed if the facts as alleged by the respondent, considered in conjunction with the applicant's averments - to the extent that they were admitted by the respondent, justified the granting of the final order sought. Otherwise final relief would be refused. (See: *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* 1984(3) SA 623 (A) at 634 H-I. See also: *Ngqumba en 'n Ander v Staatspresident en Andere* 1988(4) SA 224 (A)).

Application of the Law to the Facts and Evaluation of the Application:

[20] I now turn to deal with the merits of the Application. The observations I have made do not seem to favour the granting of the Application. They are set out hereunder.

20.1 The poor representativeness of the Unions in the Council was not, in my view, a reasonable and justifiable ground to warrant the Council's winding-up. It was particularly so from the perspective of the Applicants themselves which, admittedly, were still desirous and keenly interested to continue engaging in collective bargaining with the Unions, albeit in a differently constituted forum. Indeed, they appeared to acknowledge that their collective bargaining relationship with the Unions was important to the building industry. However, it seems to me, they were under no obligation to hold on to this collective bargaining marriage if they felt that the relationship no longer served their interests and that of their members. In any event, the representativeness of the Unions in the Council was, it appears to me, irrelevant to the issue of whether or not the Council should be wound up.

20.2 A decline in the number of permanent employees in the building and timber trade industries which constituted the core body of the Council was also no justification for the Council's liquidation. Neither the Act nor the Council's constitution prescribed for the minimum number of "permanent employees" in the constituent industry in order for the Council to be established and to continue subsisting. As indicated earlier, the Council was established in terms of section 27, upon it having complied with the requirements stipulated in that section. There was no suggestion that it was no longer in compliance therewith.

20.3 In the event of any representative trade union party to the Council having lost such number of membership that it no longer had the requisite threshold which entitled it to admission to and membership of the Council then, any other party to the Council should have the right, it seems to me, to challenge the continued membership of the representative trade union party concerned. That challenge should be directed to the Council. Be that as it may, this factor also appears to be irrelevant to the question of winding-up of the Council.

20.4 According to the Applicants, the Council was subsidised by the CCMA in the sum of R450 per finalised case. They submitted that the actual cost was, however, much higher than this amount, thus resulting in the difference having to be paid by the employers and employees. However, this allegation was unhelpful in that a verifiable amount constituting the alleged actual cost or average thereof was not stated.

20.5 Compliance with the collective agreement, including issues such as the collection of levies and other dues was a matter whose resolution endeavours did not appear to me to have been exhausted between the parties. For instance, the establishment of a "help desk" and/or the appointment of an additional agent were among the options which had been put forward and which could apparently still be pursued in a meaningful consultative process.

20.6 The unsatisfactory financial condition of the Council was, it seems to me, primarily occasioned by the present ineffective measures of trying to ensure the proper compliance with the collective agreement. This ailment did not, however, appear to be incurable, in the light of some remedial avenues still reasonably possibly open and available for exploitation.

20.7 It was noted that the Council's rationalization process which saw the retrenchment of some 25% of the Council's staff was echoed by the Applicants as having **"improved the (financial) situation"** of the Council (paragraph 62 of the Applicant's founding affidavit).

20.8 The Report which the Applicants sought to rely upon was compiled on 31 August 2001, which was about one year prior to the launchment of the Application. It also consisted of statistics which, to say the least, reflected information that was even older. The Applicants' submission was that the statistical figures were the only information available and further that the position as mirrored in the statistics still currently obtained. Granted, these allegations did not appear to be disputed by the Unions. However, the duty did not lie with the Unions to produce proof that such statistics did not currently apply. In my view, it was for the Applicants to submit current authentic documentary evidence to back up its claims. The position was not necessarily to see whether the Unions or any other party opposing the Application could produce any reliable gainsaying evidence in rebuttal of the Applicants' case, but it was, at the end of the day, whether the Court was satisfied that on the evidence presented before it sufficient and valid grounds, as at the time of the hearing of the matter, existed which justified the winding-up of the Council.

20.9 The Report had not, among other things, taken into account the crucial rationalisation process (referred to above) which took place only in November 2001, some 3 months after the Report was compiled.

[21] In the Applicants' own submission they desired not to terminate their bargaining relationship with the Unions as they realised and acknowledged the crucial importance of such relationship in the building industry. All that the Applicants required was to have the collective bargaining process conducted not from the present statutorily-created council but from a non-statutory and informal bargaining forum which would, seemingly, be structured in the Applicants' own terms. Their proposed bargaining mechanism would not, to my mind, appear to augur well for the interests of all the parties, particularly the employees. Therefore, such arrangement would not be within the spirit and objective of the Act.

[22] I am accordingly not satisfied that the Applicants succeeded in

discharging their onus of proving that the Council was unable to function for any reason that could not be remedied, as contemplated in section 59(1)(b). Indeed, the Applicants were at liberty to have simply withdrawn their participation as parties to the Council in terms of clause 9.4 of the Council's constitution. In any event, there was no collective agreement currently in force, which in itself should have made things even simpler for the Applicants. The Application falls to be dismissed.

[23] The Court has a discretion on the question of costs, despite the traditional notion that "costs follow the result". Although the application itself was not an extraordinarily complicated one, there was not a single precedent judgment on the issue in point that I was able to lay my hands on. Counsel for the Applicant had indicated that attempts would be made to acquire a copy of a pertinent unreported judgment which he submitted was delivered by this Court sitting in Johannesburg some time in the past. Notwithstanding at least two reminders to the Applicants' attorneys in this regard, I was never furnished with the said unreported judgment. I assumed that it could not be found. In my view, the issues involved in this matter were such that the Applicants' launchment of the Application was not an unreasonable or frivolous step. I determine, accordingly, that an order requiring each party to pay its own costs would be appropriate, in the circumstances.

Order:

[24] In the result, I order as follows:-

- 1) The application is dismissed.
- 2) Each party is to pay its own costs.

NDLOVU AJ

Appearances:

For the Applicants : Mr P Pauw SC
Instructed by : Ntlabezo, Schady & Associates
Port Elizabeth

For the 1st Respondent: Mr R G Buchanan SC
(with him Mr P N Kroon)
Instructed by : Francois le Roux Attorneys

Port Elizabeth

Date of Judgment : 04 February 2004