REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 305 / 2013

In the matter between:

MUTUAL CONSTRUCTION COMPANY (PTY) LTD	**Applicant**
and	
CCMA	**First Respondent**
COMMISSIONER NADIA SITHOLE N.O.	**Second Respondent**
COMMISSIONER LESLIE NTULI N.O.	**Third Respondent**
NATIONAL UNION OF MINEWORKERS	**Fourth Respondent**
EMPLOYEES LISTED IN ANNEXURE "A"	**Fifth and further Respondents**

Heard: **27 February 2013**

Delivered: **1 March 2013**

Summary: strike interdict – LRA s 65 – bargaining at national level in Bargaining Council.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Mutual Construction Company (Pty) Ltd (MCC) applies on an urgent basis to have an imminent strike[1] to be embarked upon by the National Union of Mineworkers (NUM) and its members[2] declared unprotected. It does so on the basis that collective bargaining between the parties is regulated by a collective agreement compelling them to bargain at a national level; and that the parties consulted on the demands of the NUM leading to the strike at plant or enterprise level.

[2] When the parties could not reach agreement at plant level, NUM referred a dispute to the CCMA. Commissioner Sithole issued a certificate stating that the dispute remained unresolved. She indicated that the union could embark on a strike. Mr *Belger*, for the applicant, initially sought interim relief declaring the strike unprotected pending an application to have the certificate of outcome reviewed and set aside. The Court alerted the parties to the judgments of this Court in *Bombardier*[3] and *Tray International*[4] and asked them to file further written submissions on the question whether that was necessary; and also on the provisions of the Main Agreement (if any) for the Bargaining Council for the Civil Engineering Industry.

[3] Ms *Pillay*, for the NUM, accepted that it is now trite law – in the light of the authorities that I referred to – that a certificate of non-resolution issued by

[1] NUM agreed to hold off on the strike until 1 March 2013. This judgment thus had to be written in the course of less than 48 hours.

[2] The NUM is cited as the fourth respondent and its members as the fifth and further respondents. The CCMA is cited as the first respondent; and commissioners Nadia Sithole and Leslie Ntuli as the second and third respondents, respectively.

[3] *Bombardier Transportation (Pty) Ltd v Mtiya NO & ors* (2010) 31 *ILJ* 2065 (LC).

[4] *Mickelet v Tray International Services and Administration (Pty) Ltd* [2011] ZALCCT 41.

the CCMA does not grant or deny the CCMA jurisdiction to arbitrate a dispute.[5] As Van Niekerk J said in *Bombardier:*

> " In other words, a certificate of outcome is no more than a document issued by a commissioner stating that, on a particular date, a dispute referred to the CCMA for conciliation remained unresolved. It does not confer jurisdiction on the CCMA to do anything that the CCMA is not empowered to do, nor does it preclude the CCMA from exercising any of its statutory powers. In short, a certificate of outcome has nothing to do with jurisdiction. If a party wishes to challenge the CCMA's jurisdiction to deal with an unfair dismissal dispute, it may do so, whether or not a certificate of outcome has been issued. Jurisdiction is not granted or afforded by a CCMA commissioner issuing a certificate of outcome. Jurisdiction either exists as a fact or it does not."

[4] In the light of these authorities, Mr *Belger* amended the relief sought in the following terms:

> "1. The Applicant's non–compliance with the Rules relating to forms and service provided for in the Rules of this Honourable Court is condoned and the matter is treated as one of urgency;
>
> 2. that any strike arising from the Fourth to Further Respondents' demands in respect of issues of consultation, as dealt with in clause 13.2 of the Recognition Agreement concluded between the Applicant and the Fourth Respondent is unlawful and unprotected on the basis that it contravenes clause 4.2 of the Memorandum of Understanding concluded between SAFCEC and the Fourth Respondent on 30 September 2010;
>
> *3. Alternatively*, that any strike arising from the Fourth and Further Respondents' demands pertaining to: (a) hours of work; (b) wage adjustments; (c) production bonuses; (d) weekend payments; (e) insurance for injuries on duty; and (f) long service awards is unlawful and unprotected on the basis that it contravenes clause 4.2 of the Memorandum of Understanding signed between the parties on 30 September 2010;
>
> 4. Interdicting and restraining the Fourth and Further Respondents from commencing with or participating in any strike arising from the demands set out in prayer 3 above;

[5] See also *Pienaar v Stellenbosch University and others* (2010) 31 *ILJ* 2168 (LC) para [38].

5. The Fourth and Further Respondents are ordered to pay the costs of this application."

[5] In order to consider whether the applicant is entitled to the amended form of relief, I shall firstly summarise the background facts briefly.

Background facts

[6] MCC operates in the civil engineering sector and has employees stationed at seven sites in the Northwest, Mpumalanga and Limpopo provinces. NUM represents about 40% of those employees.

[7] MCC is a member of the South African Federation of Civil Engineering Contractors (SAFCEC). On 30 September 2010, SAFCEC, NUM and the Building, Construction and Allied Workers' Union (BCAWU) entered into a "Memorandum of Understanding" ("MOU"). The parties agreed that an interim procedural agreement that established a centralized bargaining structure for the civil engineering industry had become "inadequate and dysfunctional". They agreed to establish a national bargaining council for the industry. They further agreed:

"4.1. The interim recognition agreement will terminate on either the day that the parties reach agreement on the provisions of the constitution of the bargaining council or 30 October 2010, whichever is the earliest.

4.2. In respect of all those issues tabled for collective bargaining which are not currently reflected in the sectoral determination or where no agreement has yet been reached, they shall be transferred as items to be negotiated at the level of the Bargaining Council;

4.3 Once the Main Agreement of the Bargaining Council has been negotiated by the parties, that agreement will replace the provisions of the sectoral determination and for that purpose, discussions will be held by the parties with the Department of Labour. Furthermore, this Memorandum of Understanding will terminate once the Bargaining Council is registered."

[8] The Bargaining Council was registered on 7 December 2012. However, the parties have not yet concluded a Main Agreement as envisaged in the

MOU. They have published a constitution dated 12 January 2011.[6] The constitution records that the founding parties to the Council are SAFCEC, NUM and BCAWU. It envisages that:

> "16.1 The Council shall establish a National Negotiating Forum at which negotiations on wages and conditions of employment shall be conducted for all employees in the bargaining unit in the industry.
>
> 16.2 The National Negotiating Forum shall be the sole forum at which negotiations on wages and conditions of employment shall take place in the Industry."

[9] The constitution also envisages "Project Labour Agreements":

> "16.9.1 Where the parties conclude a Project Labour Agreement, that agreement shall incorporate the provisions of the agreements of the Council.
>
> 16.9.2 The Project labour [*sic*] Agreement shall deal with those issues not dealt with in the agreements of the Council and which are essentially domestic in nature (site specific issues)."

[10] On 18 October 2010 – about two weeks after having signed the MOU – MCC and NUM entered into a recognition agreement. It is particularly badly drafted. Clause 13 is headed "negotiating [*sic*] and consultation". It reads:

> "**13.1 Subject matter of negotiation:**
>
> 13.1.1 The Union will negotiate on behalf of Union members, at the national SAFCEC forum once per annum, on the following matters:
>
> 13.1.1 Remuneration and conditions of employment as applicable to members.
>
> **13.2 Subject matter of consultation:**
>
> All other matter [*sic*] affecting the interest of the parties, but excluding remuneration, conditions of employment as applicable to Union members and amendments to agreements shall be regarded for [*sic*] consultation inclusive but not limited to the following:

[6] The copy provided to the Court reflects the note, "Rev 2, November 2012" on its cover but was signed by the parties on 12 January 2011.

13.2.1 Training, education and induction

13.2.2 Health and welfare

13.2.3 Employee benefits

13.2.4 Work environment

13.2.5 Administration of discipline

13.2.6 Work progress/productivity

13.2.7 Conditions of employment as applicable to members

13.2.8 Amendments to agreements

13.2.9 Matters, which could not be resolved by the negotiating committee."

[11] The "negotiating committee" refers to the SAFCEC negotiating committee, specified to be "the sole forum for all negotiations between the Company and the Union concerning wages and/or terms and conditions of employment and/or concerning any dispute which may arise between the Company on the one hand and the Union or its members on the other hand, in accordance with the dispute procedure below. And the dispute procedure provides that:

> "A dispute is the inability of the Company, on the one hand, and the Union, on the other hand, to reach agreement in respect of which they may negotiate in terms of 16.1 above, despite their endeavours to do so through the procedures provided in 16 above."

[12] The reference to 16.1 is a reference to "all disputes". The cross-reference simply begs the question. And it will be immediately apparent from the wording of clause 13.2 (dealing with issues for consultation) that it contains an inherent contradiction: The preamble purports to exclude "conditions of employment as applicable to Union members and amendments to agreements" as matters for consultation; yet clauses 13.2.7 and 13.2.8 specifically includes those very issues.

[13] To add to the confusion, "conditions of employment" is defined to mean "terms of employment conditions between the Company and its employees on condition that both parties have taken consultation". It is difficult to make any sense of that definition.

[14] Against this confusing background the NUM referred a mutual interest dispute to the CCMA on 13 September 2012. It described the dispute as follows:

> "The respondent [MCC] is not willing to address the issues raised by our members".

[15] The parties met for conciliation at the CCMA on 10 October 2012. They agreed to extend the conciliation period for 30 days. They met on 18 October 2012. NUM explained that it wished to bargain at enterprise level with MCC on the following issues:

15.1 Hours of work;

15.2 Wage adjustment;

15.3 Production bonus;

15.4 Weekend payments;

15.5 Insurance for injuries on duty;

15.6 Long service awards; and

15.7 Medical aid.

[16] The parties reached agreement on medical aid but not on the other issues. NUM says that this was pursuant to collective bargaining at enterprise level; the MCC's human resources director, Mr Thabo Mosane, says that it was a consultation process. The significance will become apparent in the context of clause 13 of the recognition agreement.

[17] The other matters remained unresolved and the dispute was again set down for conciliation on 25 January 2013. Commissioner Leslie Ntuli completed a certificate of outcome reflecting that the dispute remained unresolved, but asked the parties to try once more. By 6 February 2013 no resolution was forthcoming and commissioner Sithole issued the certificate of non-resolution, ticking the box stating that the NUM could go on strike.

[18] Mr Mosoane, who was recently appointed as HR director, says it is only when he consulted with SAFCEC on 4 February 2013 that its IR director, Dr Annelie Geldenhuys, made him aware of the MOU. The applicant then

formed the view that the NUM could not strike over the issues in dispute, as it was bound to bargain at sectoral level.

[19] The applicant then launched this application, arguing that the imminent strike will be unprotected.

Evaluation / Analysis

[20] Before considering the merits of the application, I need to decide on a preliminary point raised by NUM.

In limine: authority

[21] Ms *Pillay* has argued that Mr Mosoane, the deponent to the founding affidavit, has only alleged that he is authorised "to depose to" the founding affidavit; therefore, she argued, he did not have the authority to launch the application.[7]

[22] When this issue was raised by NUM, the applicant delivered a supplementary affidavit together with a letter of authority from the applicant's CEO, Mr Erich Clarke. That letter, signed on 22 Febrary 2013 – i.e. before the application was launched -- makes it clear that Mr Mosoane was authorised to do so.

[23] The point *in limine* cannot, therefore, be sustained.

The MOU, recognition agreement and Bargaining Council

[24] The crux of the dispute between the parties turns on the question whether the union can go on a protected strike following a process of collective bargaining to deadlock. MCC argues that it can only do so at a sectoral level in the prescribed forum, i.e. the Bargaining Concil; theNUM argues that plant level bargaining is allowed by the terms of the Recognition Agreement and by consensus between the parties.

[25] It is common cause that the Bargaining Council has superseded the "national SAFCEC forum" referred to in the Recognition Agreement.

[7] Cf *Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) para [19].

[26] Ms *Pillay* has argued that clause 13.2 of the Recognition Agreement constitutes an agreement that the parties can engage in plant level bargaining. I do not agree. Firstly, it does not say so; nowhere does that clause – or, indeed, the rest of the Recognition Agreement – provide that the parties may bargain at plant level. Secondly, the clause itself includes, for example, matters relating to "conditions of employment" under clauses 13.1 as well as 13.2.

[27] Badly drafted as it is, on a plain grammatical reading, clause 13 of the Recognition Agreement appears to me to distinguish, not between "sectoral bargaining" and "plant level (or enterprise level) bargaining", but rather between matters for negotiation and matters for consultation. Indeed, that is the distinction drawn in the heading to clause 13 as well as the sub-headings to clauses 13.1 and 13.2 respectively.

Negotiation and consultation

[28] The terms "negotiation" (or bargaining) and "consultation" are not without difference, especially in the labour law community and in the context of collective bargaining. It is for that very reason, one surmises, that the Recognition Agreement between MCC and NUM draws that distinction in clause 13. In the early days of our labour law jurisprudence the court stated in *Metal & Allied Workers Union v Hart*:[8]

> "There is a distinct and substantial difference between consultation and bargaining. To consult, means to take counsel or seek information or advice from someone and does not imply any kind of agreement, whereas to bargain means to haggle or wrangle so as to arrive at some agreement on terms of give and take. The term 'negotiate' is akin to bargaining and means to confer with a view to compromise or agreement."

[29] This explanation is unchanged by the labour law regime under the1995 LRA. Indeed, in the heady days when the drafters of the LRA foresaw, in a spirit of our new democracy, a new dawn of cooperation in the form of workplace forums, it provided for a role for workplace forums very different to the adversarial bargaining between unions and employers:

[8] (1985) 6 *ILJ* 478 (IC).

> "**85. Consultation**.—(1) Before an employer may implement a proposal in relation to any matter referred to in section 84 (1), the employer must consult the work-place forum and attempt to reach consensus with it.
>
> (2) The employer must allow the work-place forum an opportunity during the consultation to make representations and to advance alternative proposals.
>
> (3) The employer must consider and respond to the representations or alternative proposals made by the work-place forum and, if the employer does not agree with them, the employer must state the reasons for disagreeing.
>
> (4) If the employer and the work-place forum do not reach consensus, the employer must invoke any agreed procedure to resolve any differences before implementing the employer's proposal."

[30] It is clear from the wording of s 85 – albeit hardly ever used – that "consultation", as opposed to "negotiation" or bargaining, does not necessitate agreement. If consultation does not result in agreement, the employer may implement.

[31] What the Recognition and the MOU envisages, is that negotiation – or bargaining – must take place at sectoral level in the Bargaining Council. Should the parties reach deadlock, the union may refer a dispute and the processes set out in s 64 of the LRA will follow. The same is not true for matters referred to consultation, as envisaged by clause 13.2 of the Recognition Agreement.

[32] Ms *Pillay* referred me to an unreported judgment[9] of Francis J, involving the same parties, in support of her contention that the Recognition Agreement allows for plant level bargaining. In that judgment, Francis J remarked:[10]

> "In clause 13 it was agreed that the applicant would negotiate on behalf of its members, at the national SAFCEC forum once per annum on the following matters – 'Remuneration and conditions of employment applicable

[9] *MCC Contracts (Pty) Ltd v NUM & others* (case no J 2312/11, 24 October 2011).

[10] At para [5] (my underlining).

to members'. Clause 13.2 deals with the issues for consultation which may be consulted at plant level."

He repeated at paragraphs [24] and [26]:

"Clause 13.2 deals with the subject matter of consultation....

Importantly matters that are the subject of consultation are not dealt with by the negotiating team and need not be negotiated. The consultations may take place at plant level."

[33] It is apparent from these citations that, even if this Court were to accept that the Recognition Agreement allows for consultation at plant level, what the judgment of my brother Francis J does not say – and neither could it – is that it provides for negotiation or bargaining at plant level.

[34] Read thus, it matters not whether consultation is read to take place at national level, enterprise level, plant level, or any of the above. What is clear, is that the Recognition Agreement does not allow for plant level or enterprise level bargaining.

LRA s 65

[35] The constitutionally guaranteed right to strike is subject to limitations. One of those is contained in s 65 of the LRA:

> **65. Limitations on right to strike or recourse to lock-out**.—(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if—
>
> (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;
>
> (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;
>
> (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;
>
> (d) that person is engaged in—
>
> (i) an essential service; or
>
> (ii) a maintenance service.

(2) (a) Despite section 65 (1) (c), a person may take part in a strike or a lock-out or in any conduct in contemplation or in furtherance of a strike or lock-out if the issue in dispute is about any matter dealt with in sections 12 to 15.

(b) If the registered trade union has given notice of the proposed strike in terms of section 64 (1) in respect of an issue in dispute referred to in paragraph (a), it may not exercise the right to refer the dispute to arbitration in terms of section 21 for a period of 12 months from the date of the notice.

(3) Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out—

(a) if that person is bound by—

(i) any arbitration award or collective agreement that regulates the issue in dispute; or

(ii) any determination made in terms of section 44 by the Minister that regulates the issue in dispute; or

(b) any determination made in terms of the Wage Act and that regulates the issue in dispute, during the first year of that determination."

[36] What is relevant to the present dispute, is s 65(3)(a)(i). The issues on which NUM wished to engage in collective bargaining – and over which it wishes to strike – are regulated by the collective agreements reached at sectoral level in the bargaining council. The strike would therefore be unprotected.

Estoppel / waiver

[37] Ms *Pillay* argued in the alternative that the parties had commenced negotiations and that MCC had waived its right to rely on the MOU.

[38] In response, Mr *Belger* argued – mainly on the basis of the replying affidavit, it must be said – that MCC engaged in consultation only, and did not envisage bargaining that could lead to a strike, over the issues in dispute.

[39] At worst for the applicant, I cannot find that it unequivocally agreed to waive its rights to raise its current objections in circumstances where it

was well aware of it. Firstly, nowhere did it commit itself to negotiation – as opposed to consultation – at plant or enterprise level on the issues in dispute. Secondly, on the evidence before me I cannot find that Mosoane was aware of the MOU or the Recognition Agreement – unprofessional as that may appear for the HR director – at the stage of that engagement.

Conclusion

[40] For these reasons, I must find that NUM is not entitled to take protected strike action in circumstances where it is bound by the collective bargaining clauses in the Recognition Agreement and the MOU.

Costs

[41] The confusion giving rise to these proceedings arise mainly from a badly drafted agreement. Both parties are responsible for that agreement. One can only hope that they will take the lessons from this litigation to heart and apply their minds to future agreements to be struck in the newly registered Bargaining Council. For the present, and taking into account the principles of law and fairness, as well as the ongoing relationship between the parties in that Council, I do not think a costs order is warranted.

Order

[42] I therefore grant the following order:

42.1 The applicant's non–compliance with the rules relating to forms and service provided for in the rules of this Court is condoned and the matter is treated as one of urgency.

42.2 Any strike arising from the Fourth to Further Respondents' demands in respect of issues of consultation, as dealt with in clause 13.2 of the Recognition Agreement concluded between the Applicant and the Fourth Respondent will be unprotected.

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Steenkamp J

APPEARANCES

APPLICANT:	P Belger Instructed by Cowan-Harper attorneys.
FOURTH AND FURTHER RESPONDENTS:	L Pillay Instructed by M S Molebaloa Inc.