THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No J1869/15

In the matter between:

NATIONAL UNION OF METALWORKERS OF SA **Applicant**

and

VANACHEM VANADIUM PRODUCTS (PTY) LTD **Respondent**

Date heard: **8 December 2015**

Order given: **10 December 2015**

Judgment delivered: **17 December 2015**

Summary: Application to declare lay-offs of the applicants' members employed by the respondent unlawful on basis respondent is excluded from the terms of the MEIBC's Main Agreement. Interpretation of the Main Agreement.

JUDGMENT

NKUTHA-NKONTWANA AJ

Introduction

[1] In this urgent Application the Applicant seeks an order declaring a lay-off of the Applicant's members by the respondent unlawful. This matter was initially heard by Brassey AJ on 17 September 2015 on urgent basis. The parties reached a Settlement Agreement which was made an order of court. In terms of the Settlement Agreement the application was, *inter alia*, postponed *sine die* on the basis that either party could re-enroll same on seven days' notice to the other

party. The Applicant availed itself to the said clause and hence these proceedings.

[2] The Applicant accordingly amended its notice of motion and now seeks an order in the following terms:

> *"1. That the matter be dealt with on urgent basis and that the Applicant's non-compliance with the Rules of Court be condoned;*
> *2. That it be declared that the Respondent's lay off of the Applicant's members as from 12 September 2015 and or its subsequent implementation of short time as form Saturday, 7 November 2015, was unlawful;*
> *3. That the Respondent be ordered to:*
> *3.1 Forthwith allow the Applicant's members to return to the work place; and/or*
> *3.2 Pay the Applicant'' members all the wages forfeited as a consequence of the Respond aforesaid unlawful conduct.*
> *4. Further and alternative relief"*

Background facts

[3] The pertinent facts are common cause. The Respondent is a producer of vanadium and its sole source of ore was Mapochs mine. In April, Mapochs mine was placed under business rescue and stopped to supply ore to the Respondent. The Respondent's ore reserves were depleted by 1 May 2015 and thereby creating a crisis. In response to the emergency situation it was facing, the Respondent implemented short-time and lay-offs as provided for in the Main Agreement of the Metal and Engineering Industries' Bargaining Council ("the MEIBC").

[4] It is the Respondent's case that it and the Applicant's members are bound by the terms of the Main Agreement. In terms of item 2 of Annexures "A" to the Main Agreement, the Respondent is entitled to institute a lay-off unilaterally. Clause 7 of the Main Agreement allows for the implementation of short time "owing to a shortage of work and/or materials and any other justifiable

contingencies including planned load shedding and/or unforeseen contingencies and/or circumstances beyond the control of the employer".

[5] Conversely, the Applicant disputes that the Main Agreement applies to the respondent and its members in the employ of the Respondent. In essence, that is the crisp issue to be determined by this court.

[6] It is a well-known fact that the steel industry is on its knees due to global slow down. The Mapochs mine is under business rescue and the mine ceased to operate during April 2015 and resumed for a brief period on 9 August 2015. Mapochs mine had surplus of "lumpy" ore available to sell to the Respondent. However, the Respondent needs "fines" ore and would have to crush and screen the "lumpy" ore before it could be used, at additional cost it could hardly afford.

[7] The business rescue practitioner of Mapochs mine was willing to reduce the price of "lumpy" ore by 50%. To accept the offer, the Respondent had to reduce its total cost by 30% and that would have enabled it to carry on production, although still at a loss. Its monthly loss was about R49m in September 2015.

[8] The Respondent had consultations with all its employees and its salaried staff, non-unionised employees and Solidarity trade union agreed to the proposed wage reduction of 30%. On 1 and 8 September 2015, it consulted with the Applicant on the same issue but did not respond to it. As a result, the Respondent resorted to lay-off since it had no ore.

[9] The lay-off was not a permanent solution to the Respondent's financial difficulties. For this reason, the Respondent commenced with section 189A process. This process is aimed at addressing the Respondent's long term operational requirements.

[10] The Respondent remained without ore and was thus unable to resume production after the expiry of the 8-week period of a lay-off in accordance with the Main Agreement. Thereafter, a short time was implemented in terms of the Main Agreement in order to allow necessary maintenance to be done without

the Respondent incurring its full wage bill whilst it was unable to produce and earn any income from production.

[11] The worsening financial situation of the Respondent forced it into business rescue on 17 November 2015. Whilst section 189A process is still pending.

Analysis

[12] In terms of Part 1 Clause 1(3)(e) of the MEIBC Main Agreement, the Main Agreement does not apply to enterprises that are, *inter alia*, engaged in 'the production of iron and/or steel and/or ferro-alloys'. It is common cause that the Respondent's operations fall within this exclusion.

[13] Given the crisp issues for determination, I do not intend to deal with the applicability of other MEIBC Collective Agreements. Save to interrogate the plant level agreements concluded by the parties in so far as they are linked to the Main Agreement.

[14] Historically, the terms and conditions of employment applicable to the Applicant's members in the Respondent's employ had always been regulated by what was called House Agreements which were comprehensive and provided for lay-off. The last House Agreement expired on 30 June 2010.

[15] In 2011, the parties concluded a separate agreement wherein they agreed to be bound by the Main Agreement. However, that agreement was unilaterally terminated by the Applicant and it went ahead to table its lists of demands for negotiation at the plant level. The Respondent refused to bargain with the Applicant, insisting that the parties were still bound by the Main Agreement. The matter was referred to the MEIBC and on 25 October 2012 Commissioner Dibden issued an advisory award in favour of the Applicant confirming that the Main Agreement was not applicable to its members.

[16] Subsequent to a protracted strike by the Applicant, the parties concluded a Strike Settlement Agreement dated 5 December 2012. Clause1 thereof states that the parties agree that the variation of all conditions of employment contained in annexure A shall be determined and be based on the terms and

conditions of the signed MEIBC Main Agreement. Annexure A interestingly refers, in summary, to rates of pay, allowance, call outs, fatigue rest period, housing subsidy. The Strike Settlement Agreement remains applicable for the duration of employees' employment.

[17] On 30 May 2014, another collective agreement was concluded between the parties, termed Supplementary Conditions of Employment Agreement, which expressly provides that it must be read together with the Strike Settlement Agreement. It is clear from the terms of this collective agreement that, contrary to the Respondent's adamant assertion that the Main Agreement is applicable to its employees, the parties yet again collectively bargained issues that fall within the ambit of a Main Agreement at the plant level.

[18] The Respondent raised two main defenses. Firstly, that effect that the Main Agreement, as amended by the agreements negotiated by parties, is binding on the parties; and secondly, that the matter is *res judicata*.

[19] The counsel for Respondent referred me to the SCA's judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1] which contextualized the new approach to be adopted in interpretation of documents. For completeness sake, I intend to refer the whole paragraph 26 partially quoted by the Respondent's counsels:

> *"In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used. (footnote omitted) Here, it is usually said that the language is ambiguous although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration."*

[1] [2012] 2 All SA 262 (SCA) at paras 14 to 24.

[20] With due respect, Part 1 Clause 1(3)(e) of the MEIBC Main Agreement unambiguously excludes business operations involved in 'the production of iron and/or steel and/or ferro-alloys'. As such, *Natal Joint Municipal Pension Fund* is not applicable in this instance.

[21] However, I am not oblivious of the views expressed by the LAC in *North East Cape Forests v S A Agricultural Plantation and Allied Workers Union*, quoted with approval in *Food & Allied Workers Union (FAWU) v Commission for Conciliation Mediation and Arbitration and Others*[2] that:

> "*In the case of a collective agreement, the parties are in an employment relationship, with conflicting interests: their agreement generally represents a compromise that is the result of a protracted process of negotiation, and may follow the exercise of power. I do not therefore think a collective agreement can be properly interpreted without full regard for the context in which it is negotiated … In my opinion the effective resolution of labour disputes is not promoted by reliance on a legal rule of evidence which restricts the abilities of parties to present the argument at a forum such as this. [Emphasis added]*

[22] In *North East Cape Forests* the court held further that "the primary objects of the LRA are to advance economic development, social justice, labour peace and the democratisation of the workplace, and that these objectives are better served by the practical approach to the interpretation and application of the collective agreement rather than by reference to purely contractual principles." Other than being bound by this dictum, I totally agree with it.

[23] In this instance, it is clear that parties to the Main Agreement deliberately and expressly excluded business operations involved in 'the production of iron and/or steel and/or ferro-alloys'. The terms and conditions of covering the excluded enterprises were deferred to House Agreements. As stated above, there is no House Agreement currently. The conundrum the parties find themselves in is owing to the lacuna created by the lapse of their last House Agreement in 2010 and the absence of a clear replacement.

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[2] *Food & Allied Workers Union (FAWU) v Commission for Conciliation Mediation and Arbitration and Others* (C536/06) [2006] ZALC 30 (27 January 2006) at para 69.

[24] In the premises, it is my view that that the Main Agreement is generally not applicable to the parties, save for instances where they have entered into a collective agreement to extend its application totally or on limited issues. Clearly, both the Strike Settlement and the Supplementary Conditions of Employment Collective Agreements do not provide for the lay-off or short-time.

Res judicata:

[25] In *Nestle(SA) (Pty) Ltd v Mars Inc.*[3] stated that:

> *"The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principal which is that they should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must be brought to its conclusion before the tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (res judicata). The same suit, between the same parties, should be brought only once and finally."*

[26] Whilst in *Dumisani & another v Mintroad Sawmills (Pty) Ltd,*[4] the Labour Appeal Court held that '*it is against public policy that a litigant should on the same grounds be able to keep demanding the same relief from the same adversary'.*

[27] For a defence of *res judicata* to succeed in this instance, the Respondent had to show that the prior arbitration award and judgment concern the same parties in which the same point was at issue. There is no dispute that both the arbitration award of Walele and judgment of Van Niekerk J concern the same parties. However, the Applicant asserts that they do not concern the same issue since it now seeks a pronouncement on the lawfulness of the layoff and short-time.

[3] 2001 (4) SA 542 (SCA)
[4] (2000) 21 *ILJ* 125 (LAC) para 6

[28] It is clear, *ex facie,* the arbitration award of Walele that she misconstrued the issues before. Contrary to her findings, the parties have since, as a matter of fact, concluded plant level collective agreements. In fact, the issues that had been canvassed during the arbitration proceedings are now dealt with in terms of the Strike Settlement Agreement and the Supplementary Conditions of Employment Agreement. By the same token, the issue that was before Van Niekerk J was about the legality of the Applicant's strike. The court in that matter was asked to determine whether the Applicant's demands (appointment of shop stewards, insourcing and transport costs) constituted matters of mutual interest.

[29] Undauntedly, both previous proceedings did not deal with the issues before this court or finally and definitely determine the merits of the dispute between the parties. Accordingly, the Respondent's defense of *res judicata* is untenable and stands to be dismissed.

Conclusion

[30] In the circumstances, it is clear that Part 1 Clause 1(3)(e) of the Main Agreement unambiguously excludes the Respondent's business operations. Even though the current plant level collective agreements between the parties limitedly extend some of the provisions of the Main Agreement, lay-off and short –time provisions, *inter alia*, remain excluded.

[31] Therefore, the Respondent's unilateral implementation of the lay-off of the applicant's members as from 12 September 2015 and/or subsequent implementation of a short time as from 7 November 2015 was unlawful. Consequently, the Respondent must reinstate the Applicant's members' *status quo ante*.

Costs

[32] On costs, it is practice that this court's would normally decline to make orders for costs in circumstances where the parties to a collective bargaining

relationship are before the court, and where an order for costs has the potential to prejudice that relationship. There is no reason to depart from that approach in the present instance. I, therefore, find it proper not to make any order as to costs.

Order

[33] For the above reasons, I make the following order:

1. The matter is dealt with on urgent basis and that the Applicant's non-compliance with the Rules of Court be condoned;

2. It is declared that the Respondent's lay-off of the Applicant's members as from 12 September 2015 and or its subsequent implementation of short time as from Saturday, 7 November 2015, was unlawful;

3. The Respondent be ordered to:

   3.1 Forthwith allow the Applicant's members to return to the work place; and/or

   3.2 Pay the Applicant's members all the wages forfeited as a consequence of the Respond aforesaid unlawful conduct.

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Nkutha- Nkontwana, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Minnaar Niehaus of Minnaar Niehaus Attorneys
For the Respondents:	Adv G Pretorius SC with Adv H Viljoen
Instructed by:	Cowan-Harper Attorneys