IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

Of interest to other judges

Case no: P88/16

In the matter between:

NUMSA obo MEMBERS **Applicant**

and

TRANSNET SOC LTD AND OTHERS **Respondent**

Heard: **29 April 2016**

Delivered: **13 May 2016**

Summary: Urgent application in terms of section 189A (13) of the Labour Relations Act. Applicant contends that the Respondent cannot terminate fixed term contracts without complying with section 189A. The respondents contends that the fixed term contracts are permitted by a collective agreement, therefore terminable upon effluxion of time. Whether the collective agreement binds the Applicant's members in terms of section 23 (1) (d) or is capable of being extended within the contemplation of section 32 (1). Whether the Transnet Bargaining Council is a Council within the contemplation of the Labour Relations Act as amended. Whether the Applicant has the *locus standi* to act on behalf of its

members. Held that the fixed term contracts are permitted by the collective agreement within the contemplation of section 198B (2) (c) of the Labour Relations Act as amended. Held that the collective agreement binds the Applicant's members within the contemplation of section 23 (1) (d). Held that Transnet Bargaining Coucil is a Council within the contemplation of the Labour Relations Act. Held that the Applicant has the locus standi to launch the application. The application dismissed with no order as to costs.

JUDGMENT

MOSHOANA, AJ

Introduction

[1] This is an urgent application seeking a declaratory order to the effect that the Transnet SOC Ltd is obliged to invoke the provisions of section 189 and/or 189A of the Act relevant to the terminations of employment of the Applicant's members. Further an interdict, interdicting Transnet SOC Ltd from terminating and direction to comply with section 189 or 189A of the Act. A declaratory that the collective agreement entered into on 15 December 2015 does not bind the Applicant and its members and that it is not a collective agreement envisaged in section 198B(2)(c) of the Act. Reinstatement of Applicant's members whose employment terminated from 28 February 2016, alternatively, compensate them.

[2] The reliefs sought are opposed by Transnet SOC Ltd. Urgency was not challenged and, accordingly, the matter was entertained as one of urgency. The United National Transport Union (UNTU) filed a notice to abide. The South African Transport and Allied Workers' Union (SATAWU) did not file any opposition.

Background facts relevant to the determination of this matter.

[3] On or about 15 December 2015, Transnet SOC Ltd, SATAWU and UNTU entered into a collective agreement at the Transnet Bargaining

Council. Clause 6.1 of the collective agreement permitted Transnet SOC Ltd to employ fixed term contract employees for a defined period exceeding three months. Clause 6.2 provided that fixed term contracts, which exceed three months or are renewed successively, shall not be deemed to be of an indefinite period. The collective agreement defined an employee as all persons employed in Transnet in the Bargaining Unit in terms of a fixed contract of employment. In terms of clause 2, the agreement applied and bound all fixed term contract bargaining unit employees in Transnet SOC Ltd, including those who are not members of the trade union parties to the agreement.

[4] At the time of the conclusion of the collective agreement, SATAWU and UNTU jointly represented 75% of the employees within the bargaining unit. They both represented 69% of the entire workforce of Transnet SOC Ltd. Following signature of the collective agreement; a memorandum was circulated to Transnet Bargaining Unit employees. The salient features of the said memorandum were that the agreement would regulate the terms and conditions of all bargaining unit Fixed Term Contract Employees (FTC's) with effect from 1 January 2015. The applicant availed an example of the fixed term contract. Suffice to assume that following the collective agreement; fixed term contracts were entered into. It is apparent that from 23 February 2016, Transnet SOC Ltd gave notices of termination of the fixed term contracts. It was as a result of such notices that the present application was conceived.

Evaluation

Does the Applicant have locus standi to bring the application?

[5] In law, *locus standi* simply means an ability of a party to demonstrate to court sufficient connection to and harm from the action challenged to support that party's participation in a case. Transnet raised the point on the basis that the applicant was being opportunistic in that the vast majority of the affected employees are members of SATAWU and UNTU. Effectively, Transnet challenged the applicant to demonstrate that it has members who are affected by the termination. In rebuttal, James Viwe

supported by Nomonde Baleni testified that hundreds if not thousands of the fixed term employees joined the applicant. On the probabilities, I must accept that the applicant has members who are affected by the termination or impending terminations.

[6] I do not see how the applicant can go to the trouble of bringing an urgent application at an expense when it has no members to protect. Even if the number has not been determined, it is probable that the applicant has members who are affected. Even if one member is shown to be a member and is affected, such is sufficient in my mind. Section 200(1) of the Act, provides that a registered trade union, the applicant being one, may act in any of the three capacities. Those are, its own interest, on behalf of any of its members and in the interest of any of its members.

[7] Even if I were to accept that the applicant has no members on whose behalf and interest it can act, I do not see how the applicant as a registered trade union will not have an interest in a dispute that involves mass dismissal of employees employed in an industry that it is registered in. Section 38 of the Constitution of the Republic of South Africa, 108 of 1996, allows anyone to approach a competent court and allege that a right in the Bill of Rights has been infringed or threatened in five categories. I do not see how in a matter like this a registered trade union cannot comfortably bring itself in any one or more of the five categories. Accordingly, I am of firm view that the applicant has the necessary *locus standi*. Therefore, Transnet's objection cannot be upheld.

Is Transnet Bargaining Council a Council in terms of the Labour Relations Act?

[8] Given the view that I take at the end, this issue is more academic than real. However, the issue was sharply raised by the applicant. Its relevance goes to the applicability of section 32 of the Act. In terms of section 213 of the Act, Bargaining Council means Bargaining Council referred to in section 27. Section 27 (1) provides that one or more registered trade unions and one or more employers' organisation may establish a bargaining council for a sector and area. Section 27 contemplates two parties to establish a bargaining council. It is common

cause that two parties as contemplated in the section did not establish the Transnet Bargaining Council. As *Cassim SC* for Transnet submitted, Transnet Bargaining Council is *sui generis*. I agree with this submission.

[9] An employer and not an employers' organisation established Transnet Bargaining Council on the one hand. However, it is common cause that around 1988, it was known as Labour Council. In 1991, the Labour Council was converted into Transnet Industrial Council registered in terms of the 1956 Act. In terms of clause 7 of Schedule 7 of the Act, an Industrial Council or deemed to be registered in terms of the Labour Relations Act immediately before the commencement of the current Act is deemed to be a bargaining council under the current Act. On the strength of this provision, I am constrained to find that Transnet Bargaining Council is a council in terms of the current Act. Accordingly, the submission by *Buchanan SC* must be upheld.

Are the fixed term contracts valid and enforceable in law?

[10] Central to this matter is the validity of the fixed term contracts entered into at the back of the 15 December 2015 collective agreement. As a point of departure, fixed term contracts are valid and enforceable in terms of the common law. Section 198B, which will be considered later in this judgment did not alter the common law position. The applicant's case is that the collective agreement of 15 December 2015, which clearly permits fixed term contracts is not a collective agreement contemplated in section 198B(2)(c) of the Act. Further, the applicant's case is that the collective agreement does not bind their members because it has not been lawfully extended within the contemplation of section 32 of the Act. On the other hand, Transnet argued that section 32 found no application. Instead, section 23 is applicable.

[11] Section 198B(2)(c) provides that the section does not apply to an employee employed in terms of a fixed term contract permitted by "any" statute, sectoral determination or collective agreement. The legislature chose to use the word any before the instruments that permit usage of fixed term contracts. It must then follow that "any" collective agreement,

whether concluded at the bargaining council or outside, is contemplated. The word 'any' is defined in the Shorter Oxford English Dictionary to mean some-no matter which, of what kind. If the legislature intended only collective agreements concluded in a bargaining council, the legislature should have expressly stated so as it did in section 32. It must be remembered that one of the powers and functions of a bargaining council is to conclude collective agreements. See section 28(1)(a) of the Act. I did not understand Buchanan SC to be arguing that the agreement of 15 December 2015 is not a collective agreement. He only persisted with an argument that it is not one contemplated in the section that ousts the provisions of the section.

[12] In terms of section 213, a collective agreement means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions on the one hand and on the other hand one or more employers. The agreement of 15 December 2015 is in no doubt a collective agreement. That being the case, it is so that that collective agreement permitted employment on fixed term contracts. There is no doubt that the employees affected herein were employed on a fixed term contract as permitted by the collective agreement. To my mind, the provisions of section 198B(2)(c) find application in this matter.

[13] Section 198B(5) provides that employment in terms of a fixed term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration. It is on the strength of this subsection that the applicant seeks a declaratory that section 189 or 189A must be complied with to justify termination since the fixed term contracts are deemed to be for an indefinite duration by the section. The simple answer to this argument is that subsections 198B(3) and (5) do not apply. Their application is removed by section 198B(2)(c).

[14] If a positive finding is made that the fixed term contracts through which the employees are employed are permitted by a collective agreement *cadit quaesto.* I make such a finding. A different situation would have

arisen if the applicant had contended that the collective agreement is not valid and enforceable in law. Such a contention, the applicant is not making. Therefore, a valid and enforceable agreement exists. Clause 6.1 read with 6.2 permits the fixed term contracts. Accordingly, the fixed term contracts are valid and enforceable in law.

Is section 23(1)(d) applicable?

[15] In argument, Cassim SC contended that section 23(1)(d) finds application. Buchanan SC argued that section 23(1)(d) has not been appropriately pleaded and cannot be relied on. Without necessarily deciding whether the provisions of the section have been appropriately pleaded, I accept that one issue raised squarely by the applicant is the binding effect of the collective agreement to its members. It is the duty of this court to apply the law. If the law to be applied is found in a statute, even if not appropriately pleaded by any of the parties, that law will be applied to resolve a dispute between the parties. In order for this court to resolve the disputed binding effect of the collective agreement to the applicant's members, resort should be had to amongst others section 23 of the Act, which clearly bears a caption "Legal effect of collective agreement"

[16] It is common cause that the applicant is not a party to the collective agreement. On that simple proposition, the agreement will have no binding effect on it and its members unless the provisions of the law provides otherwise. Section 23(1)(d) provides that a collective agreement binds employees who are not members of the registered trade union party to the agreement if the employees are identified in the agreement; the agreement expressly binds the employees and the trade unions that have, as their members, the majority of employees employed by the employer in the workplace. The question that immediately arises is whether the requirements of the section are met?

[17] In relation to the first requirement, to my mind, identification can either be by name or by category. It is common cause that the employees concerned in this matter are known as FTC's. The agreement clearly

identifies such employees. In relation to the second requirement, the agreement expressly binds FTC's even if they are not members of the Union party. Lastly, in relation to the final and third requirement, it is undisputed that SATAWU and UNTU jointly represent 75% of the bargaining unit and 69% of the entire workforce. Therefore, it must follow that legally, the applicant members as employees contemplated are bound by the collective agreement. Accordingly, the contention and argument of the applicant is without merit and cannot be upheld. Even if I were to accept, which I am not, that section 23(1)(d) finds no application, I would have sought refuge from the common law. A collective agreement is an agreement.

[18] The law of contract would certainly apply to it. Such denotes interpretation of such an agreement should its application or interpretation be placed in dispute. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[1] it was held that interpretation is the process of attributing meaning to the words used in a document. It was also held that whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.

[19] In *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*,[2] it was held that the proper approach to the construction of a legal instrument requires consideration of the document taken as a whole. The legality or otherwise of the collective agreement of 15 December 2015 is not called to question. Therefore, what remains is its interpretation as a whole.

[20] Regarding its binding effect, clause 2 specifically provides that the agreement applies and binds all fixed term contract bargaining unit employees in Transnet SOC Ltd, including those employees who are not

[1] 2012 (4) SA 593 (SCA) at para 18.
[2] 2009 (2) SA 204 (CC) at para 90.

members of the trade union parties to this agreement. The literal meaning of this clause is lucid and clear. Clause 1 sets out the purpose of the agreement. It is to record the terms and conditions of employment of fixed term contract employees in the bargaining unit of Transnet SOC Ltd. It seeks to regulate fixed term contracts in the bargaining unit.

[21] Clause 4.1.5 defines an employee to mean all persons employed in Transnet in the bargaining unit in terms of a fixed term contract. It was never contended before me that certain clauses of the collective agreement are unenforceable and or severable. In a rather convoluted manner, Viwe James testified as follows:

> 'In the circumstances, even if the validity and binding nature of this agreement should be accepted (and the Applicant most definitely does not accept it)…'

In response to amongst others this convoluted evidence, Reyana Sallie testified as follows:

> 'The first respondent and its recognised trade unions, who represent more than 75% of all employees in the agreed bargaining unit, concluded a valid and binding agreement as contemplated by section 189B(2)(c) of the LRA…'

[22] Further and in what appears to be in total contradiction of his earlier evidence, Viwe testified that the simple answer to the contention that a substantive application ought to have been brought to set aside the collective agreement is that the applicant is not seeking to nullify any agreement.

[23] All it desires is the confirmation of this court that it is not binding the applicant and its members. Sadly, the applicants did not spell out who its members are. However, regard being had to the testimony of Viwe, the members are the employees employed in terms of a fixed term contract. Such employees have been identified in the agreement and are bound by the agreement. On the papers before me, it is not clear who of the so-called fixed term contract employees was or was not a member of

SATAWU or UNTU. Nonetheless, whether a specific person was a member of the applicant at the relevant time 15 December 2015, such is of no consequence given the provisions of the contract and section 23(1)(d) of the Act.

[24] What brings such a member to the binding fold is the category FTC's. It was never contended before me that any member of the applicant does not fall in the category of FTC's. All the categories mentioned by Viwe in paragraphs 9.2.1-9.2.3 of the founding affidavit are FTC's.

[25] A submission was made to the effect that as a court of equity, this court must guard against unscrupulous employers who would seek to contract out of the provisions of the Act. Unfortunately for this argument, the Act promotes collective bargaining. The Act allows parties through collective bargaining to contract as it were out of the provisions of the Act. Subsection 2 of 198B is clear. This section does not apply to certain situations. Such, in the context of subsection (c), allows or permits contracting out of the provisions of the Act.

[26] What then remains is the question whether section 32 finds application or not? Firstly, Transnet has disavowed the application of section 32. The fact that the deponent of the answering affidavit used the term 'extended' is of no consequences. Buchanan SC persisted with an argument that section 32 must apply because the collective agreement of 15 December 2015 was concluded at the bargaining council. I do not agree. I have already found that section 198B(2)(c) will apply even if the agreement is concluded at the bargaining council or outside. In *casu,* it is common cause that Transnet Bargaining Council has not asked the Minister in writing to extend the collective agreement of 15 December 2015 to non-parties like the applicant.

[27] The Labour Relations Act recognises the sanctity of collective bargaining and the principle of majoritarianism. Collective agreements bind non-parties and non-members-individual employees. Section 23(1)(d) applies to employees whereas section 32 is specifically intended for non-parties. I need not look at section 31 as implored by Cassim SC. The simple

answer to the contention is that there is no request in writing to extend the collective agreement. Accordingly, the argument that section 32 must apply is without merit and cannot be upheld.

[28] There was in any event no need to seek an extension because Transnet ensured that it is sufficiently covered by the provisions of section 23(1)(d). If Transnet wished to have the collective agreement to bind NUMSA as a non-party within the contemplation of section 31, it would have done so. However, as I have said, having covered themselves in terms of section 23(1)(d) such would have been unnecessary.

[29] In the light of the above conclusions, the applicant is entitled to the reliefs sought? A fixed term contract terminates with affluxion of time. If that time arrives, termination is automatic and does not amount to a dismissal within the contemplation of section 186 of the Act. An interdict will not issue where no illegality obtains. Section 185 of the Act provides every employee with a right not to be unfairly dismissed. In terms of section 188(1)(b), a dismissal is unfair if the employer fails to prove that the dismissal was effected in accordance with a fair procedure.

[30] Section 189A(13) is a procedure available to the so-called mass dismissal situations. It is aimed at dealing with adherence to a fair procedure before a dismissal is effected. Therefore, in instances where a dismissal is not to ensue, this procedure is not available. In *casu,* since no dismissal is to arise, unless one contemplated in 186(1)(b), which is not the case herein, the provisions of section 189A(13) does not apply.

[31] In true cases of section 186(1)(b), aspects of a fair procedure do not obtain. What obtains is the reasonable expectation, which ought not to be met.

[32] On the issue of costs, I am guided by section 162 of the Act. Guiding principles are law and fairness. In my view, this is a matter where no order as to costs should be made.

[33] In conclusion, I am of a firm view that the applicant has the necessary *locus standi*. Transnet Bargaining Council is a Council within the contemplation of the Act. The fixed term contracts are valid and enforceable in law. Section 23(1)(d) is applicable as opposed to section 32. An interdict cannot be issued. The procedure contemplated in section 189A(13) is not available to the applicant.

Order

[34] In the results, I make the following order:

1. The application is dismissed.

2. No order as to costs.

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Moshoana, AJ,

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant:	Advocate R Buchanan SC
Instructed by:	Minaar Niehaus Attorneys.
For the Second Respondent:	Advocate N Cassim SC
Instructed by:	Maserumule Attorneys.