Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: J 287/17

In the matter between:

NATIONAL TERTIARY EDUCATION UNION ('NTEU')	**Applicant**
and	
TSHWANE UNIVERSITY OF TECHNOLOGY	**First Respondent**
NATIONAL EDUCATION HEALTH & ALLIED WORKERS UNION ('NEHAWU')	**Second Respondent**

Heard: 16 February 2017

Delivered: 23 March 2017

Summary: (Urgent – no clear or prima facie right – freedom of association rights and rights to collective bargaining – no right to restoration of collective bargaining status and re-opening of negotiations on substantive agreement concluded during interval when union had no recognised status or right to participate in bargaining forum)

JUDGMENT

LAGRANGE J

Introduction

[1] The applicant in this matter, an academic and staff union ('NTEU'), applied for urgent interim relief suspending clause 5 of the collective agreement between Tshwane University of Technology ('TUT') and NEHAWU ('the substantive agreement') pending the conclusion of a recognition agreement between NTEU and TUT which recognises its organisational rights, the readmission of NTEU to the TUT Bargaining Forum ('TBF') and the negotiation and consideration of the applicant's submissions at a meeting of the TBF. Failing the successful conclusion of such negotiations, NTEU seeks the suspension of clause 5 of the collective agreement pending the finalisation of a dispute concerning the interpretation and application of clause 5 of the collective agreement.

[2] Clause 5 of the substantive agreement which was dated 13 January 2017 stated:

> "5 Post Retirement Medical Aid Benefits
>
> 5.1 The parties acknowledge the financial burden that this benefit places on the University and agreed to terminate the benefit is 30 days from the signing for employees who fall within the bargaining unit (post levels 5 to 17).
>
> 5.2 The University would initiate appropriate processes with an intention of terminating the benefit of the other beneficiaries not falling within the bargaining unit and ensure that such processes are completed within 90 days of the date of signing of this agreement.
>
> 5.3 The parties agree that Council and or its appropriate committees/s handled the termination of the benefit in relation to employees on post levels 1 to 4."

Chronology

[3] In June 2011, the TBF was established by a collective agreement concluded between NTEU, NEHAWU and TUT. In terms of clause 1.2 and 1.3 all other existing forums of collective bargaining were dissolved, but existing recognition and procedural agreements remained in effect except to the extent they conflict with the Constitution in terms of clause 3 of the agreement.

[4] Clause 3.3 establishes the TBF as the sole bargaining forum unless amended by negotiations. In terms of clause 4.1 of the TBF Constitution, parties to the forum are unions recognized on the basis of having at least 28% of employees within "the bargaining unit". The same clause identifies two sectors, namely academic and non-academic workforce sectors comprising Peromnes levels 5-17, but no further reference is made to these categories in the TBF Constitution.

[5] Clause 5 of the TBF Constitution deals with the admission of a "newly recognised union". To obtain membership of the forum, such a union must lodge a copy of its recognition and procedural agreement between itself and TUT with the Secretariat of the bargaining forum, which must confirm its membership of the forum. TUT is also required to verify the newly recognised union's membership and disclose that to the bargaining forum. It is unclear why it is necessary for a union to conclude a recognition agreement to become a member of the forum, but whether that is a necessary pre-requisite for bargaining rights in the forum in the light of clause 4.1 is not something that requires determination in this application.

[6] In any event, on 21 February 2013, quite separately from the TBF agreement, NTEU and TUT concluded a recognition and procedural agreement ('the NTEU recognition agreement'). Clause 3.1 of the NTEU recognition agreement provided that the threshold for recognition was 30% plus one and that a majority union with a membership of 50% +1 shall have collective bargaining rights for its members employed in the University from post levels 17 up to 5. Clause 3.2 of the same agreement provided that the parties agree to negotiate and consult at the "bargaining and consultative forum".

[7] It is immediately apparent that the threshold criteria under the NTEU recognition agreement and the TBF Constitution are different. NTEU admits that the different thresholds in the recognition agreement and the bargaining forum Constitution have created substantial confusion for itself and the institution. Nonetheless, for the purposes of this application, those contradictions do not required to be resolved in light of NTEU's membership at the relevant junctures in this application.

[8] On 17 August 2016, TUT advised NTEU that its membership of the bargaining forum had automatically terminated and that it did not meet the required threshold for recognition of 30% +1 because in July 2016 it only represented 789 out of 3002 employees (approximately 26% of the workforce).

[9] It is immediately obvious that this figure also fell short of the 28% required by clause 4.1 of the TBF Constitution. Accordingly, the letter also stated that the implication of clause 6.3 of the TBF Constitution was that NTEU's membership had lapsed and automatically terminated.[1] It further gave the union notice of its intention to terminate the recognition agreement on three months' notice in terms of clause 21 thereof because its membership had fallen below 50%.

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[1] Clause 6.3 and 6.4 of the TBF Constitution reads:

> "6. TERMINATION
>
> The membership of a trade union to the Bargaining Forum will be terminated:
>
> …
>
> 6.3 if the union's membership of the bargaining unit as per clause 4.1.1 and clause 4.1 .2 read along with as 3.3 is less than the prescribed thresholds depending on the recognition basis, the recognition agreement shall lapse of ceased to be of any force or effect and terminated, resulting in the automatic termination of its TUTBF membership.
>
> 6.4 If the recognition agreement is terminated in terms of the recognition and procedural agreement

[10] On 6 October 2016 NTEU requested TUT to revise the recognition agreement. There was no response from TUT and on 24 October NTEU followed up its initial letter with a request that recognition be based on a numerical threshold of 600 members rather than a percentage. There was still no response to this proposal and on 8 December 2016, the union wrota letter invoking section 21(8C)(b) of the LRA calling upon TUT to retain the union's existing rights on the basis that it represented significant interests or a substantial number of employees even though it did not meet the thresholds of representativeness established in a collective agreement.

[11] S 21(8C) provides:

> "(8C) Subject to the provisions of subsection (8), a commissioner may in an arbitration conducted in terms of section 22(4) grant the rights referred to in sections 12, 13 or 15 to a registered trade union, or two or more registered trade unions acting jointly, that does not meet thresholds of representativeness established by a collective agreement in terms of section 18, if—
>
> (a) all parties to the collective agreement have been given an opportunity to participate in the arbitration proceedings; and
>
> (b) the trade union, or trade unions acting jointly, represent a significant interest, or a substantial number of employees, in the workplace."

[12] In mid-December 2016, NTEU referred a dispute to the CCMA claiming organisational rights under the provisions of s 21(8C). The matter was due to be conciliated on 24 January 2017 in terms of a notice of set down issued on 5 January.

[13] However, on 13 January 2017 events took an additional turn when NEHAWU and TUT concluded an agreement on substantive issues. Amongst other things, clause 5 of the substantive agreement required TUT to terminate post retirement and medical aid benefits and directly affected the conditions of service of the applicant's members and retired members receiving the benefit. The agreement was extended to all employees in the bargaining unit and purportedly to those who have left the service of the employer already. The agreement came to the attention

of NTEU on 16 January and on 18 January NTEU sent a letter of demand to TUT calling upon it to suspend the terms of the collective agreement. The letter claimed that the terms and conditions were concluded under circumstances where the union was not a party to the negotiations and where there was a pending dispute concerning its admission to the bargaining forum. The letter gave the University until 25 January to respond failing which it would institute proceedings.

[14] On 23 January, TUT responded that the substantive agreement complied with section 23(1)(d)(1)(i) to (iii) of the LRA[2] and it could not be unilaterally suspended as it was valid and binding. Further, it pointed out that NTEU's organisational rights dispute was currently pending at the CCMA.

[15] NTEU claimed that it had achieved the membership threshold of 30% plus one by 1 February 2017, and at a meeting on 6 February TUT confirmed receiving membership forms from TUT on 3 February. NTEU also contended that its membership met the threshold for admission to the bargaining forum.

[16] However, by 7 February, TUT refused to admit the union to the bargaining forum until the membership forms had been processed on its system at the end of February and until the union has lodged a copy of a new recognition agreement with the TUT with the Secretariat of the bargaining forum. Nonetheless, the same letter did agree to afford NTEU all the rights

[2] The section provides:

"23 (1) A collective agreement binds-

...

(d) employees who are not members of the registered trade union or trade unions party to the agreement if-

(i) the employees are identified in the agreement;

(ii) the agreement expressly binds the employees; and

(iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace."

available to it under sections 12, 13 and 15 of the LRA, which would appear to potentially settle the dispute under s 21(8C).

Urgency

[17] NTEU launched its application the day after TUT refused to admit it to the forum, giving TUT two days to file an answering affidavit. The union claims the matter is urgent because the members' post-retirement medical benefit was due to terminate on 13 February 2017. It claimed its members who stood to lose post-retirement medical benefits would suffer irreparable harm if the new substantive agreement is implemented in circumstances where it has been deprived of the opportunity to represent its members' interests on the issue in the substantive negotiations.

[18] I am satisfied that NTEU only could have known of the imminent harm posed to its members' post-retirement medical benefits on 16 January 2017. The contention by TUT that the union could have foreseen this because NEHAWU had tabled such a demand in August 2016, is absurd. The mere tabling of a demand does not mean that demand will necessarily form part of a concluded agreement. It was only on 23 January that TUT responded to NTEU's demand to suspend the implementation of clause 5. Arguably, NTEU should have launched the application within a week of receiving this response to beat the deadline of 13 February when the cessation of medical benefits was due to take effect.

[19] As it is, NTEU still hoped that if it could secure its readmission as a bargaining forum party, it might be able to salvage the situation and it was only when a quick resolution of its admission was thwarted that it launched these proceedings. I am satisfied NTEU took reasonable steps to find alternative solutions and acted with sufficient alacrity in bring the application even though the matter was heard a day or two after the post-retirement medical benefits were due to be withdrawn. In any event, the withdrawal of the benefits is obviously not an irreversible one once implemented, but obviously the negative implications for beneficiaries are serious and of immediate consequence. However, the rights NTEU seeks to assert here are not any possible contractual rights its members or retired members might have to such benefits.

Existence of a right

[20] The *prima facie* right asserted by NTEU is its "right to represent its members' interests" which are "constitutionally entrenched by virtue of an employee's right to freedom of association." The union also contends that because it had recognition previously and was a party to the TBF, it has a stronger basis for its claim compared to a union that was not previously recognised especially as it now met the membership threshold required for admission to the TBF.

[21] In essence, NTEU is asserting a right to resume its seat at the bargaining table established under the auspices of the TBF and to temporarily stay the effect of the substantive agreement concluded in its absence in order to be given an opportunity to renegotiate it on terms not unfavourable to its members. It asserts that it has a right to regain its former status on the basis of its *current* membership strength and re-open negotiations as if its membership of the TBF was uninterrupted.

[22] In ***National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another***[3] the constitutional court summarised freedom of association rights in the following terms:

> [34] Of importance to this case in the ILO jurisprudence described is firstly the principle that freedom of association is ordinarily interpreted to afford unions the right to recruit members and to represent those members at least in individual workplace grievances; and secondly, the principle that unions should have the right to strike to enforce collective bargaining demands. The first principle is closely related to the principle of freedom of association entrenched in s 18 of our Constitution, which is given specific content in the right to form and join a trade union entrenched in s 23(2)(a), and the right of trade unions to organize in s 23(4)(b) . These rights will be impaired where workers are not permitted to have their union represent them in workplace disciplinary and grievance matters, but are required to be represented by a rival union that they have chosen not to join.

[23] NTEU asserts that it had a right to represent its members' interests which is entrenched by virtue of their rights to freedom of association. Moreover,

[3] 2003 (3) SA 513 (CC); (2003) 24 *ILJ* 305 (CC) at 324.

it currently is entitled to participate in the bargaining forum and was previously recognised. The first point to make is that, the right of employees to freedom of association is not the same as the right of unions to engage in collective bargaining. The organisational rights which *inter alia* promote the exercise of the right to freedom of association are: the right to have access to the workplace, which includes communication with members and the holding of meetings with employees; the right to the deduction of membership fees from wages, and the right to be represented in disciplinary and grievance proceedings by a shop steward. The rights of employees to participate in union activities are expressly protected by s 4 of the LRA and reinforced by prohibitions against victimisation in s 5.

[24] However, the right of a union to engage in collective bargaining is not an incident of the right of freedom of association even if the latter right is a necessary pre-condition for genuine collective bargaining. The right to engage in collective bargaining has been framed thus:

> "[4] Section 23(5) of the Constitution of the Republic of South Africa D 1996 enshrines the right to collective bargaining. It provides:
>
> 'Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).'
>
> [5] The national legislation contemplated in s 23(5) of the Constitution is the Labour Relations Act 66 of 1995 (LRA). Section 36(1) of the Constitution is the provision allowing for the limitation of the rights in the Bill of Rights by measures which are reasonable and justifiable in an open and democratic society."[4]

[25] The LRA provides support for the institution of collective bargaining and avails unions of the right to strike to allow them to bring economic power to bear on the bargaining process, but the LRA does not bestow a legal entitlement on a union, to a seat at the bargaining table unless it has attained bargaining rights by agreement with the employer or unless it is

[4] *Free Market Foundation v Minister of Labour & others* (2016) 37 *ILJ* 1638 (GP) at 1643

entitled to be granted such rights in terms of an existing collective agreement, which affords collective bargaining rights to any union satisfying stipulated membership thresholds. In certain instances, the LRA will also permit a minority union to strike in support of the demand to bargain collectively[5], but the right to engage in collective bargaining with a particular employer is ultimately something that is attained as a result of one of the mechanisms mentioned.

[26] The difficulty NTEU faces is that *at the time* the prejudicial substantive agreement was concluded, it was not entitled to exercise collective bargaining rights it had formerly attained under the TBF, because it fell below the thresholds for bargaining representation which it had accepted. The fact that it subsequently recovered its membership status and would now appear to be eligible to re-join the TBF does not mean the court can rewind the negotiations so that they can recommence. What matters was NTEU's collective bargaining status at the time the agreement was concluded.

[27] Consequently, I am not satisfied NTEU has demonstrated a *prima facie* right to interim relief.

[28] Moreover, the real harm the union seeks to prevent is the prejudicial effect of clause 5 on its members' interests and presumably those who are no longer employees but have already retired. As mentioned, whether there is another basis for disputing the enforceability of that provision especially in respect of former employees, that is not before the court. The reason for seeking the kind of relief NTEU has sought in this application is that, it will provide an opportunity to achieve an alternative deal. But even if the applicant had been a party to the bargaining forum, the only right it could have exercised in the event of not agreeing to the termination of the medical benefits as part of the negotiations is to invoke the dispute resolution provisions of clause 14 of the TBF constitution. That in turn might, in the absence of reaching an agreement, have led to industrial action or to interest arbitration, provided of course the parties agreed to that process.

[5] See e.g *Bader Bop*

[29] There is no basis for thinking the applicant(s) could have exercised an absolute veto over the terms of the substantive agreement but they may have lost the opportunity to embark on strike action on that occasion. I mention this only to emphasise that the relief sought in this application, even if granted, would not necessarily prevent the real harm the union wants to avoid, namely the prejudice to its members' post-retirement medical benefits. Thus, to the extent the applicant fears irreparable harm in the form of never recovering that benefit might occur, the relief sought could not by itself have averted it.

Conclusion

[30] In the absence of NTEU being able to demonstrate the existence of a *prima facie* right, I am satisfied the application must fail on that ground alone and consequently it is not necessary to decide if any other preconditions for urgent relief have been met.

Order

[31] The application is heard as one of urgency and non-compliance with Labour Court rules pertaining to time periods and service are condoned to the extent necessary.

[32] The application is dismissed.

[33] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	E van As instructed by Len Dekker Attorneys Inc.
FIRST RESPONDENT:	F Malan of ENS Africa Inc.
SECOND RESPONDENT:	N Thaanyane of Thaanyane Attorneys