**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Reportable

Case no: J 3424 / 18

In the matter between:

**J & L LINING (PTY) LTD** **Applicant**

and

**NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA ('NUMSA')** **First Respondent**

**THE EMPOYEES LISTED IN ANNEXURE "A"** **Second Respondent**

**Heard**: **6 December 2018**

**Delivered**: **10 December 2018**

**Summary: Strike – issue in dispute considered – issue in dispute concerns a demand for an increase – is a matter mutual interest – strike competent**

**Strike – section 65(1)(c) considered – contention by employer that dispute settled – industry settlement agreement relied on by employer never concluded by the employer's representative and the employer thus was not a party to it –**

**settlement agreement cannot form the basis of the application of section 65(1)(c)**

**Strike – section 65(3)(a) – employer contended that union obliged to follow processes in bargaining council constitution / dispute agreement – union did follow this process in industry dispute – where employer itself however disavowing industry settlement the original dispute referral by union under constitution / dispute resolution agreement still applicable – union entitled to continue with dispute against employer**

**Strike – section 65(3)(a) – plant level bargaining prohibition in main agreement relied on by applicant – employer's representative not party to main agreement and disavowing extension of same to non-parties – employer thus cannot rely on this provision – cannot approbate and reprobate – no prohibition to plant level bargaining**

**Strike – procedural requirements – section 64(1) complied with – no need to follow further processes in order to render strike protected**

**Strike – none of the substantive and procedural limitations in sections 64 and 65 of the LRA contravened – strike protected – *rule nisi* discharged**

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**JUDGMENT**

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SNYMAN, AJ

Introduction

[1] This matter came before me on 6 December 2018 as return date of a *Rule Nisi* granted by Prinsloo J on 28 September 2018, in terms of which strike action embarked upon by the respondents at the applicant was declared to be unprotected, and consequently interdicted. The application of the applicant was originally unopposed, but it has now been opposed at return date stage.

[2] The applicant seeks confirmation of the *Rule Nisi*, whilst the respondents contend it should be discharged. Confirming the *Rule Nisi* entails the granting

of final relief, and this being so, the applicant must establish: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[1] This matter only turns on the first requirement of a clear right, as it accepted that the requirements of the absence of a suitable alternative remedy and prejudice (injury apprehended) are met.

Background facts

[3] The facts in this matter are uncontested.

[4] The business of the applicant resorts under the scope and jurisdiction of the Metal and Engineering Industries Bargaining Council ("MEIBC'). It is well known that collective bargaining in the MEIBC for wages and conditions of employment is conducted at a central level and not plant level, between the various parties to the MEIBC, which includes the first respondent, which I will refer to in this judgment as 'NUMSA'. Plant level bargaining in individual employers is prohibited on these issues.

[5] The applicant is a member of NEASA, an employers' organisation which is also a party to the MEIBC, and subject to its constitution. The same holds true for NUMSA. NEASA is however not a party to the MEIBC main agreement, but NUMSA is.

[6] In May 2017, NUMSA and the other trade union parties to the MEIBC initiated negotiations on wages and conditions of employment at a central level. A set of demands were formulated, and presented to all employer parties to the MEIBC, including NEASA.

[7] Following negotiation, and on 23 August 2017, NUMSA and all the other trade union parties in the MEIBC concluded a settlement agreement on wages and conditions of employment with SEIFSA, the principal employers' organization in the MEIBC. I refer to this settlement agreement in this judgment as 'the settlement agreement'. NEASA refused to sign this agreement, and did not

[1] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter and Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) at para 20; *Royalserve Cleaning (Pty) Ltd v Democratic Union of Security Workers and Others* (2012) 33 ILJ 448 (LC) at para 2.

settle the dispute with NUMSA and the other unions. As is said in the applicant's own founding affidavit:

> '… this follows that it (referring to NUMSA) is still in dispute with the other employer parties to the MEIBC, including NEASA (and by extension, its members amongst whom is the Applicant in casu) …'

[8] Normally, any settlement agreement concluded between some or all of the parties in the MEIBC would be extended by the Minister[2] in terms of section 32 of the LRA to all non-parties in the industry covered by the MEIBC. Therefore, and in the ordinary course, the above settlement agreement would have been extended even to NEASA and its members, despite not having been a party to it, and that would resolve any outstanding disputes.

[9] But in this instance, the settlement agreement was never extended to non-parties. As such, it only remained binding between SEIFSA and the union parties, including NUMSA. The settlement agreement did not bind NEASA, and thus, the wage and conditions of employment dispute between NUMSA and its members who were employed at employers that were members of NEASA, remained unresolved.

[10] On 5 July 2018, the applicant informed its employees that they would not be receiving an increase, because the 'negotiations' in the industry were not resolved, there was an issue with the industry main agreement, and the applicant's adverse financial situation.

[11] In the end, and on 15 August 2018, NUMSA referred what it labelled a "mutual interest" dispute to the MEIBC, on behalf of its members employed at the applicant, against the applicant. Under the summary of facts in the referral, it was recorded, verbatim:

> 'There was an agreement between the employer and the employees that they will get an increase of 6%'

It was requested in the referral that employees receive the 6% '*as per our agreement*'.

[2] The Minister of Labour, as responsible Minister under the LRA.

[12] NEASA answered this referral by way of a letter to NUMSA on 17 August 2018, contending that the referral did not comply with the dispute resolution rules in the MEIBC constitution, and the dispute was still 'active' at industry level. It was further contended that until the settlement agreement was extended to non-parties, NUMSA was not entitled to refer a dispute concerning conditions of employment against the applicant. It called on NUMSA to withdraw the dispute.

[13] The matter was unsuccessfully conciliated on 10 September 2018, and a certificate of failure to settle was issued by the MEIBC.

[14] On 20 September 2018 NUMSA, on behalf of its members, gave the applicant written notice of intended strike action. In this notice, it was stated that the issue in dispute between the parties is that the employees of the applicant be paid an increase of 6%, across the board. In terms of this notice, the strike was due to commence on 25 September 2018.

[15] On 27 September 2018 the applicant then brought an application to interdict the proposed strike action, on the basis that it was unprotected. This application came before Prinsloo J on 28 September 2018 on an unopposed basis, and the learned Judge issued a *Rule Nisi* with a return date of 6 December 2018 in terms of which the proposed strike was declared to be unprotected and the respondents were interdicted from embarking upon the same. I am now tasked to either confirm or discharge this *Rule Nisi*.

<u>The clear right</u>

[16] The applicant has the duty to prove that the proposed strike would be unprotected. In this regard, the applicant relies on two primary considerations, being:

16.1 The issue in dispute is one that the respondents have the right to refer to the Labour Court, and thus strike action is prohibited by virtue of section 65(1)(c) of the LRA;[3]

16.2 The respondents are bound by a collective agreement that regulates the issue in dispute, and thus strike action is prohibited by virtue of section 65(3)(a)(i) of the LRA.[4]

[17] From the outset, and in terms of section 64(1), every employee has the right to strike for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest.[5] In this case, the matter has nothing to with resolving a grievance. It is therefore only about resolving a dispute about a matter of mutual interest. In *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members and Others*[6] the Court held:

> '… the phrase 'any matter of mutual interest' defies precise definition. The phrase is couched in very wide terms. According to Grogan, the phrase is extremely wide, 'potentially encompassing issues of employment in general, not merely matters pertaining to wages and conditions of service. …
>
> Grogan concludes, correctly in my view, that 'the best one can say, therefore, is that any matter which affects employees in the workplace, however indirectly, falls within the scope of the phrase "matters of mutual interest" and may accordingly form the subject matter of strike action'

[18] There can be no doubt that the actual issue as raised by NUMSA, being a 6% increase for its members, would thus as a matter of general principle qualify as a matter of mutual interest susceptible to form the subject matter of permitted (protected) strike action.



[3] The section reads; '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 - ,,, (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 or any other employment law'.
[4] The section reads: '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 …'.
[5] See the definition of a 'strike' in section 213 of the LRA.
[6] (2014) 35 ILJ 983 (LAC) at paras 54 and 56.

[19] It is also true that the right to strike is substantively limited in section 65 of the LRA, and indeed the applicant relies on sections 65(1)(c) and 65(3)(a). It follows that if the applicant is correct in its contentions in this regard, the applicant will have shown a clear right to exist, and would be entitled to the relief sought. But when construing these restrictions, one should always be mindful of the fact that the right to strike is a fundamental right under the Constitution,[7] and as such the Court should not too readily adopt an interpretation or determination that limits such right. In *Pikitup* the Court said:[8]

> 'Given the historical and contemporaneous importance of the right to strike, it should not be limited or restricted by reading implicit limitations into it. In *SATAWU v Moloto* it was said that:
> 'The right to strike is protected as a fundamental right in the Constitution without any express limitation. Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them, and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning.'
>
> An interpretation which limits the right to strike should therefore be avoided if the text that seeks to limit it is susceptible to an interpretation that upholds and protects the right to strike. In essence, any legislative provision that seeks to restrict the right to strike should do so expressly, in clear and unequivocal terms.'

[20] Turning to the case at hand, what does the applicant then rely upon to establish the application of section 65(1)(c)? The applicant's case where it comes to the application of section 65(1)(c) is founded squarely on a contention that the issue in dispute between the parties is that NUMSA and its members are demanding the enforcement of an agreement in terms of which the applicant's employees would receive a 6% increase. If that is true, then of course NUMSA's members would have a right to such an increase which, if

[7] Section 23(2)(c) of the Constitution.
[8] (*supra*) at paras 28 – 29. See also *SA Transport and Allied Workers Union and Others v Moloto NO and Another* (2012) 33 ILJ 2549 (CC) at para 43; *SA Police Service v Police and Prisons Civil Rights Union and Another* (2011) 32 ILJ 1603 (CC) at paras 29-30.

not honoured by the applicant, would have to form the subject matter of adjudication to enforce it, rendering the proposed strike unprotected.[9]

[21] As a point of departure in considering this issue, it is always critical for this Court to nonetheless conduct a proper enquiry into the true or real issue in dispute between the parties, no matter how it may be labelled or described by one of the parties, as part of the enquiry of establishing whether the substantive limitations apply.[10] This is important in this case, because it is true that if one reads the conciliation referral by NUMSA to the MEIBC of 15 August 2018, it on face value suggests the existence of an agreement for a 6% increase which was sought to be enforced. As said in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*[11]:

> 'A commissioner must, as the Labour Relations Act requires, "deal with the substantial merits of the dispute". This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature.'

[22] Despite what the referral may reflect, and when considering what in essence was now the undisputed factual matrix, it must surely be apparent that the issue in dispute cannot concern the enforcement of an agreement in terms of which a wage increase of 6% was afforded to the applicant's employees. Mr Groenewalt, representing the applicant, was hard pressed to indicate to the Court where exactly this agreement was to be found. He conceded, which is obviously correct considering the content of the applicant's own founding affidavit, that the applicant was not bound by the settlement agreement because NEASA was not a party to it, and as such, this settlement agreement could not be enforced against any NEASA member, such as the applicant.



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[9] See *Mawethu Civils (Pty) Ltd and Another v National Union of Mineworkers and Others* (2016) 37 *ILJ* 1851 (LAC) at paras 19 and 21.

[10] *Coin Security Group (Pty) Ltd v Adams and Others* (2000) 21 *ILJ* 924 (LAC) at para 15; *TSI Holdings* (*supra*) at paras 29 and 31; *Pikitup* (*supra*) at para 47; *Unitrans Supply Chain Solutions (Pty) Ltd v SA Transport and Allied Workers Union and Others* (2014) 35 ILJ 265 (LC) at paras 9 – 11; *City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union and Others* (2009) 30 *ILJ* 2064 (LC) 2069G-H; *SATAWU v Coin Reaction* (2005) 26 *ILJ* 1507 (LC) at 1512D.

[11] (2008) 29 *ILJ* 2461 (CC) at para 66. See also *National Union of Metalworkers of SA on behalf of Sinuko v Powertech Transformers (DPM) and Others* (2014) 35 ILJ 954 (LAC) at para 17.

Secondly, it was confirmed by Mr Groenewalt that there was no agreement struck between the applicant and NUMSA directly with regard to a 6% increase. In sum, and on the evidence, there was actually no agreement for an increase in existence between the parties that entitled NUMSA and its members to enforce it by way of adjudication.

[23] The evidence thus answered the question of what the real issue in dispute was. To simply rely on the referral form, as the applicant did, is unduly formalistic and inappropriate. In *September and Others v CMI Business Enterprise CC*[12] the Court said:

> 'The Labour Appeal Court adopted an overly formalistic approach as it held that to answer the question whether the real dispute had been conciliated necessitates a very narrow factual enquiry which entails only looking at two aspects, namely 'the characterisation on the referral form and the contents of the certificate of outcome'. The Labour Appeal Court failed to take into account the purpose and context of the Labour Relations Act and the dispute-resolution mechanisms for which it provides. By relying only on the referral form and the certificate of outcome the Labour Appeal Court essentially held that no evidence from the conciliation proceedings may be led as evidence in subsequent proceedings.'

The Court concluded as follows:[13]

> 'It would therefore be wrong to adopt the Labour Appeal Court's approach, which essentially precludes the courts from referring to evidence outside of the certificate of outcome and referral form, to determine the nature of the dispute conciliated. The general rule is that the referral form and certificate of outcome constitute prima facie evidence of the nature of the dispute conciliated. However, if it is alleged that the nature of the dispute is in fact different from that reflected on such documents, the parties may adduce evidence as to the nature of the dispute.'

[24] Thus, a proper conspectus of the facts show that the wage dispute between the applicant and NUMSA and its employees remained unresolved, at the time when NUMSA referred the dispute to the MEIBC on 15 August 2018. The

[12] (2018) 39 ILJ 987 (CC) at para 44
[13] Id at para 52.

settlement agreement did not apply, and there was no individual agreement between NEASA or the applicant, and NUMSA. There was thus nothing that NUMSA could enforce to the Labour Court. Section 65(1)(c) thus cannot apply, and the applicant has shown no clear right to exist in this regard.

[25] The next question is whether NUMSA and its members, in pursuing their unresolved wage dispute against the applicant, was bound by a collective agreement that regulated that issue in dispute, as contemplated by section 65(3)(a). In this regard, the applicant does not say that the collective agreement concerned determines the substance the wage increase sought by NUMSA for its members. Rather, the applicant contends that there exist a procedural limitation, in that NUMSA is compelled to apply a prescribed procedure in pursuit of the wage demand, before referring it to the MEIBC for conciliation, which it has not done.

[26] It is accepted law that section 65(3)(a) of the LRA does not only apply to substantive regulation of the issue in dispute. Regulation also includes regulation by way of a process created in the collective agreement which must be applied to resolve the issue in dispute.[14] As held in *CSS Tactical (Pty) Ltd v Security Officers Civil Rights and Allied Workers Union and Others*[15]:

> Section 65(3)*(a)* permits parties to limit the right to strike by regulating the issue in dispute. The term 'regulate' includes regulation by way of creating a process to resolve the issue.'

[27] A prime example of this kind of procedural regulation can be found in the provisions in bargaining council collective agreements, which prescribe that conditions of employment can only be negotiated at central level in the council, and not in individual employers at plant level that resort under the council. In such cases, it has been accepted that any attempts by a trade union to seek to collectively bargain for wages and conditions of employment at an individual

[14] *Fidelity Guards v PTWU and Others* [1997] 11 BLLR 1425 (LC) at 1433F-H; *Unitrans Fuel and Chemical (Pty) Ltd v Transport and Allied Workers Union of SA and Another* (2010) 31 *ILJ* 2854 (LAC) at para 18; *Air Chefs (Pty) Ltd v SA Transport and Allied Workers Union and Others* (2013) 34 *ILJ* 119 (LC) at para 27; *ADT Security (Pty) Ltd v SA Transport and Allied Workers Union and Another* (2012) 33 *ILJ* 2061 (LC) at para 18; *Transnet Ltd v SA Transport and Allied Workers Union and Others* (2011) 32 ILJ 2269 (LC) at paras 21 – 24.
[15] (2015) 36 *ILJ* 2764 (LAC) at para 18.

employer and then pursue strike action, would be unprotected by virtue of the application of section 65(3)(a) of the LRA.[16] But it must be considered that this kind of regulation has a specific objective, described in *Cape Gate (Pty) Ltd v National Union of Metalworkers of SA and Others*[17] as follows:

> 'The objective underlying the clause is to ensure that negotiation of such matters takes place only at the level of the bargaining council and in no other forum, such as at plant level. It is also to preclude any strike action over such matters while they continue to be regulated by the main agreement. The clause would make little sense if it had the effect now contended for on behalf of NUMSA, namely that where wage increases are determined in the main agreement, employees and their unions are free to agitate for further increases by way of plant level negotiation and ultimately strike action. This would be subversive of the objective of promoting collective bargaining at the level of bargaining councils and the effectiveness of their agreements. This would not accord with the clear and worthy objectives of the LRA. …'

[28] The MEIBC is indeed a bargaining council where there is such a centralized bargaining structure in place, as I have touched on above. The applicable structural collective agreements in the MEIBC can be found in the Constitution of the MEIBC, as well as its main agreement.

[29] NEASA and NUMSA are both parties to the constitution of MEIBC. However, NEASA is not a party to the main agreement, but NUMSA is. As matters currently stand, the main agreement has not been extended to non-parties by the Minister, in terms of section 32(2) of the LRA. An attempt to do was made on 24 November 2014,[18] but this was reviewed and set aside and declared to be null and void by this Court in *National Employers' Association of SA and Others v Minister of Labour and Others*[19]. As such, the main agreement of MEIBC only applies between the actual parties thereto, and thus would not apply to NEASA and its members, such as the applicant.



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[16] See *BMW SA (Pty) Ltd v National Union of Metalworkers of SA on behalf of Members* (2012) 33 ILJ 140 (LAC) at paras 9 – 10; *SA Clothing and Textile Workers Union and Others v Yarntex (Pty) Ltd t/a Bertrand Group* (2010) 31 ILJ 2986 (LC) at para 56
[17] (2007) 28 ILJ 871 (LC) at para 38.
[18] GN R1050 and GN R1051 published in *Government Gazette* 38366 dated 24 December 2014.
[19] (2017) 38 ILJ 2034 (LC).

[30] The MEIBC constitution, in clause 11, provides that '*The negotiation procedures and the procedures to be followed for the resolution of disputes arising within the jurisdiction of the Council, are contained in Annexure "E" and "F"".* Annexure "E" contains what is called the negotiation and disputes procedure. Clause 2 of this procedure sets out the process to be followed in the case of negotiating new agreements or amending existing agreements, within the council. In summary, this procedure entails the following: (1) the party initiating the negotiation must submit its proposals to the secretary of the council; (2) these proposals are then circulated to all interested parties, and if considered to be an industry matter, negotiating meetings are convened; and (3) if the negotiations do not lead to a resolution, a dispute is then declared.

[31] Clause 3 of the negotiating and disputes procedure in the constitution then deals with what transpires once a dispute is declared in terms of clause 2(d) as set out above. If it is an industry matter, it is dealt with in various committee meetings, depending on circumstances, and may be referred to conciliation under clause 7 or arbitration in term of clause 8. However, and in terms of clause 3(d), if the dispute referred remains unresolved in 30 days, any of the parties has the right to apply the dispute provisions under the LRA.

[32] The above provisions in the MEIBC constitution are virtually mirrored in clauses 6.1.1 and 6.1.2 of the MEIBC dispute resolution agreement, which is a collective agreement to which both NEASA and NUMSA are indeed parties.

[33] In this instance, and as dealt with above, NUMSA indeed pursued its industry dispute regarding wages and conditions of employment by way of a declaration of a dispute to the council secretary on 2 May 2017, in terms of clause 2 of annexure "E", which of course would also serve as a referral in terms of clause 6.1.1 of the dispute resolution agreement. It was undisputed that negotiation followed as contemplated by the aforesaid dispute resolution processes, and this culminated in the settlement agreement being concluded in August 2017. But because NEASA refused to be a party to the settlement agreement, the dispute pursued by NUMSA remained unresolved. As 30 days have clearly lapsed, as contemplated by clause 3(d) of the constitution and clause 6.1.2(c) of the dispute resolution agreement, NUMSA was thus entitled to invoke the dispute resolution process under the LRA against the applicant,

as member of NEASA. It thus cannot be legitimately contended that NUMSA contravened the dispute resolution process under the MEIBC constitution or the dispute resolution agreement.

[34] The simple point is that if NEASA refuses to be a party to the settlement reached, which of course would apply to its members as well such as the applicant, then the applicant must expect to be subjected to the further dispute resolution process under the LRA, as specifically contemplated by the constitution and the dispute resolution agreement. This would include strike action. In my view, there is accordingly nothing contained in the MEIBC constitution or dispute resolution agreement that would stand in the way of NUMSA being entitled to have referred the wage dispute in this case to the MEIBC, in terms of the LRA, for conciliation. Section 65(3)(a) of the LRA thus cannot find application in this respect.

[35] This the only leaves the main agreement. Clause 37 of the main agreement provides as follows:

> '(1) Subject to subclause (2) –
> (a) the Bargaining Council shall be the sole forum for negotiating matters contained in the Main Agreement;
> (b) during the currency of the Agreement, no matter contained in the Agreement may be an issue in dispute for the purposes of a strike or lock-out or any conduct in contemplation of a strike or lock-out;
> (c) any provision in a collective agreement binding an employer and employees covered by the Council, other than a collective agreement concluded by the Council, that requires an employer or a trade union to bargain collectively in respect of any matter contained in the Main Agreement, is of no force and effect. (2) Where bargaining arrangements at plant and company level, excluding agreements entered into under the auspices of the Bargaining Council, are in existence, the parties to such arrangements may, by mutual agreement, modify or suspend or terminate such bargaining arrangements in order to comply with subclause (1). In the event of the parties to such arrangements failing to agree to modify or suspend or terminate such arrangements by the date of implementation of the Main Agreement, the wage increases on scheduled rates and not on the actual rates shall be applicable to such employers and employees until the parties to such arrangement agree otherwise.

(3) The provisions of this clauses shall apply equally to any trade unions not party to this Agreement.'

[36] It is clear that clause 37 of the main agreement would indeed have stood firmly in the way of NUMSA being entitled to have pursued plant level collective bargaining at the applicant. But once again, the problem for the applicant is that NEASA is not a party to the main agreement. NEASA was also the party responsible to scupper the extension of the main agreement to non-parties. As matters stand now, the MEIBC main agreement only applies to the parties to that agreement, and this does not include NEASA and its members, such as the applicant. The applicant has thus forfeited the centralized bargaining level protection in terms of section 37 of the MEIBC agreement. If NEASA had been a party to the main agreement, or if the main agreement was extended to non-parties, that would not be the case.

[37] I consider the proposition of the applicant that it should be entitled to rely on the centralized bargaining provisions applying to the MEIBC to immunize it from plant level bargaining, where its own employer's organization seeks to disavow this very agreement, to be untenable and opportunistic. NEASA does not want to be a party to the main agreement and does not want to agree to the settlement reached following industry centralized bargaining. But despite this, NEASA contends that NUMSA is not allowed to conduct plant level bargaining at its members. This approach leaves NUMSA in effect in limbo, rendering it incapable of negotiating wages and conditions of employment for members of NEASA. This is inconsistent with the right of NUMSA under the LRA to collectively bargain on behalf of its members. In *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another*[20] the Court said:

'… the Act seeks to provide a framework whereby both employers and employees and their organizations can participate in collective bargaining and the formulation of industrial policy. Finally, the Act seeks to promote orderly collective bargaining with an emphasis on bargaining at sectoral level,

[20] (2003) 24 ILJ 305 (CC) at para 26. See also *Kem-Lin Fashions CC v Brunton and Another* (2001) 22 ILJ 109 (LAC) at paras 17 – 18.

> employee participation in decisions in the workplace, and the effective resolution of labour disputes.

[38] The approach propagated by NEASA, and with it the applicant, is destructive of this sentiment expressed in *Bader Bop*. It in effect renders NUMSA impotent to bargain on behalf of its members for wages and conditions of employment. The facts of this case illustrate the point. NUMSA negotiated a settlement for its members at a central level in the MEIBC, and concluded a settlement agreement. But NEASA refuses to agree to it, meaning that NUMSA's members at the applicant cannot enjoy the benefits of the settlement. NUMSA then seeks to negotiate a wage directly with the applicant, but is then told that it cannot do so, and can only negotiate at central level complying with central processes, despite the central level dispute being settled with all other parties. It would be impossible for NUMSA to initiate centralized industry negotiation again for a dispute that has been settled between all the other parties. This leaves NUMSA in effect remediless. This is an untenable proposition.

[39] The conduct of NEASA has a further consequence. This consequence is that all other employees in the industry, save for those employed by NEASA members, receive a wage increase. All the other employers have to pay the increase. This gives NEASA an unfair advantage in the industry, because its members are in effect given a competitive advantage off the back of employees' conditions of employment. As said in *South African Clothing and Textile Workers Union and Others v Yarntex (Pty) Ltd t/a Bertrand Group*[21]:

> 'The constitution is premised on centralised bargaining between NAWTM and SACTWU, the main purpose of which is to create and maintain uniformity in the determination of wage levels so as to ensure that all employers in a given sub-sector or section level in this industry are treated in an equitable fashion. Employers and employees in these sub-sectors should enjoy the same treatment to ensure that employers compete with their counterparts in a fair manner in order to sustain the industry and to prevent job losses.'

[40] In sum, the applicant extract itself from centralized bargaining, on the one hand, but seeks rely on it on the other, when it is confronted with plant level bargaining as a result. Because clause 37 of the main agreement does not

[21] (2013) 34 ILJ 2199 (LAC) at para 58.

apply, there is exists no prohibition in a collective agreement, to which the applicant is a party (directly or by extension), to plant level bargaining at the applicant. That is the unfortunate consequence to any NEASA member in the current state of affairs in the MEIBC. It was thus competent for NUMSA to engage the applicant, as NEASA member, with a wage demand at plant level.

[41] It is thus my conclusion that section 65(3)(a) does not find application in this instance, and the applicant's reliance on this provision is misplaced. This is because the applicant, as member of NEASA, is not bound by the MEIBC main agreement, and since the applicant is not bound by the industry settlement agreement relating to wages and conditions of employment, the original dispute referral by NUMSA under the MEIBC constitution / dispute resolution agreement still remains valid and applicable to the wage dispute with the applicant.

Conclusion

[42] In all the circumstances as set out above, the applicant has failed to demonstrate a clear right to the relief it seeks. The strike initiated by NUMSA in its notice of 20 September 2018 concerns a legitimate matter of mutual interest and is not hit by any of the two prohibitions in terms of section 65(1)(c) and 65(3)(a) of the LRA. As NUMSA has complied with the procedural requirements in section 64(1), the strike action would be permitted, and protected.

[43] Where is comes to the issue of costs, it is trite that section 162 of the LRA affords me a wide discretion. In exercising this discretion, I consider the fact that the applicant and NUMSA in effect now stand at the threshold of a plant level bargaining relationship, at least whilst the current state of affairs in the MEIBC continues to exist, and in my view it would unduly interfere with such a fledgling relationship to mulch either of the parties with a costs order. Fairness dictates that no order as to costs be made.

Order

[44] In the circumstances, I make the following order:

1. The rule nisi issued on 28 September 2018 is discharged.

2. There is no order as to costs.

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Sean Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate D J Groenewalt

Instructed by: Serfontein, Viljoen & Swart Attorneys

For the Respondents: Ms R Edmonds of Ruth Edmonds Attorneys