

SOUTH AFRICA / JUDGMENT

Bravo Group Sleep Products (Pty) Ltd and Another v CEPPWAWU and Others (J1398/08) [2008] ZALCJHB 89 (12 September 2008)

[2008] ZALCJHB 89**COURT**

Labour Court Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

J1398/08

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Source record**IN****THE LABOUR COURT OF SOUTH AFRICA****HELD****AT JOHANNESBURG****Case****no: J1398/08****In****the matter between:**

BRAVO
GROUP SLEEP
PRODUCTS
(PTY) LTD
1st Applicant
FURNITURE,
BEDDING & UPHOLSTRY
MANUFACTURERS'
ASSOCIATION
2nd Applicant
And
CEPPWAWU
1st
Respondent
INDIVIDUAL
MEMBERS
2nd Respondents
FURNITURE
BARGAINING
COUNCIL
3rd Respondent

JUDGMENT**MOLAHLEHI J****Introduction**

[1] On the 9th July 2008, this Court issued an interim order enforcing the picketing rules and interdicting the strike action by the first respondents and its members. The respondents anticipated the return day and opposed the interdict against the strike action and not the enforcement of the picketing rules. The terms of the rule nisi issued by the Court was as follows:

1.1 “Enforcing the picketing rules entered into between the first Applicant and the first Respondent and directing the individual Respondents to comply with same.

1.2 Interdicting the strike by the Individual Respondents.

1.3 Declaring that the strike of the Individual Respondents be unlawful and unprotected.

1.4 Directing that the first Respondent to advise and to council its members to comply with the picketing rules

1.5 Directing the first Respondent to advise and council its members not to participate or engage in the unprotected

and unlawful strike.”

[2] The respondents consented to clauses 1.1 and 1.4 (which related to the enforcement of the picketing rules) of the above order being confirmed as final but opposed the confirmation of clauses 1.2, 1.3 and 1.5. The later clauses related to the lawfulness of the strike action by CCEPAWU and its members.

The parties

[3] The first applicant, Bravo Group Sleep Products (PTY) Ltd, is a company registered in terms of the laws of South Africa and is the employer of the further respondents, represented in this matter by their union, CCEPAWU which is registered in terms of the Labour relations Act 65 of 1995 (the Act). The third respondent is the Furniture Bargaining Council, constituted by the second respondent, the Furniture Bedding and Upholstery Manufactures being the employer parties, CCEPAWU and NUFAWSA being the employee parties. The third respondent is a bargaining council registered as such in terms of the Act.

Background

facts

- [4] The facts of this matter are generally common cause. The issue concerns in the main the interpretation of the bargaining council agreement relating to its binding effect on a party to council but not a party to the collective agreement, whose provisions are still to be extended to non parties in terms of section 32 of the Act.
- [5] On the 3rd June 2008, the bargaining council issued a certificate of non resolution of the dispute arising from the failure by the parties to reach settlement in their negotiations regarding wages and conditions of employment.
- [6] On the 17th June 2008, the second applicant concluded a collective agreement with NUFAWSA in terms of which the wages and conditions of employment for the Furniture Industry was determined for the period 1st July 2008 to 30th July 2010. CCEPAWU did not sign the collective agreement on behalf of its members and accordingly issued a notice of intention to strike on the 27th June 2008. The strike commenced on the 1st July 2008.
- [7] The bargaining council took a formal resolution on the 8th July 2008, to apply to the Minister of Labour to have the collective the collective agreement extended to non parties. At that stage CCEPAWU represented approximately 28.4% of party employees at the bargaining council and NUFAWSA represented 71.6%.

The nature of the strike

- [8] The applicant contended that the strike action was unprotected for the following reasons:

“7.1.1 The Constitution of the Bargaining Council provides for the process of negotiating collective agreements. (Clause 18.1 to 18.4 of the Constitution of the Bargaining Council, ...;

7.1.2 In terms of clause 8.9 of the Constitution of the Bargaining Council, a decision of the Bargaining Council, can be taken by a majority vote.

7.1.3 The parties to the Bargaining Council consist of two Employer's Organisations and two trade unions namely, NUFAWSA and CEPPAWU. In respect of trade union representation, NUFAWSA has 7 out of 9 seats, whilst the first Respondent has 2 seats on the Bargaining Council, each seat consisting of one vote, based on representativity, the employer organisations also have nine seats.

7.1.4 On 8 July 2008, the Bargaining Council took a majority decision by all members excluding the first Respondent, adopting the Collective Agreement dated 17 June 2008 ...;

7.1.5 The Minister is required to extend the collective agreement to all non-parties, once the Department of Labour is satisfied that the parties to the Bargaining Council constitute the majority of employers and employees in terms of the Labour Relations Act. A copy of this certificate has been issued by the Department of Labour, during May 2008, confirming that the parties represent the majority in the industry. A copy of the certificate will be made available to the Honourable Court if required

7.1.6 It is submitted that the Bargaining Council has complied with all the legislative requirements of the Act.

7.1.7 Once the Bargaining Council has taken a resolution to adopt the collective agreement, the first Respondent and its members are bound by the provisions of such collective agreement, insofar as resolutions of the Bargaining Council are binding on all member parties. Therefore constitutes a collective agreement, to be referred to the Minister for extension. The first Respondent and its members are bound by the provisions of such collective agreement.

7.1.8 In the circumstances the resolution of the Council has resolved the dispute.

7.1.9 Any further strike action by the members of the first Respondent is accordingly in contravention of section 65(3) of the LRA and is therefore unprotected and unlawful.

7.2 Lastly it is noted that the first Respondent sent a letter to all its regions and shop stewards, stating that the first Respondent had been outvoted at the Bargaining Council and the collective agreement has been referred to the Minister of Labour for promulgation”

[9] It is clear from the above that the issue of the legality of the strike or otherwise turns around whether or not the collective agreement is binding on CCEPAWU. The applicant contended that the collective agreement is binding on CCEPAWU because of the provisions of the constitution of the bargaining council which according to it provides that a majority decision of council binds on other parties to the bargaining council who do not sign a collective agreement. In other words the applicant's contention is that

CCEPAWU is bound by the collective bargaining agreement even though it did not sign it. The applicant further argued that once the bargaining council had adopted the collective agreement it meant that the dispute that existed between the parties to council came to an end and therefore the provisions of section 65 (3) of the Act became operative.

[10] CCEPAWU disputes that the collective agreement is binding on it because it is not a party to it and that it will be come binding only after the Minister of Labour has promulgated the extension of the operation of the collective agreement to non-parties.

[11] In support of its argument that the collective agreement was binding on CCEPAWU, the applicant referred to the application to have the collective agreement extended to non-parties which was made pursuant to the resolution of council, where it is inter alia stated that:

1. “The above parties are parties to the Furniture Bargaining Council (“the Bargaining Council”). The Chemical Energy Paper and Printing Wood and Allied Workers Union (“CCEPAWU”) is also a party to the Bargaining Council. i
 2. ...
 3. ...
 4. The parties agrees as follows:
 - 4.1 The collective agreement is legally binding document.
 - 4.2 It binds the parties that are the signatories to the collective agreement.
 - 4.3 It binds members of the registered trade union, NUFAWSA, that is a party to the collective agreement where its members are the majority within the registered scope of the Bargaining Council.
 - 4.4 It binds the members of the registered employer associations namely FBUMA and CMPA, whose members employ the majority of the employees within the registered scope of the Bargaining Council.
 - 4.5 The collective agreement is to be extended to cover-
 - 4.5.1 non unionised employees at the workplace of the employers who are party to the employer associations as aforesaid;
 - 4.5.2 it expressly binds all employees, who are members of CCEPAWA, employed at the employers that operate within the registered scope of the Bargaining Council.
- [12] The applicant further argued that the constitution of the bargaining council provides for a majority decision to be taken and to be binding on non-parties. Emphasis was placed on clause 8.9 of the constitution of the bargaining council which provides as follows:
- “The chairperson may rule that a motion shall be submitted in writing in which case it shall be signed by the person who introduced the motion as well as the seconder of the motion and it shall thereafter be read out loud by the chairperson at the meeting. Except where otherwise provided in this constitution, all matters forming the subject of the motions shall be carried by the votes of the majority of those present and entitled to vote, and voting shall be by show of hands.”*
- [13] This clause falls under the heading “MEEETINGS OF THE BARGAINING COUNCIL.” This part of the constitution which was annexed to the applicant’s papers as annexure “D1” deals mainly with the procedures of the meetings of the bargaining council. Annexure “D2” which is also attached to the applicant’s papers and forms part of the constitution deals under the heading “PROCEDURES FOR NRGOTIATIONS OF COLLECTIVE AGREEMENTS,” with the procedures and what parties may do in the event of failure to reach an agreement during the negotiations process. It provides for referral to arbitration or resort to a strike or a lock-out or request for arbitration for employees involved in essential services. The constitution is

silent under this heading as to what happens in the event of a settlement where one of the union parties to the council does not sign the settlement agreement.

[14] There is no evidence that the chairperson exercised his discretion to call for a motion for the adoption of the collective agreement. It therefore follows that in terms of the applicant's argument consideration has to be given to the second part of clause 8.9 of the constitution of the bargaining council. Whilst in its papers the applicant testified that the collective agreement was adopted by council there is no evidence that the resolution adopting the collective agreement was done by way of a motion carried by votes of the majority of those present and entitled to vote. There is also no evidence that voting was done by way of show of hands as required by the provisions of clause 8.9 of the constitution.

[15] It would seem to me that in order to bring the collective agreement within the provisions of clause 8.9, the settlement agreement should have been placed before the bargaining council by way of either a written motion and seconded by another party to the bargaining council if the chairperson deemed it necessary to do so. This is optional and is done at the discretion of the chairperson. I have already indicated that clause 18 of the constitution is silent as to what happens in the event of the majority parties reaching an agreement and another party not being a party to such an agreement.

[16] It is obvious from the submission of the applicant that, what it sought to introduce through its interpretation of the constitution was a limitation on the right to strike of CCEPAWU and its members. Whilst CCEPAWU is a member of the bargaining council it is not a party to the collective agreement signed by NUFAWSA and other members of the bargaining council.

[17] The general right to strike is provided for in section 64(1) of the Act which provides that "every employee has the right to strike and every employer has the right to lock-out". The right to strike is subject to certain conditions which are set out in sub-paragraph (a) to (d) read with subsections

(2) and (3) of the same section. The limitation to the right to strike and recourse to lock-out is provided for in section 65(3) of the Act which inter alia provides as follows:

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

(a) if that person is bound by-

i. any arbitration award or collective agreement that regulates the issue in dispute;"

[18] In *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd*

[1998] 12 BLLR 1191 (LAC), the Court in dealing with the principles to apply when interpreting the provisions of the Act held that:

"The statute itself requires in section 3 that it be interpreted to give effect to its primary objects, and in conformity with the

Constitution (Constitution of the Republic of South Africa Act 108 of 1996) and South Africa's public international law obligations.

Section 1 expresses the LRA's primary objects amongst others as "to give effect to and regulate the fundamental rights" conferred by section 23 of the Constitution (paragraph (a)); and to promote "orderly collective bargaining" (paragraph (d)(i)). "Conformity with the Constitution" entails inter alia that the provisions of the LRA must be considered against the background of the Constitution, which is the supreme law of the land and which itself requires that this Court when interpreting the LRA promote the spirit, purport and objects of the Bill of Rights (see *Business South Africa v Congress of South African Trade Unions and another* (1997) 18 ILJ 474 (LAC) at 476F–478I; *Ceramic Industries t/a Betta Sanitary Ware v National Construction, Building & Allied Workers' Union* (1997) 18 ILJ 671 (LAC) at 675E–I; *Carephone (Pty) Ltd v Marcus NO and others* (case no JA 52/98, paragraph [8])."

[19] In interpreting what was said in *Attorney-General v Moagi* 1982

(2) *Botswana* LR 124 at 184, and repeated in the Constitutional Court in *S v Zuma and others* 1995 (2) SA 642 (CC) at 651I, the Court held that

"[20] The starting point where a constitutional right is given without express limitation, as Kentridge AJ stated is that "Constitutional

rights conferred without express limitation should not be cut down by reading implicit limitations into them". Kentridge AJ had in mind cutting constitutional rights down "so as to bring them into line with the common law", but in my view his remarks suggest a general caution when seeking to read implicit limitations into constitutional rights. Nevertheless, the constitutional right to strike may need to be given specific content in circumstances where it is contended that limitations on its exercise are unconstitutional, though that is not in issue here."

[20] In terms of section 31 of the Act, a collective agreement concluded in the bargaining council binds-

"(a) the parties to the bargaining council who are also parties to the collective agreement;

(b) each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such a party and the members of

such other party; and

(c) the members of a registered trade union that is a party to the collective agreement and the employers who are members of a registered employers' organisation that is such a party, if the collective agreement regulates -

(i) terms and conditions of employment; or

(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers.

- [21] The above provisions are subject to the constitution of the bargaining council and the provisions of section 32 of the Act. The provisions of section 32 which relates to the extension of the collective agreement to the non-parties by the Minister of Labour, do not at this stage arise in this matter. The issue of the extension of the collective agreement to non-parties is still pending before the Minister of Labour. The provisions of the constitution of the bargaining council were dealt with earlier.
- [22] In my view the constitution of the bargaining councils makes no provision for automatic binding of collective bargaining agreements to parties which are not signatories to such agreements. According CCEPAWU its members are not bound by the terms of the collective bargaining agreement which was signed by employer associations and NAFASWU. It is thus my view that there is no textual support upon which the limitation to the right to strike can be justified in the present instance.
- [23] If for any reason it was to be concluded that the binding effect arises from the implicit provisions of clause 8.9 of the constitution, my view would still remain that the collective agreement is not binding on CCEPAWU because of non compliance with the provisions of that clause. As indicated above the chairperson has discretion to call for a written motion to be signed by the mover and seconded by another person. It is clear from the papers that this never happened. Therefore the next enquiry is to determine whether or not the second part of clause 8.9 of the constitution was evoked and complied with. There is no evidence that the adoption of the collective bargaining agreement by the bargaining council was done by way of voting by those present at the time. The voting in terms of this clause has to be done by show of hands. There is no evidence to this effect.
- [24] Turning to the requirement for a final interdict, it is trite that in order to succeed an applicant seeking a final interdict has to show a clear right, an injury actually committed or reasonably apprehended or absence adequate protection by any other ordinary remedy. *UMSA and Others v Comark Holdings (Pty) Ltd* (1997) 18 ILJ 516 (LC)
- [25] In the light of the above I find the contention of the applicant that CCEPAWU and its members did not have the right to strikes due to the collective agreement to be unsustainable. In all probabilities a different conclusion may have been reached had there been full compliance with the provisions of clause 8.9 of the bargaining council constitution. The applicant has therefore failed to show that it had a right not to be faced with a strike by CCEPAWU and its members, in the face of the collective agreement.

[26] I have already indicated earlier that this matter does not concern the issue of the extension of the collective agreement to non-parties. The matter in as far as the extension is concerned seems to still be pending before the Minister of Labour. Of course once the Minister promulgates the extension of the collective agreement to non-parties including CCEPAWU the converse would apply.

[27] I see no reason why costs should not follow the results.

[28] In the premises the following order is made:

1. Clauses 1.1 and 1.4 of the rule nisi is confirmed.
2. The rule nisi issued by this Court on the 9th July 2008, is discharged with costs.

Molahlehi J

Date of Hearing : 5 August 2008

Date of Judgment : 12 September 2008

Appearances

For the Applicant : Adv A Franklin

Instructed by : Glyn Marais Inc

For the Respondent: K. Naidoo

Instructed by : Cheadle Thompson & Haysom Inc

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