

SOUTH AFRICA / JUDGMENT

Communication Workers Union v Sentech SOC Limited and Another (J 215/20) [2020] ZALCJHB 240 (22 October 2020)

[2020] ZALCJHB 240

COURT

Labour Court Johannesburg

BEFORE

S B Nhlapo

CASE / FILE NUMBER

J 215/20

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

No: J 215/20

In

the matter between:

COMMUNICATION
WORKERS UNION Applicant
and
SENTECH
SOC LIMITED First
Respondent
NATIONAL UNION OF
METAL
WORKERS
OF SOUTH AFRICA Second
Respondent
Heard
: 17 March 2020

Delivered:

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 22 October 2020.

JUDGMENT

NHLAPO, AJ

Introduction

- [1] In this matter the Applicant (CWU) applies to this Court on an urgent basis for an order that the First Respondent (Sentech) be interdicted from terminating the Agency Shop Agreement entered into between CWU and Sentech on 28 June 2011. Further that the Organisational Rights Agreement entered into between Sentech and the Second Respondent (NUMSA) on 21 February 2018 be declared invalid and unenforceable.
- [2] Sentech, in addition to opposing the orders sought by CWU, launched a counter-application on 24 February 2020. In the counter-application Sentech sought orders directing that their application be heard together with the main application on an expedited basis; furthermore, that the Agency Shop Agreement is invalid and unenforceable; and an order declaring that clause 4 of the Recognition Agreement (this is an agreement it entered into with CWU on 28 June 2011, “CWU Recognition Agreement”) is invalid and unenforceable.
- [3] On 25 February 2020 the main and the counter-application were before La Grange J who, by agreement between the parties, made the following orders:
- “1. The First Respondent shall file a supplementary founding affidavit in the counter-application by 28 February 2020,*
2. The Applicant shall file a supplementary answering affidavit thereto by 4 March 2020,
 3. The First Respondent shall file any replying affidavit thereto by 6 March 2020,
 4. The parties shall file heads by 12 March 2020,
 5. Costs are reserved,
 6. The parties further agree that the agency shop agreement between the Applicant and First Respondent shall remain in force pending judgment in this matter.”
- [4] NUMSA had not opposed the CWU application at the time when the matter was before Lagrange J on 25 February 2020, as such they were not part of the agreement reached by the parties, which agreement was made an order of Court. I am therefore not inclined to consider their opposing affidavit that was filed on 3 March 2020. More so in that there is no condonation application or at the least, a mere explanation for failure to participate in the proceedings that resulted in the agreement that was made an order of this Court, setting out timelines for filing of further papers.

- [5] Sentech filed an amended notice of motion to its counter-application together with a supplementary affidavit. It is noteworthy that CWU objected to the filing of an amended notice of motion. I will deal with this objection herein below. In terms of the amended notice of motion the following are the orders sought by Sentech:

“1. Directing that the First Respondent’s counter – application be heard together with the main application on an expedited basis.

2. Declaring that the agency shop agreement entered into between the Applicant and the First Respondent, with effective date 25 July 2014 and attached to the Applicant’s founding affidavit as “CWU3”

(“agency shop agreement”) is invalid and unenforceable

3. In the alternative to prayer 2, it be declared that the agency shop agreement has been cancelled with effective date of 28 May 2020.
4. Declaring further that clause 4 of the Recognition and Procedural Agreement entered into between the Applicant and the First Respondent on 28 June 2011 is invalid and unenforceable.
5. That any party that opposes this relief, be ordered to pay the costs thereof.
6. Further and/or alternative relief.
- [6] It would appear that the amended notice of motion merely introduced orders 3, 4 and 5. The amendment was effected prior to delivery of an answering affidavit from CWU insofar as the counter-application is concerned. I was not informed of any prejudice suffered by CWU as a result of the amendment to the notice of motion. As a result, the amended notice of motion is allowed, which amendment is incidental to the agreement between the parties that the founding affidavit in the counter-application be supplemented.
- [7] It is in the interests of justice and further fulfils the primary objects of the Labour Relations Act[1] (LRA) to allow the amended notice of motion in the counter-application as pertinent issues relevant to collective bargaining are canvassed. The above factors are also compelling in so far as the determination of the counter-application on an expedited basis. My view is that the nature of the issues raised as well as the expeditious resolution of labour disputes justifies the hearing of

the counter-application on an expedited basis.

Main application

- [8] CWU is the majority trade union at Sentech with its membership currently at 63% of the total workforce. On 28 June 2011 CWU and Sentech entered into a Recognition and Procedural Agreement as well as an Agency Shop Agreement. The latter agreement was with effect from June 2014.

- [9] Clause 4 of the Recognition and Procedural Agreement provides that CWU is recognised as the sole collective bargaining agent for as long as it enjoys majority status and remains above 50% plus 1. It is common cause that at the time of the application CWU continued to enjoy majority status by virtue of its membership sitting at 63%.
- [10] Clause 16 of the Agency Shop Agreement provides that should the trade union fail to establish that they represent the majority of the employees at the workplace within 90 days, the trade union must be given 30 days' notice of termination.
- [11] Clause 4 of the Agency Shop Agreement specifically provides that the employees who are not members of the representative trade union are not compelled to become members of the representative trade union.
- [12] On 21 February 2018 Sentech and NUMSA entered into an Organisational Rights Agreement. Clause 3.3 thereof provides that should the union membership prove to be less than 20% of the employees employed in the workplace, the company may withdraw the organisational rights, subject to a three (3) months written notice, during which the union may endeavour to re-establish its representation levels.
- [13] Clause 3.4 of the Organisational Rights Agreement between Sentech and NUMSA further provides that NUMSA shall be entitled to enjoy collective bargaining rights for a pre-defined bargaining period provided it proves by valid stop orders it represents 33,3% of the workforce.
- [14] CWU contends that the conduct of Sentech and NUMSA in concluding the Organisational Rights Agreement which entitled NUMSA to enjoy

collective bargaining rights for a pre-defined bargaining unit was done notwithstanding clause 4 of its Recognition and Procedural

Agreement with Sentech, which agreement recognises CWU as the sole collective bargaining agent as long as it enjoys majority status and remains above 50% + 1.[2] CWU further contends that Sentech's conduct has led to an untenable situation where there are two (2) unions who enjoy collective

bargaining rights, notwithstanding the provisions of sections 18 and 25 of the LRA.[3]

- [15] It appears that on 6 February 2020 an email was sent to CWU by Sentech informing CWU of its intention to terminate the Agency Shop Agreement premised upon a legal opinion received from senior counsel. This was the reason for the urgent application brought by CWU.
- [16] The issue raised in the notice of termination appears to be that clause 4 of the Agency Shop Agreement does not satisfy the requirements of section 25 (3) of the LRA and therefore the Agency Shop Agreement was invalid.[4]

Counter – Application

- [17] I will not deal with the aspect of urgency as the parties agreed on timelines, more so in view of the counter-application. This is despite my reservations on the urgency of CWU prayer regarding the 2018 agreement between Sentech and NUMSA.
- [18] In the main counter-application Sentech raised the following issues:[5]
- 18.1. That the Agency Shop Agreement was terminated because the agreement did not comply with the LRA
- 18.2. The Agency Shop Agreement differs from the prescribed wording contained in section 25 (3) of the LRA.
- [19] Sentech further contended that there is a material difference between clause 4 of the Agency Shop Agreement and the mandatory wording prescribed by section 25 (3) of the LRA. I will not deal any further with this contention that clause 4 of the agency shop agreement is different to section 25 (3) of the LRA as this submission was withdrawn by Sentech in its supplementary founding affidavit.
- [20] Sentech in its main counter-application further states that clause 4 of its Recognition Agreement with CWU grants sole bargaining rights to CWU contrary to public policy and is thus unenforceable as the parties did not have the legal power to restrict minority unions from acquiring organisational rights. It has further alleged that the clause is contrary to section 23 of the Constitution and section 20 of the LRA.[6]
- [21] Sentech further contends that the purpose of section 18 of the LRA is to allow a majority union together with an employer to set thresholds for representivity applicable to unions seeking organisational rights in their workplace. In the absence of a collective agreement between CWU and Sentech regulating thresholds for representivity about section 12, 13 and 15 rights, Sentech may enter into agreements with any union that it wishes to extend those rights to.[7] On those basis Sentech contends that the collective agreement it entered into with NUMSA is valid and legally enforceable.
- [22] In the amended counter-application as well as the supplementary founding affidavit, Sentech abandoned the initial contention that clause 4 of the Agency Shop Agreement differs from the prescribed wording contained in section 25 (3) of the LRA.
- [23] In its supplementary founding affidavit Sentech set out further grounds upon which it contends that the Agency Shop Agreement should be declared invalid and unenforceable.
- [24] Sentech's identified the following clauses in the Agency Shop Agreement as the basis for its contention that it is invalid and unenforceable:
- 24.1. Clause 12 provides that: an employee may apply in writing to the Bargaining Forum or Department of Labour for exemption from the provisions of this agreement on the grounds that the employee conscientiously objects to being associated with or paying contribution to a secular association.

24.2. Clause 13 provides that: if an exemption is granted to an employee who is a conscientious objector, the employee may request that the agency fee be paid into a fund administered by the Department of Labour.

24.3. Clause 14 provides that “any exemption to this agreement may be granted by agreement of the Bargaining Forum or the Department of Labour”.

[25] Premised upon the aforementioned clauses Sentech advanced the following grounds as the reasons for the submission that the Agency Shop Agreement is invalid and unenforceable.

[26] Sentech submits that section 25(4)(b) provides employees who are conscientious objectors with an absolute right to request their employer to pay the amount deducted from that employee’s wages into a fund administered by the Department of Labour. Section 25(4)(b) does not define a conscientious objector nor does it seek to prescribe the basis upon which an employee may object. Since clause 12, provides that an employee may only apply for exemption if the employee objects to being associated with or paying contributions to secular associations it limits the basis and/or grounds upon which an employee may seek that the agency fee be paid to a fund administered by the Department of Labour.

[27] On the aspect of the CWU Recognition Agreement, Sentech maintained its contention that clause 4 thereof is invalid and unenforceable as it dilutes and infringes upon the right of minority unions, such as NUMSA, from acquiring organisational rights.

[28] CWU contends that Sentech required its permission or consent prior to entering into the organisational rights agreement with NUMSA.

Analysis

On Agency Shop Agreement

[29] The Agency Shop Agreement came into effect on 25 July 2014 for an indefinite period.

[30] Clause 17, which is the only clause on termination, provides that the Agency Shop Agreement shall terminate after the period mentioned in clause 16. Clause 16 provides:

‘If the representative trade union fails to establish that they represent the majority of the employees within the 90 day period, the employer must give the trade union and the employees covered by the agreement 30 days’ notice of termination, after which the agreement will terminate.’

[31] Sentech’s states as follows in its supplementary affidavit:

“In the alternative, Sentech gives notice to CWU in terms of section 23(4) of the LRA to terminate the Agency Shop Agreement in three

months (28 May 2020). It should therefore be declared that the Agency Shop Agreement is cancelled in terms of section 23(4) of the LRA.”

[32] This submission is premised on the provisions of section 23(4) of the LRA, which states:

‘Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties.’

[33] In this instance it is common cause that the agreement does not provide otherwise with regards to the duration of the agreement. It is further common cause that Sentech in its supplementary affidavit issued a termination notice on 28 February 2020, with effect from 28 May 2020 (three months’ notice).

[34] I consider the aspect of the notice of termination as being primary to the one raised regarding the interpretation to be afforded to section 25(4)(b) of the LRA when read against clauses 12, 13 and 14 of the Agency Shop Agreement.

[35] In TAWUSA and Alliance comprising of STEMCWU v Anglo Platinum Ltd[8] Van Niekerk J dealt with a collective agreement concluded for an indefinite period and held as follows:

‘I turn first to the matter of a clear right. Section 23(4) of the Labour Relations Act provides that a party to a collective agreement that is concluded for an indefinite period may terminate that agreement by giving reasonable notice. The respondent is, in terms of that provision, entitled to invoke the right to give reasonable notice which, in my view, it did; three months notice is not unreasonable to terminate the collective agreement, that is the subject of these proceedings.

The applicants’ contentions before the CCMA do not concern the unreasonableness of the notice of termination given; rather, they contend that the respondent is not entitled to cancel the agreement at all and that certain consequences that will flow from that cancellation will have the effect of prejudicing their members’ rights.

...

The relief that the applicants seek, as I have indicated, is in effect an interdict preventing the respondent from cancelling the collective agreement, pending the outcome of the remaining disputes before the CCMA. To grant this relief would, in my view, amount to compelling the respondent to continue in a collective bargaining relationship to which it no longer wishes to be a party.’

[36] The above decision was cited with approval by this Court in South African Federation of Civil Engineering Contractors and Another v NUMSA and Others[9], where Rabkin Naicker J held:

[20] In my judgment, taking into consideration the contextual issues I have referred to, “indefinite period” in section 23(4) of the LRA cannot simply mean in perpetuity, but its meaning must include a period of a fixed term, the actual duration of which is unknown. This matter is a clear example of why such a reading is apposite. The PLA has already been in existence since 2008. From the papers, it is evident that it is envisaged to continue for some years to come. Where the duration of a collective agreement is tied to

an indeterminate period of time, i.e. the time that it takes to complete certain works or a particular project, it would amount to interference in the collective bargaining relationship to deprive a party of the right to withdraw from it in terms of section 23(4).’

[37] In South African Federation of Civil Engineering Contractors reference was also made to the judgment of the Labour Appeal Court (LAC) in *Edgars Consolidated Stores Ltd v Federal Council of Retail and Allied*[10] where Moegeng JA (as he then was) had this to say about section 23(4) of the LRA:

‘ . . . Section 23(4) opens with the words ‘unless the collective agreement provides otherwise ...’. These words suggest an exception to the general rule that the balance of the sentence provides for. The balance of the sentence is to the effect that a party to a collective agreement concluded for an indefinite period may terminate that agreement by the giving of reasonable notice in writing to the other party. The exception contemplated is where the collective agreement itself provides otherwise. In other words a collective agreement cannot be terminated in the manner provided for in s 23(4) if it itself precludes that. Such a case would be where a trade union and an employer have included a clause in their collective agreement to the effect that a party must seek a third party’s leave to terminate the agreement before it can terminate it, e.g. seek the court’s leave or the CCMA’s leave.’

[38] Another LAC judgment that is important in this regard is *Bader Bop (Pty) Ltd v NUMSA and Others*[11] where the following was stated regarding section 23(4) of the LRA:

‘ . . . Unless the employer has undertaken to continue to recognise the union for a specified period, section 23(4) grants an unfettered right to either party to terminate the agreement by giving reasonable notice.’

[39] I align myself with all of the above decisions of the Labour Appeal Court as well as those of this Court.

[40] Premised upon the wording of the Agency Shop Agreement, section 23(4) of the LRA as well as the principle set out by the LAC and this Court, I find that the Agency Shop Agreement is an indefinite one.

- [41] Accordingly, Sentech is entitled to issue a notice of its termination as no party to the agreement can be forced by this Court to remain in an indefinite collective agreement. Van Niekerk J in TAWUSA succinctly states that to force a party to remain in an indefinite contract 'would be an unwarranted interference in a collective bargaining relationship'. I agree fully with this.
- [42] It therefore follows that it is not competent for this Court to grant the relief sought by CWU once the notice of termination has been issued. CWU has been given three months' notice, which notice period is reasonable. The Agency Shop Agreement has therefore been cancelled with effect from 28 May 2020.
- [43] I am of the view that it is not necessary to consider the validity of clauses 12, 13 and 14 of the Agency Shop Agreement given the fact that the entire agreement has now been terminated at the behest of Sentech. The next issue concerns the CWU Recognition and Procedural Right Agreement.

The CWU Recognition Agreement

- [44] CWU contends that Sentech's conduct has led to an untenable situation where there are two unions who enjoy collective bargaining rights, notwithstanding the provisions of sections 18 and 25 of the LRA.[12] CWU therefore seeks an order declaring the Organisational Rights Agreement entered into between Sentech and NUMSA on 21 February 2018 invalid and unenforceable.
- [45] CWU also contends that Sentech required its permission or consent prior to entering into the NUMSA Organisational Rights Agreements. For this contention, CWU relies on section 18 of the LRA[13] which provides that an employer and a majority trade union may conclude a collective agreement establishing a threshold of representativeness in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.
- [46] In this instance it is common cause that no threshold had been set in the CWU Recognition Agreement.
- [47] Sentech on the other hand contends that clause 4 of the CWU Recognition and Procedural Agreement entered into on 28 June 2011 is invalid and unenforceable, for the reason that the clause recognises CWU as the sole collective bargaining agent as long as CWU enjoys majority status and remains above 50% + 1.
- [48] Sentech submits that during 2019 NUMSA met the threshold in terms of the NUMSA Organisational Rights Agreement, being 35% membership. As such NUMSA met the threshold to enjoy collective bargaining rights, therefore it became apparent to Sentech that there is a potential conflict between the three agreements which are the subject of this application. In essence, since NUMSA meets the threshold and is entitled to exercise collective bargaining rights there is a potential conflict with the CWU Recognition Agreement, as that

agreement provides that CWU shall be the sole collective bargaining agent.[14]

[49] Section 23(5) of the Constitution of the Republic of South Africa, 1996 provides that every trade union has the right to engage in collective bargaining. The LRA in turn regulates the constitutional right to collective bargaining.

[50] In *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others*[15] the Constitutional Court held:

‘[71] Section 23 of the Constitution guarantees a number of rights, including the right to form or join a trade union of one’s choice and the right of every trade union to engage in collective bargaining. These rights cannot be limited by a private agreement between an employer and a majority union. But they may be limited by a law of general application provided it meets the requirements of section 36 of the Constitution. This provision emphatically declares that rights in the Bill of Rights may be limited only in terms of a law of general application.

[72] To conclude that the 2001 collective agreement precluded SACOSWU from bargaining with the employer here would constitute an impermissible limitation of SACOSWU’s right to engage in collective bargaining unless the prohibition is authorised by section 18. The meaning given to this section will have a practical effect on all future disputes involving agreements that declare thresholds of representativeness. This illustrates that a decision of this Court on the merits will be of great benefit to workers, trade unions and employers in the future. This is because section 18 of the LRA continues to apply to their relationships and the Act was enacted to give effect to rights in section 23 of the Constitution...

[93] Section 18 reads:

“(1) An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.

(2) A collective agreement concluded in terms of subsection (1) is not binding unless the thresholds of representativeness in the collective agreement are applied equally to any registered trade union seeking any of the organisational rights referred to in that subsection.”

[94] In unambiguous terms the section confers, on an employer and a majority union, the right to establish thresholds of representativeness. This right may be exercised by means of concluding a collective agreement in terms of which a threshold is agreed. This threshold relates to organisational rights mentioned in sections 12, 13 and 15 only. For a collective agreement so concluded to be binding, it must apply equally to all registered trade unions.

[95] The text of the section limits its content and scope to the right to determine a threshold in terms of a collective agreement.

Section 18 does not authorise the employer and a majority union to determine which constitutional rights other unions that are not parties to the collective agreement, may exercise. The section does not refer at all to the right to engage in collective

bargaining. Nor does it mention freedom of association, which enables every worker to form or join a trade union of their own choice.

[96] It is not surprising that section 18 does not prohibit collective bargaining between an employer and a minority union where there is a collective agreement between that employer and the majority trade union. Such a prohibition would be inconsistent with the Constitution and international law. Over and above that, the prohibition if it were to exist, would be meaningless. This is because section 20 declares that nothing in Part A of Chapter III, where section 18 is located, precludes the conclusion of a collective agreement that regulates organisational rights.'

[51] This Court is bound by the principle set out by the Constitutional Court apposite to this matter, more particularly paragraph 95 thereof.

[52] I thus agree with the submission made on behalf of Sentech that it is apparent from the above authority of the Constitutional Court and section 18 of the LRA that an employer and a majority trade union may enter into an agreement in terms of section 18 to determine a threshold. However, what section 18 does not authorise is an employer and majority trade union determining what constitutional rights may be exercised by other trade unions.

[53] I further agree with the submission made on behalf of Sentech that the NUMSA Organisational Rights Agreement is valid as CWU and Sentech have not entered into an agreement in terms of section 18. Therefore Sentech was entitled to enter into the NUMSA Organisational Rights Agreement without the consent or permission of CWU.

[54] To the extent that clause 4 of the CWU Recognition Agreement grants CWU sole collective bargaining rights, such a clause is invalid.

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

Order

1. The application to interdict the termination of the Agency Shop Agreement is dismissed.
2. The application to declare the Organisational Rights Agreement entered into between Sentech and NUMSA on 21 February 2018 invalid and unenforceable is hereby dismissed.
3. The Agency Shop Agreement is hereby declared to have been cancelled with effect from 28 May 2020.
4. Clause 4 of the CWU Recognition and Procedural Agreement entered into between CWU and Sentech on 28 June 2011 is hereby declared invalid and unenforceable.
5. Each party is to pay its own costs, in both the main and counter applications.

S. B. Nhlapo

Acting Judge of the Labour Court of South Africa

Appearances:

For Applicant: B Ndlovu

Attorney:

Peter Zwane Attorneys

For the Third Respondent: FA Boda SC. Assisted by Z Ngwenya

Instructed by:

Cliffe Dekker Hofmeyr Inc.

[1] No. 66 of 1995, as amended.

[2] FA: paragraph 7.14

[3] FA: paragraph 7.15

[4] FA: paragraph 7.18 to 7.22

[5] Sentech's main counter application: paragraphs 13.2 to 13.5

[6] Counter – Application; FA: paragraph 15

[7] Counter – Application; FA: paragraph 16

[8]

(2009) 30 ILJ 2142 (LC) at p. 3.

[9]

(2013) 34 ILJ 2084 (LC) at para 20.

[10]

(2004) 25 ILJ 1051 (LAC) at para 22.

[11]

[2002] 2 BLLR 139 (LAC) at para 105.

[12] FA: paragraph 7.15

[13] Section 18 (1) of the LRA provides: “an employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15.”

[14] Supplementary Founding Affidavit: Counter – Application; paragraph 18

[15]

[2018] 11 BLLR 1035 (CC)

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