IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO J1060/00

In the matter between:

SAMANCOR LIMITED Applicant

and

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

THE INDIVIDUALS STIPULATED IN ANNEXURES "A" TO "C" Second to Further Respondents

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JUDGMENT

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JAMMY AJ

1. On 18 March 2000, a *rule nisi* was issued by this Court pursuant to an urgent application brought by the Applicant on that date. In terms of that order the First Respondent and the Second to Further Respondents were interdicted from participating in, promoting or inciting an unprotected strike, with certain ancillary relief to the Applicant relating to the protection of the Applicant's premises, its employees and its business operations.

2. The First Respondent anticipated the return date and it was eventually extended to 5 May 2000.

3. On that date the Applicant sought an order confirming the *rule nisi* with costs. Submissions were addressed to this Court by Counsel for the Applicant and the Respondents respectively on the basis of comprehensive Heads of Argument filed by each of them. The application was supported by what Adv P Pauw, for the Applicant, accurately referred to as a voluminous volume of papers.

4. Counsel appear however to be *ad idem* regarding the crisp issues for determination by this Court, although they are differently articulated. The central issue, Mr Pauw submits, is whether there is a legally binding collective agreement regulating the issue upon which the proposed strike action was to take place. If this is so, as the Applicant submits is the case, that strike would be unlawful and unprotected on the basis of the relevant provisions of s65(1)(a), (b) and (c) and of s65(3)(a)(i) of the Labour Relations Act 1995 ("the Act"). The further question for determination submitted by Adv J G Van de Riet for the Respondents, is whether, if the proposed strike is found to be protected in terms of the Act, there is a valid basis for the Applicant's alleged apprehension of unlawful conduct by the individual Respondents in the course of their participation in it.

5. The sequence of what the Applicant contends were collective agreements, was reviewed by Mr Pauw. During May 1996 the Applicant and a number of representative trade unions, including the First Respondent, concluded a **"Framework Agreement for Collective Bargaining on Divisional Level"**, which was stated to be in respect of three divisions of the Applicant's business, one of which was its chrome division. Envisaged in that agreement was the future negotiation and conclusion of collective agreements applicable to the respective divisions and the agreements reviewed by Mr Pauw and relevant to this dispute are those negotiated by the Divisional Bargaining Forum for the chrome division.

6. The 1996 agreement included definitions of a dispute of right and a dispute of interest. A dispute of right was defined -

As to the interpretation or application of any term of this agreement or any agreement concluded in terms of this agreement, or any dispute about the dismissal of any member of the union or any unilateral change and condition of service.

Any dispute as to whether information demanded for the purposes of wages and conditions of service is relevant and whether

or not such information shall be disclosed."

A dispute of interest is defined as -

A dispute pertaining to wages and conditions of employment and the failure of collective bargaining."

The agreement further provided in a schedule titled: **Collective Bargaining Agreement on Divisional Level,** a Peace Obligation prohibiting outright industrial action in respect of a dispute of right and precluding industrial action in respect of a dispute of interest **concerning any matter in issue which is the subject matter of this agreement, or any agreement concluded in terms of this agreement,"** until the dispute resolution process defined in the agreement or, where applicable, the relevant procedures of the Act, had been exhausted,

7. I do not propose, for the purposes of this determination, to review other than by way of broad reference, the substance and sequence of the series of agreements which followed in the course of ongoing negotiations between the parties. An agreement regulating terms and conditions of employment at the Applicant's Middelburg and Krugersdorp plants, within its chrome division, was concluded between the Applicant and a number of trade unions including the First Respondent and envisaged a grading model which would eventually be implemented and in terms of which a new grading structure incorporating a proposed job reconstruction programme, would be established. Recorded therein was the agreement of the parties to the framework and principles of that programme and to **"general implementation principles,"** the **"final implementation details of which will be further discussed at working group meetings."** A short-term implementation strategy was however defined and agreed upon.

8. In March 1997, following the resolution of a dispute which had in the interim been declared between the parties in that regard, an agreement was reached regarding a process to resolve further outstanding issues relating to the framework for the implementation of the new grading system. The merging of

certain grades into six new grades would be implemented on a different basis at the Applicant's Witbank plant from that obtaining at Krugersdorp and Middelburg. A note to the agreement, in that regard, reads as follows:

"The MFC/PFC broadbanding structure remains as is currently agreed unless agreed otherwise during future negotiations."

It is the Applicant's contention that the gravamen of that provision is that the job grading structure which had been agreed upon at the Krugersdorp and Middelburg plants would continue to apply at all its plants unless and until otherwise agreed, a contention rejected by the Respondents in the pleadings.

9. On 24 April 1997 a further agreement between the Applicant and the recognised trade unions, including the First Respondent, was concluded, entitled **"Workplace Change Agreement"**, in terms of which inter alia, the Paterson Job Grading System, consisting of nine job grades, would be collapsed or merged into six job grades although the manner in which this had occurred at the Witbank plant differed from the manner in which it would be implemented at the Krugersdorp and Middelburg plants. Employees furthermore "would have access to training, designed to improve their skills." This would appear to have been a logical progression from the agreement of March 1997 which preceded it.

10. It was a programme designed to implement the agreements which had been arrived at. The Applicant's contention that substantial progress in that context has been made at its Krugersdorp and Middelburg plants although slower at the Witbank plant, is not contested. A three-year timeframe agreed upon in terms of the April 1997 agreement has not yet expired.

11. The next significant agreement was signed on 29 September 1998, entitled **"The Skills Based Pay Agreement."** That agreement, contended by the Applicant to be a further collective agreement between the parties, was signed by a shop steward, certain Mabogoane, expressed therein as doing so "for and on behalf of the National Union of Metalworkers of South Africa duly authorised." At all relevant times, the Applicant contends, this shop steward

had held himself out as being mandated and authorised to conclude agreements on the First Respondent's behalf and the agreement was concluded by the Applicant, it contends, on the strength of that representation. The shop steward had signed in the presence of a Regional Official of the First Respondent and "this was the way agreements of this nature were normally concluded."

12. That contention is rejected by the Respondents who contend that Mabogoane was neither authorised as required by the First Respondent's Constitution nor mandated by the First Respondent's members at the workplace to do so. If Mabogoane made the representations which the Respondents allege, he had no authority to do so. The Regional Official who was present moreover, certain Peege, was neither "responsible for these companies nor was he familiar with the negotiations leading to the purported agreement."

13. One year wage negotiations between the parties commenced in April 1999 and arising therefrom, after protracted negotiation in which, the Applicant contends, the Skills Based Bay Agreement was utilised by it as a "reference point", the Applicant prepared a written document purporting to record the terms of the agreement alleged to have been reached, but which the First Respondent, in the person of its Regional Secretary, refused to sign. That agreement, the First Respondent contended, did not reflect the full agreement between the parties to the extent that it omitted to incorporate an agreement to implement the Workplace Change Agreement at all plants by 1 September 1999. The Applicant's response was a denial of any such agreement and in the result a dispute was declared by the First Respondent and eventually referred to independent mediation in the course of which, inter alia, and in response to a contention by the Applicant that certain of the issues in dispute were regulated by the Skills Based Pay Agreement, the First Respondent denied the validity of that agreement on the basis, as has been indicated. that the shop steward who signed it had not been authorised to do so. It is common cause that the mediation process failed to resolve the dispute referred to it.

14. On 13 March 2000 the First Respondent issued a strike notice to the Applicant. The strike was to commence at 07h00 on 15 March 2000 and the notice identified the dispute upon which it would be based as a failure by the Applicant to implement a five-grade remuneration system at all its chrome centres by 1 September 1999 according to a broadbanding formula which was set out. It is common cause that that strike notice was withdrawn on 14 March by letter in which the First Respondent undertook "to comply with all internal dispute procedures and collective agreements should our members decide to embark on strike action."

15. Further attempts to resolve the disputed issues then ensued but these notwithstanding, the First Respondent served a further notification of strike action upon the Applicant on 16 March 2000. The demands upon which the strike action, which was to commence on Monday 28 March 2000 at 06h00 would be based, were defined as the incorporation and/or conversion of certain grades into others with stipulated minimum rates of pay. The notice continued -

"We record that there is no collective agreement which regulates the issue in dispute and nor is there any dispute about the interpretation or application of any collective agreement in that -

1. the Skills Based Pay Agreement of 1998, which was signed by our shop steward without a proper mandate or authorisation in terms of the union's Constitution, was repudiated by the union;

2. the Skills Based Pay Agreement does not constitute a collective agreement between the union and yourselves and we do not consider such agreement to be binding on ourselves or our members; and

3. the Substantive Wage Agreement for the period 1999/2001 specifically records that no agreement was reached on the issue of minimum rates of pay applicable to the five-grade structure."

The notice finally recorded that the Respondents had "complied with all the applicable internal dispute procedures in accordance with s64(3)(b) of the

Labour Relations Act 1995" and that in the circumstances, "our members' strike action will be protected."

It was that notice and the threat of impending strike action which it contained, which led to the proceedings now before this Court and it is the primary question of whether there is a legally binding collective agreement regulating the issue upon which the proposed strike action was to take place, which is the core matter for determination. If no such collective agreement exists or is applicable, the strike will be protected. If the existence of such an agreement is established, the strike will be prohibited in terms of s65(1)(a) of the Act. As has been indicated earlier moreover, there will be no right to strike if the dispute in question is one of right and not interest.

16. It is the Respondents' contention that not only is the issue in dispute in fact one of mutual interest but that there is no collective agreement which has the application provided for in the limitation provisions of s65.

17. To the extent to which the Applicant relies on the agreement of 7 March 1997 and on the Skills Based Pay Agreement of 29 September 1998 as constituting collective agreements as contemplated by the Act, this contention is rejected by the Respondents for a number of reasons. In the first instance, they contend, those agreements have not been, and cannot, in the absence of further negotiations and consensus on issues falling within their ambit, be implemented. Secondly, the issues which are the subject matter of the strike-related demands by the Respondents are not regulated by those agreements. Finally, the authority of the union shop steward to have signed the Skills Based Pay Agreement is, as stated, rejected and the union and its members are accordingly not bound thereby. I will deal with each of these grounds of objection in turn.

18. A "collective agreement" is defined in s213 of the Act as -

"A written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions on the one hand and, on the other hand, -

(a) one or more employers;
(b).....
(c)....."

19. The verb "implement" is defined in the **Longman Modern English Dictionary** as **"to carry into effect."** In my view, the inability, for one or another reason, to implement the terms and conditions of a contract in that context, does not in any way impugn the existence of the contract itself. On the contrary, there can be no implementation unless there is something in existence to implement.

20. That each of the agreements in the sequence thereof reviewed by Counsel was in all material respects intended to be a collective agreement within the statutory definition to which I have referred, is not, in my view, open to question.

21. The strike demand of 15 March 2000 was, as I have indicated, for the incorporation of certain grades and the conversion of others into different grades with minimum rates of pay. The Respondents' contention that no collective agreement exists which regulates those issues, is narrowly sourced. That is the case, it is stated, **"*in that:*"** (emphasis added) the Skills Based Pay Agreement of 1998 is not binding, it is in any event not a collective agreement as contemplated by s65(3)(a) of the Act and finally, the Substantive Wage Agreement for the period 1999-2001 specifically records, it is stated, that no agreement was reached on the issue of minimum rates of pay applicable to the five grade structure.

22. The full and only inference to be drawn from the structure and substance of the strike notice therefore, is, in my view, that, irrespective of the substance of the other agreements in the chronology thereof reviewed by the parties, if the Skills Based Pay Agreement of 1998 is held to be a collective agreement binding on the parties and the unresolved linking issue referred to in the 1999/2000 Wage Agreement is not the issue in dispute, the proposed strike action will be unlawful and unprotected. The demands in question moreover,

will constitute a dispute of right as opposed to a dispute of interest and would therefore, on that basis, negate strike action in terms of the Framework Agreement concluded in March 1996, if the basic substance thereof relates to the interpretation or application of its terms. Those will be issues for determination by arbitration and not industrial powerplay.

23. The Skills Based Pay Agreement, to which the First Respondent was one of five union parties, is a brief and uncomplicated one. It provides for a common scale of remuneration which will be applicable to the Applicant's four Chrome Alloy Centres and which will "form the basis of the calculation of the skills based pay." A further provision is for the payment of a skills allowance and a separate clause, sub-headed **"Implementation"** reads as follows:

The implementation of the skills based pay will commence in line with the implementation of whole jobs as developed through the productivity improvement programme in accordance with the principles outlined in the Workplace Change Agreement.

This agreement forms part of the Workplace Change Agreement and will be appended as Annexure "B"."

24. The strike notice in question, apart from the contention that it is not binding for want of authority of the First Respondent's ostensible signatory, rejects the agreement as not constituting a collective agreement. That contention is not developed in the notice and is presumably "pleaded" in the alternative. The Skills Based Pay Agreement does not bind the Respondents they submit, alternatively, if it is found that it is binding, it is not a collective agreement which would preclude the industrial action in question. In support of its contentions regarding the second of these alternatives, the Respondents rely on submissions which, in my view, do not relate to the substance of the Skills Based Pay Agreement and the Workplace Change Agreement of which it is expressly stated to form part, but on the allegation that the process of development of the uniform skills based grading structure therein defined is still being negotiated. Those factors however, in my view, do not render the agreement any less finite in its negotiated terms. The Applicant, in its three

chrome alloy centres, is a contracting party thereto, as is the First Respondent. A common scale of minimum rates of pay applicable to specified job levels and the basis of their determination is defined. A skills allowance and the manner of its application is determined. The timing and basis of implementation are separate issues from its material substance as are the provisions for its variation. It is not clear to me on what basis the Respondents contend that this written agreement is not one **"concerning terms and conditions of employment or any other matter of mutual interest"** concluded between a registered trade union and an employer.

25. The question then arises whether, if it is binding - an issue to which I will revert later - it is an agreement which regulates the subject matter of the Respondents' strike-related demands. By definition, it "forms part of the Workplace Change Agreement of 24 April 1997." That agreement in turn defines a structure of job reconstruction and development which embodies the grading structure to which the minimum rates of pay defined in the Skills Based Pay Agreement will apply. Significantly moreover, the dispute resolution process prescribed in the Collective Bargaining Agreement earlier referred to is endorsed in relation to any issue of "interpretation or implementation of this agreement."

26. There is no doubt in my mind that that agreement, as with its adjunct, is a collective agreement as defined in the Act. It is unnecessary, in my opinion, for me to review in any detail the minutes of the various meetings at which the implementation of the restructured grading system was discussed. Whilst the timing of that implementation and the finalisation of the agreed structures in relation to determined minimums was certainly canvassed, those issues do not detract from the basic intention of the parties and the substance of the agreements in which that intention was recorded. They are, as I have already stated, issues of implementation and not of substance.

27. The strike demand must of course be sourced in the initial declaration of dispute. In its letter of 17 November 1999 that dispute is described by the First

Respondent as "bad faith bargaining." I agree with the Respondent's submission that its factual substance should be determined without reference to that characterisation and that substance is unambiguously stated. The Applicant, it is alleged, failed to implement a new five-grade structure with effect from 1 September 1999. The strike notice is of different import. It does not purport to relate to a failure by the Applicant to implement the new grading system. It defines the basis upon which the Respondents require the system to be implemented and the minimum rates of pay which are to apply thereto. That is a different issue and in the context, as the Applicant submits, that it seeks an amendment of what the Applicant contends was a basic structure defined in the Skills Based Pay Agreement as read with the Workplace Change Agreement, that is not an objective legitimately to be attained by industrial action. Mr Van der Riet expressly submits that the Respondents' demand **"is simply that the Applicant agrees to the minimum rates in the different Paterson grades proposed by the Respondents."** To the extent to which that is regarded by the Respondents as their entitlement, the dispute is one of right and not interest, and constitutes a new area of confrontation which is not susceptible to industrial action but which, in terms of the dispute procedure defined in the Collective Bargaining Agreement, must be referred to arbitration.

28. I turn now to the validity and binding effect of the Skills Based Pay Agreement. Mr P Mabogoane, the First Respondent's shop steward, is alleged to have been "unaware of the extent of the disagreement on these issues" and "not mandated and properly authorised to sign on behalf of the union and its members." The Regional Organiser for Krugersdorp, certain Mr Peege, had represented it in the negotiation meeting leading to the formulation and conclusion of that agreement and the signatory, the shop steward Mabogoane, had been involved in those substantive negotiations. Mr Peege at no stage placed into question Mr Mbogoane's authority to sign the agreement, nor did he attempt to prevent him from doing so.

29. To the extent to which the Applicant relies on a representation of authority by

Mr Mabogoane, that representation itself was made without authority, the First Respondent submits, and in ostensible substantiation of that contention, it annexes to the Answering Affidavit of Mr A Mathibela, its Mpumalanga Regional Secretary, an extract from its Constitution containing the "relevant provisions." Reference to that annexure is however of no assistance. It provides for a "Shop Stewards Committee" which will manage the affairs of the union "inside their workplace." The powers and duties of that Committee include the negotiation of agreements with employers about working conditions "mandated to do so" by members in the place and for their conclusion and signature after approval by the members concerned and the "Regional Executive Committee."

30. Whatever the factual position may be as to Mr Mabogoane's authority or lack of it, I have little doubt, on the submissions on the papers, that there was no cause or reason at the time that the agreement was signed for the Applicant to doubt it. The fact of the matter is that the substance of that agreement had been determined and defined and certainly, in the ensuing meetings and discussions between the parties, whilst issues of its implementation in conjunction with the Workplace Change Agreement unquestionably arose, there was nothing in the conduct of the First Respondent's representatives which reflected upon its validity and binding effect. If Mr Mabogoane was not in fact initially empowered to sign it, then, in my opinion, it was unquestionably ratified by the subsequent conduct of properly authorised officials of the First Respondent. In addition, I agree with Mr Pauw's submission that in the circumstances which prevailed, if Mr Mabogoane was indeed theoretically unauthorised, the First Respondent is estopped from relying on that lack of authority as a basis of repudiation of the agreement. Mr Mabogoane's personal representation of that authority was, on the face of it, not denied by either Mr Mathibela or Mr Peege and the Applicant was entitled to rely on it.

Peri-Urban Areas Health Board v Breedt NO and another 1958(3) SA 783 T at 790.

Kerr: The Law of Agency (Third Edition).

31. A number of disputes of fact appear to arise on the papers. They relate inter alia to the issue of Mr Mabogoane's authority to have signed the Skills Based Pay Agreement as well as to the necessity or otherwise, in the face of alleged oral agreements between representatives of the parties, for the prescribed dispute procedure to have been followed in all its defined respects. It does not seem to me that those disputes relate to issues which, in the context of my overall assessment of this matter, materially frustrate its determination on the papers before me. The core issues to which I have referred emerge clearly from the submissions pleaded and no aspect thereof, in my opinion, requires further clarification or elucidation through oral evidence.

32. For all of these reasons I have concluded that -

The strike-related demands contained in the strike notice of 15 March 2000 differ materially from the issues forming the substance of the declaration of a dispute by the First Respondent on 17 November 1999.

Both the Skills Based Pay Agreement of 29 September 1998 and the Workplace Change Agreement of which it is expressly stated to form part are valid collective agreements which are binding upon all parties thereto.

The issues in dispute, variously described in both the dispute declaration and the strike notice, are issues relating to the application and/or the implementation of those agreements and not to the substance thereof and are accordingly disputes of right, regarding which industrial action is expressly precluded by the Collective Bargaining Agreement within the ambit of which they were concluded.

33. The issue of the Applicant's entitlement to the protection sought by it in the context of the interdict which it obtained was questioned by the Respondents in the context that it purported to be justified by historical, and not prevailing circumstances. The conduct of members of the First Respondent during a period commencing in August 1998 and recurring as recently as October 1999

appears to me to be the basis of a reasonable apprehension by the Applicant of a perpetuation thereof in the event of further strike action by the individuals concerned, an apprehension which appears to have been justified by events subsequent to the launching of this application. The circumstances which prevailed on 18 March 2000 clearly justified, as the Court then determined, the granting to the Applicant of the interdict relief which it obtained. For all the reasons which I have stated, the Respondents have failed to establish any acceptable basis which would at this stage warrant the withdrawal of that protection.

34. I accordingly make the following order:

The *rule nisi* issued by this Court on 18 March 2000 is confirmed.

The First and Further Respondents are ordered jointly and severally to pay the Applicant's costs.

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B M JAMMY
ACTING JUDGE OF THE LABOUR COURT

22 May 2000