IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO:J440/01

In the matter between:

1st Applicant

2nd to further

Applicants

and

METAL & ENGINEERING INDUSTRIES

1st Respondent

2nd Respondent

3rd Respondent

THE STEEL & ENGINEERING INDUSTRIES

4th Respondent

JUDGMENT

GERING AJ

1. This case concerns, primarily, the interpretation and application of Section 64(2) of the Labour Relations Act, 66 of 1995 ("the Act", or "the LRA"), as well as the interpretation of the relevant collective agreement, in particular clause 37 thereof.
2. The voluminous papers have been sub-divided, for ease of reference, into bundles, as follows: Bundle A: 1

to 69; Bundle B: 71 to 99; Bundle C: 100 to 183; Bundle D: 184 to 244; Bundle E: 245 to 249; Bundle F: 250 to 252; Bundle G: 253 to 291.

3. Helpful heads of argument were filed on behalf of the Applicants (the First Applicant is a trade union, herein referred to as the Union); the First and Second Respondents (the Bargaining Council, and the Conciliator appointed by Bargaining Council), and the Third Respondent (referred to as the Company or the Employer). I may mention that Mr Maluleke very competently argued on behalf of the Applicants, although he is not a legal practitioner.

4. The Company is a member of an employers' organization, the Light Engineering Industries Association of SA, which is affiliated to the Fourth Respondent ("SEIFSA"), and is one of the employer parties to the Bargaining Council. The First Applicant (the Union) is not amongst the unions that are party to the Bargaining Council, but the Minister of Labour has extended the collective agreement to non-parties under section 32(2) of the Act.

5. The effect in law of an extension of a collective agreement in terms of section 32(2) is that, for all intents and purposes, a non-party is turned into a party, and is placed in relation to the collective agreement on the same level as a signatory to the collective agreement. See **Kem-Lin Fashions** case [2001] 1 BLLR 25 (LAC) at 32/33 para [25]. This clearly applies to the First Applicant (the Union).

6. Section 64(2) of the Act provides that "if the issue in dispute concerns a refusal to bargain, an advisory award must have been made in terms of section 135(3)(c) before notice is given in terms of subsection (1) (b) or (c)."

7. In a line of cases stretching over many years, it has been accepted by our Courts that a dispute postulates, as a minimum, the notion of expression by the parties opposing each other of conflicting views, claims or contentions. A dispute exists when one party maintains one point of view and the other the contrary or a different one. (See the judgment of Zondo AJP (as he then was) in the **Driveline** case 2000 (4) SA 645 (LAC) at 655/6 para [36]; 2000 21 ILJ 142 at 151). It is important to appreciate the nature of the dispute between the parties, the cause of, or the event giving rise to, the dispute, and the grounds of each party's case to the dispute. (Ibid at para [35]).

8. Section 213, which is the definition section of the Act, contains a definition of "dispute" and of "issue in dispute". These definitions apply "unless the context otherwise indicates".

9. The definition of "dispute" includes "an alleged dispute".

10. The definition of "issue in dispute", in relation to a strike, "means the demand, the grievance, or the dispute that forms part of the subject matter of the strike".

11. In the **Driveline** case (at page 662), the Labour Appeal Court disagreed with statements to the effect that a party who wants to take a dispute further is bound by the conciliating commissioner's description of the dispute in the certificate of outcome. Zondo AJP (as he then was) stated that:
"What the parties are bound by is the correct description of the real dispute that was referred to conciliation" (see at para [62]).

12. The Union on 17 November 2000 referred the following dispute to the registrar of the accredited Bargaining Council. Under the heading "nature of the dispute", the following is stated: "This dispute is about: (1) Employer's refusal to bargain, as set out in employer's letter [being letter dated 16 November 2000, Bundle A-41]. (2) Matters of mutual interest as set out in [the Union's] letter dated 15 November 2000" [Bundle A-39]. The referral documents appear in Bundle A- 27 to 43. On page 34 of Bundle A, the desired outcome is stated as follows: "Employer and employees shall conclude a Collective Agreement concerning matters of mutual interest."

13.Pursuant to the aforesaid referral, a Certificate of Outcome of Dispute was signed by the Second Respondent (referred to herein as "the Conciliator"). This certificate (Bundle A-64) certified that the dispute between the Union and the Employer (the Third Respondent), "which was referred for conciliation on 17 November 2000 concerning alleged refusal to bargain on matters of interest" remained unresolved as at 13 February

2001.

14. There was argument as to whether the referral covered one dispute or two disputes. Although the matter is not entirely free from doubt or difficulty, in my view, applying the reasoning in the **Driveline** case, there was one real dispute, namely a refusal by the Employer to bargain on matters of mutual interest, the Employer's refusal being based on its interpretation of the collective agreement. The grounds of each party's case to the dispute do not convert the dispute (in the singular) into two disputes. I accordingly reject the Union's contention that there were two separate disputes and that the certificate of outcome only related to one of the two disputes. I may add that in argument the Union's representative, in answer to a question from me, expressly denied that he was challenging the validity of the certificate of outcome. Of course, had there been an attack on the validity of the certificate, in my view the correct procedure would have been an application under section 158(1)(g), namely review proceedings. (See **Cleanrite** case 1999 20 ILJ 1747 at 1751; and the **Fidelity Guards** case [2000] 3 BLLR 271 at 276, a judgment of Pillemer AJ upheld on appeal by the Labour Appeal Court: [2000] 12 BLLR 1389; 2000 ILJ 2382).

15. In an affidavit deposed to by the Conciliator (Bundle B-97 to 99), he states that he was appointed by the First Respondent (the Bargaining Council) to act as conciliator; that the dispute that was referred is set out in annexure M5 [Bundle A-27 to 43]; and that "the dispute was described as a 'refusal to bargain' ". In para 10 of his affidavit he states that he issued the Certificate, mentioned in para 4 supra "under the following circumstances: My interpretation of the LRA is that as a conciliator I am not obliged to make an advisory award; I considered the request to make an advisory award, but decided not to do so after due consideration of the submissions made on behalf of the parties and the conciliation referral (annexure M5); I was of the view that there was no refusal on the part of the third respondent [the Employer] to bargain with the first applicant [the Union] as the third respondent was by reason of the main agreement compelled to negotiate matters relating to wages etc at another forum, namely the bargaining council [as stated in its letter of 16 November 2000]".

16. Prior to the present litigation, judgment was given by Francis AJ in case J4784/2000 (see Bundle C- 137 to 150. That case dealt with an urgent application by the Employer to interdict the Union from participating in a strike, in respect of which the Union had given notification. The learned Judge stated that the application before him "relates to a dispute between the applicant [the Employer] and the respondents [the Union and certain members] in respect of the refusal by the [Employer] to engage the [Union] in collective bargaining in respect of wages and other substantive conditions of employment. The [Employer] contends that it is precluded from entering into a collective bargaining arrangement with any collective bargaining agent outside the structures of the Metal & Engineering industries Bargaining Council (the Bargaining Council)". I would point out here that in the present case the Bargaining Council is the First Respondent. The learned judge stated that one of the Employer's submissions was that "the dispute refers to matters of mutual interest which meant that an advisory arbitration would have to be obtained before the [Union] could embark on strike action."

17. Para 24 of his judgment is very much in point. "It is trite that in terms of section 23(2)(c) of the Constitution of the Republic of South Africa, 1966, every worker has the right to strike. This right can under certain circumstances and in terms of section 36 of the Constitution be limited. Section 64 of the LRA recognizes the right to strike. Section 64 sets out what procedure needs to be followed before a strike can take place. The issue in dispute will first have to be referred to a Bargaining Council. . . If the conciliation has failed and a certificate has been issued that the dispute remains unresolved, 48 hours notice of the proposed strike must be issued in writing to the employer. However in terms of section 64(2) if the issue in dispute concerns a refusal to bargain, an advisory award must be made before notice of the proposed strike can be given." (See also **Technikon SA v Nutesa** [2001] 1 BLLR 58 (LAC) at 68 para 35, where Zondo JP said: "Employees have the right to strike and employers have a recourse to lock-out. In both cases the right to strike and the recourse to lock-out are subject to the limitations set out in section 65. In other words, there is

no right to strike where any one of the limitations in section 65 applies.")

18. In para 31 of the judgment of Francis AJ, the following is stated: "From the correspondence between the parties it is clear that the [Employer] was not prepared to meet and bargain with the [Union]. The issue in dispute is therefore a failure to bargain as envisaged in section 64(2). . . In terms of section 64(2) if the issue in dispute involves a refusal to bargain an employee is required to apply for an advisory award before giving a strike notice."

19. In para 17 the following appears: "The [Employer's] attorneys advised that clause 37 specifically precluded any party from engaging in plant-level bargaining on any matter contained in the Bargaining Council agreement."

20. And in para 35, Francis AJ stated: "It is my finding that the [Union's] failure to apply for an advisory award renders the notice to strike and the proposed strike action unlawful and unprotected."

21. I have found these statements very helpful in categorizing the dispute that was referred to the conciliator. They support my view that there was only one dispute, and that it "concerned a refusal to bargain", and that the refusal to bargain related to matters of mutual interest, and that the Employer's refusal to bargain was based on its interpretation of the collective agreement, in particular clause 37. The Employer's legal advice was that "clause 37 specifically precluded any party from engaging in plant-level bargaining on any matter contained in the Bargaining Council agreement".

21.Of course in the present case no notice to strike has been given. But the Union has applied to this Court for an order as against the First and Second Respondents that an advisory award be made. And in the oral argument it was made clear that it was the Union's intention to avail itself of its constitutional right to strike in an endeavour to achieve the improvements in respect of the matters of mutual interest set out in its letter of 15 November 2000, which forms part of the aforesaid referral. It is to be noted that in the Notice of

Motion relief is claimed only against the First and Second Respondents, apart from costs which are not claimed as against the Third and Fourth Respondents unless they opposed. The Third Respondent (but not the Fourth Respondent) did in fact oppose the Application.

22. Brassey in his Commentary on Section 64(2), and on the reference in that section to "an advisory award in terms of section 135(3)(c)" states: "There is a serious problem in the way the two provisions [i.e. 64(2), and 135(3)] interact. Section 135(3) obliges the commissioner to determine the process by which a dispute might be settled but imposes no obligation on this official to select advisory arbitration in cases of refusal to bargain. Neither the present sub-section nor any other provision of the Act imposes such an obligation. In theory, therefore, strikes over bargaining issues can be deprived of protection at the whim of the commissioner. The solution is to read the two sections in a way that will make it obligatory for the commissioner to give the award." (See Employment and Labour Law volume 3, A4: 14).

23. In my view this is a situation where it is appropriate to apply the principles of purposive interpretation, always bearing in mind the caveat stated by Zondo JP in **Technikon SA v Nutesa** [2001] 1 BLLR 58 (LAC) at 70 para 41. Otherwise the statutory requirement of an advisory award will be rendered nugatory. This is a case where the Latin maxim: *ubi jus ibi remedium* should be applied so as to deal effectively with what would otherwise appear to be a lacuna in the LRA. In terms of section 158(1), the Labour Court has the power to "make an appropriate order", including "an order directing the performance of any particular act, which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act." If I may be permitted to adapt the wording in the **Driveline** case (para [46]), one should not adopt an approach which would render the dispute resolution mechanism of the Act "unworkable and ineffective".

24. In my view, once the conciliator issued his certificate, and refused for the reasons set out in his affidavit to issue an advisory award, he was *functus officio*. (See **Softex Mattress** case [2000] 12 BLLR 1402 (LAC) at

1406/7). The power to administer the collective agreement vests in the First Respondent (see the **Kem-Lin** case at page 26 para [5]), and in my view the appropriate way to apply the above-mentioned maxim would be for an order against the First Respondent, against whom relief has been claimed in the Notice of Motion, para 2(1), to appoint a conciliator (other than the Second Respondent), with instructions to issue an advisory award within 14 days of the conclusion of the arbitration hearing. As the Second Respondent is *functus officio*, and has expressed reasons for his refusal to issue an advisory award, it would not be appropriate to order him to do so. The period of 14 days is the period applicable under section 138(7) for a commissioner under the CCMA to issue an arbitration award.

25. I do not agree with the statement by Brassey that "the section seems to give the CCMA exclusive jurisdiction to make the [advisory] award".(See Employment and Labour Law III A4: 15). It seems to me, with great respect, that this procedure can be followed by the Bargaining Council under the collective agreement. Here again, to adopt the contrary view, would be to ignore jurisprudential basis of the above-mentioned maxim, and would render "unworkable and ineffective" the provisions of the LRA in relation to the requirement of an advisory award.

26. There is my view another dispute -- in addition to the dispute that was referred to conciliation -- between the Union and the Employer, namely, in regard to the proper interpretation of the collective agreement. The Union contends that the collective agreement does not cover "plant level" bargaining on the matters set out in the letter of 15 November, whereas the Employer's contention is that under section 37 of the Agreement "the bargaining council is the sole forum for negotiating matters contained in the Main Agreement, that is, wages, severance payment, and other conditions of employment" (see letter dated 16 November). And in para 6.2 of the Third Respondent's affidavit, the Employer's submission is "that the issues the Applicants [the Union] wish to negotiate upon . . . . relate to wages and other substantive conditions of employment, which are all issues governed by the Main Agreement, <u>alternatively</u> (my emphasis) all have a monetary impact which ought to be properly dealt with during substantive negotiation at industry level in accordance

with the provisions of the Main Agreement." (See Bundle C-107/08).

27. This dispute has not been the subject of a referral, unlike the dispute dealt with under the Certificate of Outcome of Dispute. But as pointed out in the **Kem-Lin** case at page 30 para [13], under section 24(1) of the LRA every collective agreement must provide for a procedure to resolve any dispute about the interpretation and application of the collective agreement. "The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration."

28. It is clear from the papers that the collective agreement in the present case contains such provisions, as required by section 24: see para 9.1 of the Third Respondent's affidavit (Bundle C-108), and para (6) of the Dispute Resolution Agreement set out in Bundle C-162.

29. In **SA National Security Employers Association v TGWU** [1998] 4 BLLR 364 at 369, the Labour Appeal Court made it clear that "what the legislature intended with section 65(3)(b)(i) . . . was to provide that the parties are bound to the terms of the collective agreement for the period that it is operative and that they are precluded from resorting to industrial action to change its terms. (Para [23]). . ."what the 1995 Act does not expressly prohibit is a resort to industrial action by one of the parties to a collective agreement to resolve a dispute about an issue which is <u>not</u> regulated by the collective agreement." (See para [24], emphasis in the judgment).

30. Applying this to the present case, the question is whether the Union's contention that there can be "plant-level" bargaining as the matters contained in their letter of 15 November 2000 are not contained in or regulated by the collective agreement, is correct, or whether the employer's contention that these are "matters contained in the main agreement" and that therefore the Bargaining Council is the sole forum for negotiating (see Third Respondent's heads of argument, para 6), is correct.

31. Whether the Union is correct, or whether the Employer is correct, in regard to their respective contentions, involves a dispute as to the interpretation of the collective agreement, and in my view it should be resolved in accordance with the process envisaged by section 24 of the Act. That however is not a dispute that has been referred in terms of the dispute resolution agreement which is binding on the parties. If one of the parties wishes to refer the dispute as to the interpretation of the collective agreement, that party must take the necessary steps as set out in the collective agreement. It is not a matter on which it would be proper for this Court to give a decision or to express a view.

32. Accordingly, having given careful consideration to the helpful heads of argument filed on behalf of the Applicants, the First and Second Respondents, and the Third Respondent, as well as the oral arguments, I have come to the conclusion that the Applicants are entitled to an order requiring the First Respondent to appoint a Conciliator (other than the Second Respondent) to give an advisory award within 14 days after the arbitration proceedings are concluded.

33. As regards costs, although the Applicants have had substantial success in relation to the claim relating to an advisory award, which is the real dispute between the Applicants and the Employer (the Third Respondent), as Mr Maluleke who appeared for the Applicants is not a legal practitioner, I have decided, in the exercise of my discretion to follow the course adopted by Francis AJ in case J4784/2000, and to make no order as to costs.

I therefore grant the orders set out in paragraphs 32 and 33 hereof.

_____

LEONARD GERING

ACTING JUDGE OF THE LABOUR COURT

16 August 2001

Date of hearing: 14/06/01

Deate of Judgement: 29/08/01

For Applicant: Union Representative Mr. Maluleke

For 1st Respondent: Adv. E.L.E. Myhill

For 2nd Respondent: Not represented

For 3rd Respondent: Adv. A.T. Myburgh