

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO :J1529/04

In the matter between:

**COMMISSION FOR CONCILIATION
MEDIATION & ARBITRATION**

1ST APPLICANT

DEPARTMENT OF LABOUR

2ND APPLICANT

and

**GAUTENG BUILDING BARGAINING
COUNCIL (In Liquidation)**

1st RESPONDENT

**LEGAE TRUST (PTY) LTD N.O.
RESPONDENT**

2ND

**GAUTENG MASTER BUILDERS' ASSOCIATION
RESPONDENT**

3RD

**BUILDING, CONSTRUCTION & ALLIED WORKERS
UNION
RESPONDENT**

4TH

**AMALGAMATED UNION of BUILDING TRADE
WORKERS of SOUTH AFRICA
RESPONDENT**

5TH

**NATIONAL UNION of MINEWORKERS
(Construction & Allied Workers Union)
RESPONDENT**

6TH

**NORTHERN BUILDING WORKERS UNION
RESPONDENT**

7TH

**JUDGMENT DELIVERED BY
THE HONOURABLE ACTING JUSTICE NGCAMU**

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Introduction

1. This is an application in which the second applicant claims payment of the balance of the funds held by the liquidator of the first respondent, the Gauteng Building Bargaining Council in terms of Section 59(5) of the Labour Relations Act 66 of 1995. The basis for the claim is that those funds which remains in the bargaining Council after payment of all creditors, cannot be disposed of in accordance with the constitution of that Council as contemplated in section 59(5) of the Labour Relations Act.
2. The first applicant has withdrawn from these proceedings.
3. All the respondents except the sixth respondent are opposing the application.

Background

4. The third to the seventh respondents were parties to the bargaining Council, the first respondent. On 11 June 2000, the third respondent withdrew from the bargaining Council. An application to wind up the bargaining Council was filed on 19 December 2000 on the basis that the withdrawal of the third respondent made the bargaining Council non-functional. The application was heard by this court under case No. J 5389/00. The order winding up the Bargaining Council was granted on 27 June 2001. The second respondent was appointed by the court as a

liquidator of the first respondent.

5. The liquidator proceeded to pay off the liabilities of the first respondent. An amount of R17 130 275-00 remained for disposal. The liquidator obtained legal advice as to the manner of disposing of the balance remaining. On 4 June 2004, a Settlement Agreement was entered into between the parties. Only the sixth respondent did not sign the agreement. The agreement provided for the division of the money amongst five parties. These parties being the third to the seventh respondents. In July 2004, the second applicant challenged the agreement between the parties. The second respondent commenced payment to the parties. As at the time of this application, the following amounts have been paid out namely:

| | |
|-----------------------|----------------------|
| To fourth respondent | R1700 000-00 |
| To fifth respondent | R1700 000-00 |
| To sixth respondent | R1700 000-00 |
| To seventh respondent | R 850 000-00 |
| Total advanced | <hr/> R5950 000-00 |
| Balance held | R11180 275-00 |
| Total | <hr/> R17 130 275-00 |

Issues

6. There are five issues this court has to decide. The first issue is whether this court has jurisdiction to hear the matter. The second is who should have brought this application before the court. The third one is whether the second applicant has *locus standi* to bring this application. The fourth issue is the meaning of Section 59(5) of the Labour Relations Act. The fifth being the meaning of clause 36.5 of the constitution of the Bargaining Council.

7. The first three issues before the court can be disposed of without much ado. The real dispute lies with the last two issues.

Jurisdiction of the Court

8. It is necessary for the court to enquire if it does have jurisdiction to deal with this matter. The issues before the court are not really that of employer, employee relationship. The respondents did not contend that this court does not have jurisdiction. In any event, it is this court which ordered the winding up of the Bargaining Council and appointed the liquidator. It has the duty to oversee that the winding up is properly done and that the monies are distributed. It also has the duty to give directions to the liquidator when it is necessary to do so. I therefore accept that the applicant does have *locus standi* to bring this application.

Who should have brought the application?

9. The second applicant's contention is that the second respondent (liquidator) should have brought this application. It was submitted by Mr Soni for the second applicant that the liquidator must take the direction of the court as he has no discretion. The basis for this submission is that his appointment is statutory accordingly, in case of doubt, the court should be approached for guidance. It was submitted that the liquidator should detach himself from the parties. Much criticism has been leveled against the liquidator regarding the application. The criticism raised does not contribute to the decision the court has to make in this matter. However, I agree with Mr Watt-Pringle that it does not matter who brought this application. The court needs to deal with the real issues that caused the second applicant to approach the court. I therefore decline to decide as to who should have brought the application.

Does the second applicant have *locus standi*

10. I should point out at the outset that the respondents do not contend that the second applicant does not have locus standi.

11. The role of the Department of Labour cannot be underestimated. The Registrar of Labour Relations within the Department of Labour plays a pivotal part in the registration of Bargaining Councils (Section 29 of the LRA). He has authority to refuse the registration of the Bargaining Council if it fails to meet the legal requirements for registration. The registrar has to monitor the monies invested by the Council. Section 53(5)(d) provides that the monies that is surplus may be invested in any manner approved by the registrar. The registrar has to keep an eye on the financial position of the Council (Section 54).

12. Section 59(1)(b) of the LRA confers the right to the registrar to apply to court for the winding up of the Bargaining Council. The registrar has the same power to approach the court for the winding up of the trade unions or employers organisations. There cannot be any doubt that the Department of Labour does have an interest in the matter. I find that the applicant does have *locus standi* to safe guard the public funds held by the Bargaining Council. (*See KZN South Coast Accom Ass v Bargaining Council for Liquor, Catering & Accom Trades (2004) 8 BLLR 762 (LC) at page 765 para 23*). Besides that, the second applicant performs its functions in the public interest in order that whatever is done is done properly. (*See Pepcor Retirement Fund v Financial Service Board 2003 (6) SA 38 at page 48 para 14*)

Meaning of Section 59(5) of the LRA

13. The gist of the dispute relates to Section 59(5) of the LRA as well as

clause 36.5 of the constitution of the Bargaining Council.

14. Section 59(5) of the Labour Relations Act provides that:

“If after all the liabilities of the Council have been discharged, any assets remain that cannot be disposed of in accordance with the Constitution of that Council, the liquidator must realise those assets and pay the proceeds to the Commission for its own use”

15. In terms of this section, the CCMA gets the money by default.

16. This raises a question as to what this section really means. The principles of interpretation provide that words must be given their ordinary meaning. There is no need to resort to an interpretation of a section, generous, purposive or otherwise where there is no uncertainty as to its meaning. (*See Rashavha v Van Rensburg (2004) 1 ALL SA 168 (SCA) at p172 par 14*) If the intention of the legislature is clear, it has to be followed.

17. In *Geue and another v Notling and others (2003) 4 All SA 553 (SCA) at p562 par b-c* Brand JA stated that courts are not entitled under guise of absurdity, to avoid the legislature’s clear intention because they regard particular consequences to be harsh or even unwise. Once the intention of the legislature is clearly established, it can be dangerous to speculate as to why the legislature would intended a particular result.

18. The provisions of Section 59(5) are clear and do not require any interpretations. It requires that the assets which cannot be distributed in terms of the constitution must go to the Commission.

19. Mr Soni for the second applicant submitted that the balance remaining can not be distributed in terms of the constitution. As an alternative to this, he argued that at least half of the balance can not be distributed in terms of the constitution.
20. Mr Bruinders who appeared on behalf of the first and second respondents submitted that the applicant had consented to the unions getting 50% of the balance. If, on his argument, there is any dispute, it should relate to the other half. He argued that the department may be entitled to 50% of money.
21. Mr Watt-Pringle for the other respondents, submitted that the applicant is not entitled to any money but all the money should be shared by the parties in the Bargaining Council. He submitted that the 50% of the money clearly has to go to the unions and the other to the employer organisation. If the 50% cannot go to the employer organisation then, the unions must get the whole around.
22. I will deal with these different arguments. Before dealing with that, it is necessary to look at the provisions of the constitution with regard to the monies remaining when the Council is wound up.
23. Section 30(1)(q) provides that the constitution of the Bargaining Council must provide for a procedure by which it may be resolved to wind up. Clause 36 of the constitution provides that “the Council may be dissolved at any time by its own resolution to that effect. Upon such dissolution or at any time if for any reason the Council is unable to continue to function, it shall be wound up and the following provisions shall apply to the winding-up:”

24. Clause 36.5 deals with the manner of distribution of the monies remaining after payment of debts. The clause provides the following:

“After payment of all debts in accordance with clause 36.4, and if upon the expiry of the said period of two (2) years in terms of clause 36.1, the affairs of the Council have already been wound up and its assets distributed, the balance of the funds, if any, are to be paid 50% to the employer’s organisations of the Council.”

25. The employers and the unions are equal partners in the Bargaining Council. It is for this reason that the funds are distributed equally. The funds came from the contributions of members.

26. Mr Soni submitted that at the time of the winding up of the Bargaining Council, there was no employer party. The party that remained was the union. As clause 36.5 contemplates the existence of both parties, it is not applicable where only one party exists. It follows therefore, on his argument, that clause 36.5 is rendered in effective and therefore Section 59 (5) kicks in.

27. I agree that there needs to be the employer and the employee party for Clause 36.5 to apply. Clause 3.11 defines “party or parties” to mean employers’ organisations and the trade unions which are parties to the Council from time to time.

28. It was submitted that the employer party resigned and therefore no employer party existed at the time the debts were paid. On this argument, the time for the determination of parties to the Bargaining Council is at the

time the debts had been paid.

29. There is no merit in the argument that because the employer party had resigned, the unions as well have to forfeit their contributions. The employee party never resigned and they remained being members of the non-functional Council. In a letter dated 21 July 2004 appearing at p344 and p345 marked "JD3", the second applicant stated:

"The Department cannot be regarded as being party to an agreement to the preliminary distribution of the funds dealt with under your jurisdiction as liquidator. I will however admit that from the outset the Department was not and still not opposed to funds being distributed to the unions who were parties to the Council at the time of the winding-up of the Council."

30. The letter was addressed by the second applicant to the liquidator. The clause referred to confirms the contents of the written notes made by the liquidator on 30 March 2004 in which it was recorded that the applicant agreed to the payment of 50% of the funds to the unions.
31. The applicant has now turned around and wants payment of the whole amount and criticises the liquidator for not approaching the court for direction. The criticism is not justified in view of the fact that it led the liquidator to believe that it had no objection to the payment of 50% to the unions. The liquidator was further sent an email dated 30 August 2004 appearing at p349 marked "JD6" in which the 50% of the funds to be paid to the unions was confirmed. This letter was sent after the department had obtained legal opinion. It was only by letter of 2 October 2004 that the applicant came up with the view that the CCMA had to get 100% of the funds.

32. I agree with Mr Bruinders that there is no reason to deny the unions their 50% share of the contributions they had made. To sanction the forfeiture of the contributions by the unions would not contribute to the orderly bargaining process. It seems to me, the unions would have to fight and keep the Council in existence even when it did not serve any purpose for fear of forfeiting the contributions. This cannot be said to be fair when the Council is not serving any purpose.
33. I reject any submission that the unions should lose their contributions. This brings me to the second stage. That is whether the other 50% share should be forfeited by the employer party and go to the CCMA. This is what the applicant wants to happen. Mr Watt-Pringle argued that the applicant is not entitled to receive anything from the money remaining.
34. The Council was not wound up as a result of insolvency as contemplated in Section 60 of the Labour Relations Act. The winding up was as a result of the application made in terms of Section 59(1)(b) of the LRA. Section 59 deals with the winding up where the Council had resolved to wind up or an application has been made to court on the basis that the Council was unable to function.
35. It is common cause that the Council was wound up because the employer party withdrew and the Council became non-functional. The rationale for the argument that the employer party should not get anything is that it resigned and therefore the cause of the Council becoming non-functional.
36. I cannot agree with this argument for the reason that the employer may have resigned as a result of the circumstances beyond its control and for

that reason, withdrew from the Council. The parties who remained in the Council may have caused the resignation.

37. It is not for this court to determine whether the employer party was pushed to resign save to say that the employer party withdrew from the Council on the grounds set out in the application under case No J5389/2000. The file relating to the winding up has been made available to the court.

38. The funds in the Bargaining council belong to those who contributed to it. This includes the employer organisation. The parties accordingly dealt with the surplus funds in clause 36.5 of the constitution. The employer party agreed to take 50% and the employee parties agreed to take the remaining 50%.

39. The assets of the council have to be determined as on the date when the Council ceased to be operative that is, on 11 June 2000. This should be the position with regard to the membership of the council. I will deal with this later.

40. In terms of Clause 36.6 of the constitution, the liabilities of the parties to the council, and their members are limited to their unpaid liabilities (if any) to the Council as at the date on which the resolution for winding up was passed or the date as from which the Council was unable to continue to function.

41. For the purposes of the liabilities, it appears that all parties as at the date the council was unable to function are liable. There can be no justification that with regard to the liabilities, the parties are all liable but when it comes to the distribution of assets, another date should be determined.

42. The constitution of the Council does not deal with the withdrawal of parties and the consequences thereof. It therefore cannot be read into the constitution that a party who withdraws, forfeits the contributions made. There is no provision in the Labour Relations Act providing for the forfeiture of contributions on withdrawal of a member.

43. What the LRA requires the parties to deal with in the constitution is the procedure for the winding up. The question of the remaining funds after the winding up is left to the parties to deal with. If the parties fail to deal with the balance of funds, Section 59(5) kicks in.

44. To determine who are eligible to benefit from the funds, one has to look at the parties at the time the Council ceased to function. The parties are for all intents and purposes, equal partners to the Council and have equal rights to the funds.

45. When the employer party withdrew, it did not manifest any intention to forfeit the contributions. There is no suggestion that the third respondent's withdrawal was *mala fide*. The union parties could not address the third respondent's concerns which led to its withdrawal from the Council.

46. The parties that it, the employer party and the Union parties as owners of the funds, have no problem as to who should get the money. As a result of that they reached a Settlement in terms of which they agreed to distribute the funds in a manner different from the one contained in Clause 36.5 of the Constitution. The parties are entitled to settle any disputes amongst themselves. Accordingly, the parties are entitled to agree on redistribution of the funds.

47. I reject the submission that the parties should be determined as at the time of payment of the funds. I do so for the reason that the parties as at the date the Council ceases to function are liable for liabilities. In my view, that is the cut-off date for the determination of members. The constitution of the Council does not prescribe the period at which membership should be determined. There is no merit in preferring the time that will exclude the third respondent from benefiting from the funds to which it had contributed. As the third respondent was a party at the time the Council ceased to function, it is entitled to the other half.
48. Section 59(5) applies in cases where the constitution of the Council fails to deal with the funds remaining after the payment of the debts or where the parties could not be determined. When the constitution deals with the surplus funds and the members are determined, Section 59(5) does not kick in. In the present case, the surplus funds are capable of being distributed in terms of the constitution.
49. The LRA does not put any penalty on the party withdrawing from the Council. If the applicant's submissions are accepted, it would follow that the third respondent is penalized for withdrawing from the Council. A party cannot be forced to remain a member of the Council. To penalize him with forfeiture of benefits, would amount to forcing that party not to withdraw.
50. On the submissions made and documents, presented, I am satisfied that the applicant is not entitled to the order prayed. As to whether the sixth respondent is entitled to benefit, I have not been called upon to decide that. I will therefore make no ruling.

51. It was submitted on behalf of the applicant that the costs should be included in the costs of the liquidation. I do not agree with that submission. Initially, the CCMA was a party to the proceedings and it withdrew its involvement. The second applicant persisted with the application without the support of the CCMA on whose behalf the money was being claimed. If the CCMA wanted the funds or share thereof, it should have persisted with the application. I am not convinced that costs should be part of the liquidation costs.

52. In the result, the following order is made:-

- (a) The application is dismissed.
- (b) The second applicant is ordered to pay the costs.

Ngcamu AJ

Date of hearing: 2 December 2005

Date of Judgment: 16 January 2006

For 2ND Applicant: Adv V. Soni SC

For 1ST & 2ND Respondent: Adv Bruinders SC

For further Respondents (except respondent 6): Adv C.E Watt-Pringle