IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

CASE NO: PS 74/17

In the matter between

THE NATIONAL TERTIARY EDUCATION UNION **First Applicant**

NATIONAL EDUCATION, HEALTH AND

ALLIED WORKERS UNION **Second Applicant**

and

NELSON MANDELA UNIVERSITY **Respondent**

Heard: 15 December 2017

Delivered: 19 December 2017

Summary: All the circumstances of a case have to be considered in determining reasonable notice for the termination of a collective agreement of an indefinite duration and an employer may not rely on its delay to justify short notice for the cancellation of a collective agreement.

JUDGMENT

Lallie, J

Introduction

[1] The applicant brought this urgent application for an order mainly on the following terms:

"2 Declaring that:

2.1 the notice of termination of the Conditions of Service and Benefits Collective Agreement ("the Agreement") given by the respondent on 27 November 2017 is in breach the requirements of section 23 (4) of the Labour Relations Act 66 of the 1995 ("LRA") and accordingly unlawful and of no force and effect;

2.2 the Agreement and all the Applicant's rights flowing therefrom endure unless and until the Respondent terminates the agreement after giving such notice as the Honourable Court deems reasonable;

2.3 unless and until the Agreement is cancelled after the giving of the notice stipulated in Prayer 2.2 above, it remains of full force and effect.

3. Directing the Respondent to withdraw the notice purporting to terminate the Agreement with effect from 31 December 2017.

(a) Directing that the orders sought in players 2and 3 above to be final in effect".

[2] The application is opposed by the respondent which challenged both the non-joinder of the National Education Health and Allied Workers Union (NEHAWU), a trade union which is also a party to the Conditions of Service and Benefits Collective Agreement ("the COS/ collective agreement") and the urgency of this application. The former objection was withdrawn after NEHAWU applied to join as a party on the basis that it is equally affected by the notice of the termination of the COS. The COS is a tripartite collective agreement whose parties are the respondent (NMU), as the employer and the applicant and NEHAWU, the trade unions which represent organised labour at NMU.

[3] The respondent challenged the urgency of this application on the grounds that the urgency is self created. The respondent submitted that the applicant received the notice of the termination of the COS on 27 November 2017. In terms of the notice the

COS would be terminated effect from 31 December 2017. The applicant served the application on the respondent on 11 December 2017 and gave the respondent until 17h00 on 13 December 2017 to file opposing papers. The time frames set by the applicant prejudiced the respondent by affording an unreasonably short period within which to file the answering affidavit. By not filing the application earlier, the applicant created the urgency it sought to rely on justifying the dismissal of the application. In the founding affidavit the applicant denied the respondent's assertion and submitted that the cancellation of the COS would terminate the 2016/17 negotiating cycle summarily while a number of issues pertaining to wages, salaries and conditions of service are still on the table.

[4] The applicant amplified its grounds of urgency in the replying affidavit. The respondent objected to the introduction of the amplified grounds on the basis that the applicant should have stated all the grounds for urgency in the founding affidavit. I have considered the arguments on behalf of both parties on the issue of urgency. On 27 November 2017 the respondent gave the applicant notice of the termination of the COS with effect from 31 December 2017. The notice period is 26 court days. The respondent therefore afforded the applicant 26 court days within which to launch this application. On 6 December 2017 the applicant's attorney addressed a letter to the respondent in which the withdrawal of the termination notice was demanded by the following day failing which this application would be brought. On the same day the respondent's legal adviser phoned the applicants attorney and the issue was discussed. On 7 December 2017 the respondent intimated its refusal to withdraw the notice and on 11 December 2017 this application was served on the respondent. The 26 days the applicant had to launch this application coupled with the attempts to resolve the dispute between the parties before this court was approached rendered the period the applicant gave the respondent to file the answering affidavit reasonable. The conclusion that the applicant created the urgency is untenable. The applicant instead reacted to the urgency that was created by the respondent. The averments

made by the applicant in the founding affidavit have sufficiently proved the urgency of this application.

[5] The factual background to this dispute is that after the January 2005 merger of the Port Elizabeth Technicon, Vista University and the University of Port Elizabeth to form the Nelson Mandela Metropolitan University which was renamed the NMU, the respondent as the employer entered into a recognition agreement with the respondent on 5 May 2006. The respondent, applicant and NEHAWU entered into the COS on 16 April 2012 with a view to finalise conditions of service in respect of conditions of service negotiations in 2011/2012. The COS is binding on all permanent employees of the NMU in grades 5 to 18 including those employed after the COS had been signed. The conditions of employment provided for in the COS include acting allowances, relocation allowances, secondment policies, housing benefits, retirement benefits, medical aid benefits, study benefit, long service awards personal protective equipment, inter campus transport, research leave, sabbatical leave, maternity leave, sick leave, study leave, and family responsibility. They are incorporated in the contracts of employment of employees in grades 5 to18.

[6] Clause 1 of the COS records its duration as follows:

"DURATION

1.1 This Agreement will remain valid from the date of approval by Council with no predefined expiry date.

1.2 The review of this Agreement must be conducted and finalised as part of salary negotiations and in terms of the NEGOTIATING FORUM AGREEMENT; this applies equally to single-and multi-year salary agreements.

1.3 This Agreement constitutes a living document to be reviewed as part of

salary negotiations and will serve as such until, by mutual agreement and as part of a negotiated settlement between unions and Management, any change is approved by Council".

[7] In implementing of the COS and in line with the recognition agreement, the parties would raise issue before the commencement of annual salary negotiations. Those issues would form the subject matter of further negotiations and review. The applicant submitted that the respondent reneged on its undertakings in terms of the COS and agreements which formed part of the review process. The conduct led the applicant to refer 2 disputes to the NMU Ombud who on both occasions found the NMU wanting. The applicant further referred disputes against the respondent to the CCMA. Those disputes have not yet been resolved. The respondent denied having breached the COS and submitted that disputes that were referred to the Ombud pertained to the proper interpretation of the calculation of the wages formula on the COS. Both the Ombud and the CCMA, so argued respondent, are alternative remedies available to the applicant.

[8] The applicant submitted that after the 2 disputes were resolved by the Ombud, it came to its attention on 23 June 2016 that the respondent had breached the COS by introducing a Category D pension classification in the packages of the newly appointed employees. The change had the effect of depriving them of the respondent's contribution to their pension benefit. Aggrieved by the respondent's conduct applicant filed a dispute and threatened to approach this court for relief. The dispute was, however, resolved between the parties and the respondent agreed, in a meeting held on 21 November 2017, to withdraw the Category D pension membership with immediate effect. The applicant's joy was short lived in that on 27 November 2017 the respondent issued the notice to terminate the COS with effect from 31 December 2017.

[9] Section 23 (4) of the LRA requires a party to a collective agreement which has

been concluded for an indefinite period to give reasonable notice in writing to the other parties when terminating the agreement. It is common cause that reasonable notice as envisaged in section 23 (4) of the LRA is correctly interpreted in *SA Federation of Civil Engineering Contractors & another v National Union of Metalworkers of SA & others*[1] where it was held that reasonable notice depends on the nature of the collective agreement and the facts and circumstances of each case. The applicant seek a final interdict and has to prove that it has a clear right, reasonable apprehension of harm or actual harm that has been committed and the absence of any other satisfactory remedy.

[10] The respondent submitted that the applicant has no clear right to the relief it is seeking as the applicant did not make out a case in its papers to establish that the notice given by the respondent was insufficient as required in section 23

(4) to afford the parties a reasonable period to attempt to negotiate for purposes of sustaining the collective agreement. The applicant failed to illustrate why it needs a longer period and how a long period would yield a different outcome in the current negotiations between the parties. This argument is not factually correct because the applicant has submitted in the founding affidavit that a month's notice to cancel a collective agreement which has been operating for about 12 years and is still operating is not reasonable. The collective agreement has in fact been operating for about 5 years. The applicant added that several disputes concerning the COS are pending before the CCMA and the cancellation of the COS will extinguish the respondent's need to defend itself against those claims. The period for which the collective agreement has been in existence is material. I have considered the respondent's argument that the termination of the COS will not affect the disputes pending before the CCMA. I disagree and accept the applicant's argument that after the termination of the COS the CCMA may refuse to entertain the pending disputes because their outcome would be academic. Even if the CCMA may consider those disputes and

[1] (2013) 34 ILJ 2084 (LC)

issue awards it will not be possible to implement the awards. The applicant has a right to the resolution of the disputes which are pending before the CCMA and that right has to be protected from being violated by the termination of the COS. A further reason given by the applicant is that the termination on the COS on 31 December 2017 will terminate the 2016/2017 negotiating cycle while a number of important issues are still on the table.

[11] The respondent further defended the reasonableness of the notice by arguing that at the time the termination notice was issued the applicant was in material breach of the same collective agreement as it had withdrawn from negotiations. It failed to attend a meeting on 10 November 2017 and the parties to the collective agreement could not take decisions in the applicant's absence. The respondent's termination therefore, so went the argument was acceptance of the repudiation which brought the agreement to an end. The applicant denied having withdrawn from negotiations and repudiating the collective agreement. The respondent's argument is devoid of legal basis because section 23 (4) of the LRA is prescriptive. It requires termination of a collective agreement which has been entered into for an indefinite period to be in writing. It may not be inferred. None of the conduct which the respondent sought to rely on justify the violation of the applicant's right to a reasonable notice of the termination of the collective agreement. It is further impermissible for the respondent to rely on the delay caused by the referral of disputes to the Ombud and the CCMA to justify the months' notice. The applicant may not be punished for exercising its right enshrined in the collective agreement to approach both the Ombud and the CCMA. The respondent may not decide after 10 months' negotiations that a stalemate which warrants the termination of the collective agreement on a month's notice had been reached.

[12] The respondent did not refute the applicant's averment that in implementing the COS the parties would raise issues which would form the subject matter of further negotiations before the commencement of annual salary negotiations. The practice is

consistent with the recognition agreement. The respondent failed to raise the issue of the termination of the collective agreement before the commencement of annual salary negotiations thus violating the applicant's right to prior notice.

[13] The respondent denied that the notice of termination of the collective agreement was issued unlawfully and that although it had been taken by the EXCO it was subsequently ratified by Council on 13 December 2017. I accept the applicant's argument that the collective agreement is silent on the role of
the EXCO and has expressly given the power to issue the termination notice to the Council. When the EXCO purported to give the notice of termination, it acted unlawfully and ratification may not be relied upon to cure unlawful actions.

[14] The applicant has a reasonable apprehension of harm in that should the collective agreement be terminated on 31 December 2017, disputes pending before the CCMA will be meaningless, rights of the applicant's members may be negatively affected and the respondent will be unlawfully relieved of the responsibility to participate in the resolution of those disputes. The applicant will further be denied of the opportunity of persuading the respondent to either preserve the collective agreement or reach alternative agreements which may enhance the parties' relationship. The applicant has no alternative satisfactory remedy as this court has the necessary jurisdiction to grant the declarator sought by the applicant.

[15] In exercising the discretion whether to grant interdict I have taken into account all the circumstances of this case including the large number of employees who will commence employment at the respondent in January 2018 and the impact of the respondent's obligations in terms of the collective agreement. It is common cause that the employment terms and conditions prescribed in the collective agreement will put a strain on the respondent's finances. The respondent was required to have foreseen the impact of the employment of these employees earlier and issued the notice of the termination of the collective agreement. The respondent's delay in issuing the notice cannot be visited on the applicant. The indefinite nature of the collective agreement,

the five year period in which it has been implemented and the circumstances surrounding the issuing of the notice of termination rendered the months' notice unreasonable. For these reasons, I am satisfied that the applicant has made out a case for the relief the applicant is seeking.

[16] The applicant sought a costs order against the respondent. The parties have a continuing relationship and a costs order will, in the circumstances not be appropriate.

[17] In the premises, the following order is made: Order:

1. The notice of termination of the Conditions of Service and Benefits Collective Agreement given by the Respondent on 27 November 2017 is in breach the requirements of section 23 (4) of the Labour Relations Act 66 of the 1995 is unlawful and of no force and effect.

2. The Conditions of Service and Benefits Collective Agreement and all the Applicant's rights flowing therefrom endure unless and until the Respondent terminates the agreement after giving reasonable notice.

3. Unless and until the Conditions of Service and Benefits Collective Agreement is cancelled after the giving of the notice stipulated in paragraph 2 above, it is of full force and effect.

4. The notice purporting to terminate the Conditions of Service and Benefits Collective Agreement with effect from 31 December 2017 is unlawful and of no force and effect.

5. No order is made as to costs.

Z Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Dyke SC with Advocate Grogan Instructed by Brown Braude & Vlok Inc

For the Respondent: Advocate Steenkamp Instructed by Cliff Dekker Hofmeyr Inc