REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1437 / 2013

In the matter between:

KOMATSU SOUTHERN AFRICA (PTY) LTD **Applicant**

and

NATIONAL UNION OF METALWORKERS OF

SOUTH AFRICA **First Respondent**

INDIVIDUAL RESPONDENTS AS LISTED IN

ANNEXURE "A" TO THE NOTICE OF MOTION **Second Respondent**

Heard: **30 August 2013**

Delivered: 17 September 2013

Summary: **Strike – whether protected or unprotected – requirements relating to the strike notice in terms of Section 64(1)(b) – issue in dispute must be articulated in notice**

Strike – regulation of issue in dispute by collective agreement – application of Section 65(3)(a) – meaning of regulate for the purposes of this Section

Collective bargaining – centralized bargaining at sectoral level in MEIBC – consequences to plant level bargaining – application of Section 65(3)(a)

Collective bargaining – requirement of orderly collective bargaining – right to strike to be considered in such context

Strike – issue in dispute – demand for full time shop steward – demand not valid – no compliance with Chapter III

Conditions of employment – meaning of – regulated by MEIBC main agreement – plant level collective bargaining on conditions of employment impermissible

Interdict – clear right shown – rule nisi confirmed

JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter came before me on the return date of a rule nisi granted on 4 July 2013 in respect of an urgent application brought by the applicant in terms of which the applicant sought to interdict and restrain the second to further respondents from behaving unlawfully during the course of strike action they had embarked upon. The applicant further sought a declaratory order to the effect that the strike action of the second to further respondents embarked upon on 28 June 2013 was unprotected. An interim order (rule nisi) in the above terms sought by the applicant was granted by Rabkin-Naicker J with the return date being 30 August 2013. The applicant has now, on such return date, sought a final confirmation of this rule nisi, as a whole. The respondents have opposed this application for confirmation of the rule nisi and have requested that the rule nisi be finally discharged.

[2] As the relief sought is that of final relief, the applicant must satisfy three essential requirements which must all be shown to exist in order to get relief, being: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[1]

[3] At the crux of the matter lies two issues. The first issue is whether or not the strike action of the second to further respondents was unprotected by virtue of the application of Section 65(1)(a) and/or 65(3)(a) of the LRA. The second issue was whether the strike notice given to the applicant by the first respondent on 25 June 2013 in terms of Section 64(1) (b) of the LRA was a valid and lawful notice. There was also the peripheral issue of the confirmation of the rule relating to the violent and unlawful behavior of the individual respondents during the currency of the strike before it was interdicted by the rule nisi.

[4] This matter has been fully ventilated by way of the original founding affidavit, a

[1] *Setlogelo v Setlogelo* 1914 AD 221 at 227 ; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) at para 20 ; *Royalserve*

supplementary affidavit by the applicant, answering and supplementary answering affidavits by the respondents, and a replying affidavit. Insofar as factual disputes may arise from all these pleadings, I will apply the normal principles to resolve such factual disputes in motion proceedings where final relief is sought as enunciated in the judgment of *Plascon--Evans Paints v Van Riebeeck Paints.*[2] In *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another*[3] this test was most aptly described, where the Court said: 'The applicants seek final relief in motion proceedings. Insofar as the disputes of fact are concerned, the time-honoured rules …. are to be followed. These are that where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected.' The factual background determined on the basis of this test is now set out hereunder.

Factual background

[5] The business of the applicant is that of the sale and distribution of construction, mining, utility and forestry equipment to customers. The applicant also provides

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Cleaning (Pty) Ltd v Democratic Union of Security Workers and Others (2012) 33 ILJ 448 (LC) at para 2.

[2] 1984 (3) SA 623 (A) at 634E-635C ; See also *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) paras 26 – 27 ; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) para 38 ; *Geyser v MEC for Transport, Kwazulu-Natal* (2001) 22 ILJ 440 (LC) para 32 ; *Denel Informatics Staff Association and Another v Denel Informatics (Pty) Ltd* (1999) 20 ILJ 137 (LC) para 26.

[3] 2009 (3) SA 187 (W) para 19.

support services to purchasers of this equipment. The applicant has a number of branches throughout the country.

[6] The business of the applicant resorts under the scope and jurisdiction of the Metal and Engineering Industries Bargaining Council ("MEIBC"). The MEIBC is regulated by a collective agreement which determines wages and conditions of all employees employed by employers in the industry. This collective agreement is hereinafter referred to as the "main agreement" of MEIBC.

[7] Although the workplace of the applicant is to some extent unionized, it appears that the first respondent is a minority union and it is in issue whether it is even sufficiently representative. Be that as it may, the first respondent is not a recognized trade union at the applicant, it does not have any organizational rights at the applicant, and it is not the recognized bargaining agent for employees at the applicant.

[8] The main agreement of MEIBC prescribes centralized collective bargaining at sectoral level where it comes to wages and conditions of employment of employees in the industry. This takes place from time to time, as the respective periods of currency of the main agreement come to an end. In this process, the employee party representatives (the trade unions) collectively table their demands on wages and conditions of employment for employees in the industry at this central level in the MEIBC, and the employer representatives (the employers' organizations) do the same. No individual demands on wages and conditions of employment are presented to individual employers in the industry at plant level.

[9] Collective bargaining then follows at industry level on these collective wage and conditions of employment demands, and if agreement cannot be reached, industrial action at industry level also follows. Once agreement has been reached, a

collective agreement is also concluded at industry level on the agreed changes to wages and conditions of employment, and these changes are then incorporated into the main agreement and extended to all the non parties in the industry by way of Section 32 of the LRA. A period of currency of these provisions are also determined.

[10] Of particular relevance to the current matter, the current main agreement was concluded on 18 July 2011. The main agreement has a period of validity of three years, which comes to an end on 30 June 2014. The main agreement determines actual wages and conditions of employment for all employees in the industry until 30 June 2014. The main agreement further prescribes that all collective bargaining on wages and conditions of employment for employees in the industry shall only be done at a central (sectoral) level, and not at plant level. This prescription can be found in clause 37 of the main agreement which reads:

> '(1) Subject to sub clause 2 –
>
> (a) the Bargaining Council shall be the sole forum for negotiating matters contained in the Main Agreement.
>
> (b) During the currency of the Agreement, no matter contained in the agreement may be an issue in dispute for the purpose of a strike or lock-out or any conduct in contemplation of a strike or lock-out.
>
> (c) Any provision in a collective agreement binding on an employer and employees covered by the Council, other than a collective agreement concluded by the Council, that requires an employer or a trade union to bargain collectively in respect of any matter contained in the Main Agreement, is of no force and effect.

(2) Where bargaining arrangements at plant and company level, excluding agreements entered into under the auspices of the Bargaining Council, are in existence, the parties to such arrangements may, by mutual agreement, modify or suspend or terminate such bargaining arrangements in order to comply with subclause (1). In the event of the parties to such arrangements failing to agree to modify or suspend or terminate such arrangements by the date of implementation of the Main Agreement, the wage increases on scheduled rates and not on the actual rates shall be applicable to such employers and employees until the parties to such arrangement agree otherwise.'

[11] Reference must also be made to clause 36 of the main agreement, which reads:

'(1) This Bargaining Council shall, within the sector and area in respect of which it has been registered, endeavour, by the negotiation of agreements or otherwise, to prevent disputes from arising, and to settle disputes that have arisen or may arise between employers or employers' organisations and employees or trade unions, and take such steps as it may think expedient to bring about the regulation or settlement of matters of mutual interest to employers or employers' organisations and employees or trade unions. Any dispute concerning the interpretation, application or enforcement of this Agreement shall be dealt with in accordance with subclause (2) below.

(2) For the purposes of sub-clause (1) above the Council shall follow the procedure set out in the Metal and Engineering Industries Dispute Resolution Agreement, published under Government Notice R.836 in Gazette 29122 dated 18 August 2006 (subclause 2 substituted by G.N. R.77 dated 2 February 2007).'

[12] The MEIBC then has a specific dispute resolution process,[4] which in terms of clause 4.1 prescribes a negotiating procedure which must be followed if changes to wages and conditions of employment in the industry are being sought. This procedure specifically contemplates such disputes being dealt with at Council level.

[13] As to substantive issues in the main agreement, and in addition to specifically determining remuneration (wages), the main agreement specifically determines a number of conditions of employment. These are working hours, overtime and Sunday work, shift work and benefits, maternity leave, leave and leave payments, sick leave and sick leave payments, incentive bonus work, allowances,[5] severance pay, and a provident / pension fund.

[14] It appears that at some stage in April 2013, the first respondent proceeded to table a number of demands relating to conditions of employment of its members at the applicant, to the applicant, at plant level in the applicant. These demands related to a medical aid, housing subsidy, profit share, long terms service awards, a 15% salary adjustment and a full time shop steward. It further appears that these demands remained unresolved and a mutual interest dispute was referred by the first respondent to the MEIBC. The dispute remained unresolved at the MEIBC and a certificate of failure to settle was issued by the MEIBC on 25 May 2013.

[15] Further discussions ensued between the applicant and first respondent but still the issues in dispute remained unresolved. Then, on 25 June 2013, the first respondent gave notice by e-mail to the applicant to the following effect:[6]

> 'You promised to come back to us by no later than 12h00 of the 21st June 2013.

[4] As promulgated in Government Notice GN 235 as contained in Government Gazette no 33060 dated 1 April 2010 and valid for five years until 31 March 2015.
[5] This includes travelling and subsistence allowances, abnormally dirty work allowance and height allowance
[6] Bundle page 26

Kindly be advised that our strike will start on the 28th June 2013.' (sic)

It is immediately clear that no issue in dispute was articulated in this notification.

[16] The strike action by the second to further respondents indeed started on 28 June 2013. From the outset, the applicant complained about misconduct and unlawful behavior by the striking employees in a letter to the first respondent on 28 June 2013.[7] The particulars of this misconduct and unlawful behavior have been set out in the founding affidavit and supplementary affidavit, and I do not propose to repeat the same in this judgment.[8]

[17] When the misconduct and unlawful behaviour persisted, the applicant brought the urgent application giving rise to these proceedings on 3 July 2013. The applicant's application, as stated above, sought to interdict the unlawful behaviour and misconduct of the second to further respondents. The applicant's application however also specifically took issue with the protected nature of the strike, and the applicant contended that the strike was unprotected because of a defective notice and because the main agreement of MEIBC prohibited collective bargaining and consequently strike action at plant level. The application was opposed by the respondents who filed an answering affidavit, taking issue with the urgency of the application and the contentions that the strike was unprotected, as well as the misconduct by the second to further respondents. Despite this opposition, Rabkin-Naicker J granted a rule nisi on 4 July 2013 as referred to above.

[18] In the answering affidavit, which is dated 4 July 2013, the respondents appear to accept that where it concerns "salary adjustments", this would be covered by the main agreement but the other issues raised would not.[9] These issues are then

[7] Bundle page 27 – 28
[8] See Bundle page 16 – 17 at para 25 ; page 18 para 28 ; page 42 para 10 ; pages 87 – 100
[9] Bundle page 54 para 4.2.1

identified in the answering affidavit as being a medical aid, bursaries, housing allowances, profit sharing, the issue of a full time shop steward and long service awards.[10]

[19] There then appears to have been a meeting between the parties at the CCMA to try and resolve the dispute, which culminated in a further written demand being sent by the first respondent to the applicant on 19 July 2013.[11] This demand repeated the demands above, but now specified some quantums as well. What was demanded was a housing allowance of R4 000.00, profit sharing of 15%, medical aid (70% employer and 30% employees), bursaries and long service awards. Also again included in the demand was that of a full time shop steward. However, and surprisingly, and despite what was recorded in the answering affidavit of 4 July 2013, the respondents changed tack and also demanded a salary adjustment of 15% but now only for "non scheduled" employees.

[20] The applicant has contended in its supplementary affidavit that all the demands in respect of allowances, long service awards, bursaries and benefits in essence relate to remuneration, which is actually regulated and determined by the main agreement of MEIBC. The applicant contends with regard to the full time shop steward issue, the demand was not properly articulated so the applicant could understand what it was, but it would seem that after discussion this demand was not for a full time shop steward per se, but that the applicant recognize the need for a full time shop steward. The applicant further contended that the first respondent only had representivity of 19.7% in respect of scheduled employees and 5.7% in respect of non scheduled employees, and was thus by law not entitled to a full time shop steward.

[10] Bundle page 56 – 57 at para 13.1
[11] Bundle page 101

[21] The respondents, in their supplementary answering affidavit, have contended that the main agreement should be interpreted and applied on a "sui generis" basis. In essence, this contention means that if an issue is not specifically provided for in the main agreement, it is simply not regulated by the main agreement, being a sui generis issue. The respondents have also contended that the issues raised are "job perks" and not remuneration. The respondents did not dispute the applicant's understanding of what is meant by the demand for a full time shop steward and has simply said that this is not a "salary" issue.

[22] The above factual background then constitutes the basis of the determination of the matter now before me.

The issue of the misconduct and unlawful behaviour

[23] I will firstly deal with the issue of the unlawful behaviour and misconduct by the second to further respondents. The applicant has set out in the required detail all the instances of unlawful behaviour and misconduct complained of, as supported by photographic evidence and independent statements. As opposed to this, the respondents have offered really nothing else but bald denials and the ludicrous proposition that if there was unlawful behaviour the SAPS would have intervened. The respondents have also, in my view, offered nothing materially extra in its supplementary answering affidavit despite the applicant providing substantially more detail in its supplementary affidavit. There is nothing on the evidence before me to convince me to contradict the order already given by Rabkin-Naicker J on 4 July 2013 in respect of the unlawful behaviour and misconduct by the second to further respondents.

[24] In my view, the version (or better put a lack of it) of the respondents as to the issue of the unlawful behaviour and misconduct by the second respondents is nothing more

than obviously fictitious disputes of fact, lacking in detail, and is palpably implausible. I am of the view that the denial of the existence of such unlawful behaviour and misconduct on the part of the second to further respondents is clearly untenable to the extent that this version obviously stands to be rejected. This is fully in line with the *Plascon Evans* test referred to above.

[25] I accordingly conclude that there is no basis on which not to confirm the rule nisi insofar as it serves in interdict and prevent unlawful behaviour and misconduct on the part of the individual respondents. I shall accordingly confirm the rule nisi in this respect.

The issue of the application of Section 65(3)(a)

[26] What is clear in this matter is that the demands tabled by the first respondent, per se, would constitute matters of mutual interest. In the normal course of events, demands relating to a medical aid, long service awards, profit share and a housing allowance would legitimately constitute demands relating to matters of mutual interest that could form the subject manner of protected strike action if such demands remained unresolved. These are clearly issues of interest, and not of right.

[27] The applicant sought to categorize all these issues as relating to salaries and remuneration of employees, whilst the respondents described these issues as “job perks”, and thus “benefits” as defined by law and thus not remuneration. In the end, and for the purposes of the determination of the question at stake in this matter, it does not matter if these individual demands tabled by the first respondent are issues of remuneration, or constitute benefits. The fact is that remuneration and benefits both constitute conditions of employment of employees. The conditions of employment of employees encompass remuneration, benefits, and the material

employment duties and terms of employees with the employer. In *Staff Association for the Motor and Related Industries (SAMRI) v Toyota of SA Motors (Pty) Ltd*[12] it was held as follows:

> 'Any variation to an employee's salary, irrespective of whether it is increased or decreased, amounts to a change in the basic terms and conditions of employment and cannot be effected unilaterally. The use of a motor vehicle by an employee granted by the employer is in my view a quid pro quo for the work rendered and is a form of remuneration. It is in fact part of the employee's salary, albeit on a somewhat different basis. One can well imagine that the motor vehicle benefit scheme offered by the respondent was and still is a serious consideration for several prospective employees when deciding whether or not to take up employment with the respondent company. Any changes to this benefit have the result that the employee's salary or remuneration package is potentially or in fact affected and therefore constitutes a change to the employee's terms and conditions of employment.'

[28] In *SA Municipal Workers Union v Matjhabeng Local Municipality*[13] free transport was held to be a condition of employment whilst in *SA Airways (Pty) Ltd v SA Transport and Allied Workers Union*[14], the Court in referring to Grogan *Collective Labour Law* (Juta 2007) held that conditions of employment: 'must concern the terms under which employees work, or their benefits, rather than a mere 'working practice'. I finally refer to *SA Democratic Teachers Union v Minister of Education and Others*[15] where it was held as follows:

> 'What are conditions of service? The phrase has been considered in the context of s 64(1) of the Industrial Conciliation Act 36 of 1937. See Godwin v Minister of Labour & others 1951 (2) SA 605 (N) and the comment in Wallis Labour and Employment Law (issue 5) para 45 fn 10. Several possible meanings were

[12] (1997) 18 *ILJ* 374 (LC) at 378
[13] (2011) 32 ILJ 1220 (LC)
[14] (2010) 31 ILJ 1219 (LC) at para 32
[15] (2001) 22 ILJ 2325 (LC) para 27

> considered in Godwin. The wider meaning of conditions of employment, on which I shall rely (as it favours the validity of the regulations), comprehends 'all the circumstances of an employee's employment, not merely the legal rights and obligations flowing from the contractual terms, express or implied' (at 609F-G). To this must be added the view of the court that 'the engagement, suspension, discharge, etc, of employees may fall within the ambit of the expression conditions of employment' (at 611D-E).'

[29] What the first respondent thus demanded, in this instance, was the enhancement and improvement of the conditions of employment (service) of its members employed by the applicant. Again, and as a matter of general principle, this would be an entirely legitimate course of action which pursuant to a collective bargaining process could lead to enforcement by way of protected strike action if not agreed to by the applicant as an employer.

[30] Despite the above, the crisp issue that then comes into play in the current matter is the issue of the nature and regulation of the particular industry. The applicant and its employees resort under an industry that regulates the terms and conditions of employment of the employees employed in that industry at a central (sectoral) level. This industry specifically resorts under the scope and jurisdiction of a bargaining council, being the MEIBC. Now it is so that the current main agreement of the MEIBC does not specifically deal with or determine those conditions of employment forming the subject matter of the demands tabled by the first respondent in the current matter and referred to above. This is then where the first respondent's sui generis argument comes in. According to the first respondent, only conditions of employment specifically regulated and determined in the main agreement is regulated at industry level, whilst all other issues would be sui generis and can be regulated and determined at plant level between individual employers and their own employees (as may be represented by trade unions). The question now is whether the nature and structure of the industry and the provisions of clauses 36 and 37 of

the main agreement referred to above contemplates and allows for this "sui generis" situation as contended for by the first respondent.

[31] As stated above, clause 37(1)(a) and (b) of the main agreement records that the bargaining council is the sole forum for negotiating matters contained in the main agreement, and during the currency of the main agreement no matter contained therein may be an issue in dispute for the purpose of a strike. Clause 37(1)(c) renders invalid any provisions in a collective agreement that requires an employer or a trade union to bargain collectively in respect of any matter contained in the main agreement. Added to this, clause 36(1) provides that the bargaining council shall endeavour, by the negotiation of agreements or otherwise, to prevent disputes from arising, and to settle disputes that have arisen or may arise between employers or employers' organisations and employees or trade unions, and take such steps as it may think expedient to bring about the regulation or settlement of matters of mutual interest to employers or employers' organisations and employees or trade unions. A dispute resolution process is prescribed to deal with such issues.

[32] The above provisions in the main agreement, considered as a whole, together with the actual centralized structure of the industry, leaves me with the view that the industry prescribes what can generally be termed to be centralized bargaining. This means that all terms and conditions of employment in the industry can only form the subject matter of collective bargaining at central (sectoral) level in the bargaining council itself. By necessary implication and as a matter of logic, any collective bargaining on conditions of employment at plant level with individual employers would be prohibited. The purpose of centralized bargaining is to ensure uniformity and consistency of conditions of employment in an organized industry. This creates a level playing field in an industry where businesses do not complete with one another off the back of the conditions of employment of their employees. Similarly, it prevents individual employers being targeted for further and enhanced conditions of

employment just because such employers may be considered to be larger or financially able or susceptible to agree to the same. This kind of situation and regulation is fully in accordance with one of the primary objectives of the LRA, as enshrined in Section 1, where it is provided as follows:

> 'The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are- (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution; (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation; (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can- (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and (ii) formulate industrial policy; and (d) to promote- (i) orderly collective bargaining; (ii) collective bargaining at sectoral level; (iii) employee participation in decision-making in the workplace; and (iv) the effective resolution of labour disputes.' (emphasis added)

What is clear is that it is one of the primary purposes of the LRA to provide a proper framework within which orderly collective bargaining can take place, with preference being given to collective bargaining at a sectoral level.

[33] The relevant provisions of the LRA which need to be considered in this instance are Sections 65(1) (a) and 65(3) (a), which provide:

> '(1)(a) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out if - (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute; …..

(3) Subject to a collective agreement, no person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or lock-out - (a) if that

person is bound by - (i) any arbitration award or collective agreement that regulates the issue in dispute …. '

The question now simply is – are these Sections applicable in the current matter? If they are, this would be a justified statutory limitation on the right to strike, and the strike action of the second to further respondents in this matter would clearly be unlawful and unprotected, being prohibited by statute.

[34] Now immediately, it must be reiterated that the main agreement does not determine the issues of a housing allowance, profit share, medical aid and long service awards. That means that the substance of the issues raised by the first respondent as matters of mutual interest are not per se determined by the main agreement. But this is not the end of the enquiry. In *Fidelity Guards v PTWU and Others*[16] the Court said, with specific reference to Section 65(3) (a):

> 'I am of the opinion that the phrase "regulates the issue in dispute" refers to a substantive regulation of the issue or a process leading to the resolution of the issue. Must this regulation be comprehensive? Or is it sufficient that the issue be regulated generally by providing for instance, that the issue is settled, at least for the present year of bargaining, or is assigned to a specific process or that an issue is assigned to a particular level of bargaining or to a particular forum? I think that the wider sense is meant here.'

[35] The judgment in *Fidelity Guards* was approved of in *Air Chefs (Pty) Ltd v SA Transport and Allied Workers Union and Others*[17] where the Court said: 'In summary, the learned judge concluded that an issue is regulated if it is contained in a substantive rule, or if the process for dealing with the issue is set out in the regulating agreement. In this case, the parties did agree on a process regulated by a procedure.' A further reference is made to the judgment in *ADT Security (Pty) Ltd v SA Transport and Allied Workers Union*

[16] [1997] 11 BLLR 1425 (LC) at 1433F-H.

and Another[18] where it was held also with specific reference to Section 65(3)(a) that 'the prohibition against a strike action where there is a binding collective agreement is not limited to substantive issue/s in dispute but includes the procedure laid out in the collective agreement.[19]

[36] It is clear from what is set out above that the main agreement in fact does prescribe such a procedure for collective bargaining at a central (sectoral) level, and in that context, also prescribes how collective bargaining on conditions of employment in the industry must take place. In my view, the clear purpose of these prescriptions in the main agreement, as referred to above, is to prohibit any collective bargaining in respect of conditions of employment of employees in the industry at plant level at individual employers, and prescribes only centralized bargaining at a sectoral level in this respect. This is fully in line with what the Court said in *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another*[20] where the Court said:

> ' … the Act seeks to provide a framework whereby both employers and employees and their organizations can participate in collective bargaining and the formulation of industrial policy. Finally, the Act seeks to promote orderly collective bargaining with an emphasis on bargaining at sectoral level, employee participation in decisions in the workplace, and the effective resolution of labour disputes.'

[37] A number of other factors are also pertinent in determining the true purpose of the provisions in clauses 36 and 37 of the main agreement. This is firstly the fact that the industry has a registered bargaining council which in effect ensures compliance with all conditions of employment in the industry through its own inspectorate, and

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[17] (2013) 34 ILJ 119 (LC) at para 27.
[18] (2012) 33 ILJ 2061 (LC) at para 18.
[19] See also *Transnet Ltd v SA Transport and Allied Workers Union and Others* (2011) 32 ILJ 2269 (LC) at para 21 – 24; *Unitrans Fuel and Chemical (Pty) Ltd v Transport and Allied Workers Union of SA and Another* (2010) 31 ILJ 2854 (LAC) at para 18.

the activities of such an inspectorate would be unnecessarily complicated by having different "*sui generis*" conditions of employment bargained and in place at individual employers. Secondly, wages and conditions of employment are actually centrally bargained for the MEIBC, and the outcome of such bargaining process is extended to all non parties that are employers and employees in the industry. The fact is that the fist respondent itself has associated itself with an agreed structure which at its very core seeks to determine wages and conditions of employment at a central (sectoral) level. Thirdly, a dispute process is prescribed to deal with changes to conditions of employment, which requires such issues to be raised at central level in the bargaining council. In the context of these three issues as well, only centralized bargaining at sectoral level in respect of conditions of employment would be functional to collective bargaining in this industry, and consequently strike action would only be functional is embarked upon in terms of this objective. In *SA Federation of Civil Engineering Contractors on behalf of Its Members v National Union of Mineworkers and Another,*[21] the Court said that 'a lawful strike is by definition functional to collective bargaining…' In a similar vein, and in the minority judgment in *SA Transport and Allied Workers Union and Others v Moloto NO and Another,*[22] Maya AJ said:

> '…The volatility of industrial action must, therefore, rank highly among the issues that the Act's primary objects, of promoting orderly collective bargaining and effective resolution of labour disputes, seek to address. It is as well to remember the Act's purposes, amongst others, to achieve peaceful labour relations in an orderly, democratic workplace and a thriving economy and that the right to strike is also an extension of the collective bargaining process. An interpretation that results in chaos and disturbs the desired balance of labour relations that is fair to both employees and employers is untenable.'

[20] (2003) 24 ILJ 305 (CC) at para 26
[21] (2010) 31 ILJ 426 (LC) at para 21.
[22] (2012) 33 ILJ 2549 (CC) at para 33.

In my view, and to permit plant level collective bargaining in the industry in respect of conditions of employment of employees would fly in the face of all the objectives set out in the above dictum. The majority judgment in *Moloto* held:[23]

> 'Another feature of the right to strike is that it is an integral part of the collective bargaining process. As noted in *Bader Bop*, the committees engaged with the supervision of the ILO conventions have asserted that the right to strike is essential to collective bargaining. This was also recognized in the First Certification case.'

[38] The right of trade unions and employees to strike must thus not be considered in isolation and an end in itself. It must always be considered as part and parcel of and specifically in the context of, the process of collective bargaining. In the current matter, that process of collective bargaining is specifically described and determined in the main agreement, and requires centralized bargaining on wages and conditions of employment at sectoral level. In the context of the right to strike as being part and parcel of the collective bargaining process, the Court in *SA Airways (Pty) Ltd v SA Transport and Allied Workers Union*[24] held that:

> '...The structure of the Act is one in which the right to strike is drawn from the institution of collective bargaining. The right to strike, fundamental as it is, is thus not an end in itself - the resolution of disputes through collective bargaining remains the ultimate objective.'

[39] I find the following dictum on *National Police Services Union and Others v National Negotiating Forum and Others*[25] particularly apposite in arriving at a proper determination of the question I have to answer, where the Court held as follows:

[23] (2012) 33 ILJ 2549 (CC) at para 59
[24] (2010) 31 ILJ 1219 (LC) at para 22.
[25] (1999) 20 ILJ 1081 (LC) at para 52.

> 'The LRA adopts an unashamedly voluntarist approach - it does not prescribe to parties who they should bargain with, what they should bargain about or whether they should bargain at all. In this regime, the courts have no right to intervene and influence collectively bargained outcomes. Those outcomes must depend on the relative power of each party to the bargaining process.'

[40] Based on the above, first prize in a regulated industry in which wages and conditions of employment are determined by collective bargaining on a centralized basis and at sectoral level, has to be that plant level collective bargaining on conditions of employment must be excluded. Otherwise, the very objectives of the sectoral level collective bargaining structure voluntarily arrived at and defined by all the influential stakeholders in the industry is undermined, and there will be no successful achievement of orderly collective bargaining at sectoral level as one of the fundamental objectives of the LRA. To put it simply, the parties in the industry at a sectoral level should know what the employees want and need, and what the employers can afford to give, and this must be allowed to prevail. The judgement in *Kem-Lin Fashions CC v Brunton and Another*[26] in this respect is quite apposite, where it was held as follows:

> '[The purpose of the Act is stated in s 1 to be the advancement of economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of the Act. One of the primary objects of the Act is to provide a framework within which employees and their trade unions, on the one hand, and, employers and employers' organizations, on the other, can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest (s 1(c) (i)) ….

The Act seeks to promote the principle of self-regulation on the part of employers and employees and their respective organizations. This is based on the notion that,

[26] (2001) 22 ILJ 109 (LAC) at paras 17 – 18

whether it is in a workplace or in a sector, employers and their organizations, on the one hand, and employees and their trade unions, on the other, know what is best for them, and, if they agree on certain matters, their agreement should, as far as possible, prevail.'

[41] The Courts have on occasion dealt with the very issue of whether strike action is protected in instances where centralized collective bargaining at sectoral level is in place but nonetheless plant level collective bargaining in an individual employer is pursued by a trade union. I shall next deal with all of these authorities. Firstly and in *Unitrans Fuel and Chemical (Pty) Ltd v Transport and Allied Workers Union of SA and Another*[27] it was held as follows:

> 'The appellant relies on three collective agreements viz (i) the main collective agreement; (ii) the dispute-resolution collective agreement; and (iii) the provident fund collective agreement. The main collective agreement provides in clause 50(1) and (3) that:
>
> '(1) The forum for the negotiation and conclusion of substantive agreements on wages, benefits and other conditions of employment between the employers and employers' organisations on the one hand and trade unions on the other hand, shall be the council....
>
> (3) No trade union or employers' organisation shall attempt to induce or compel, or be induced or compelled by, any natural or juristic person or organisation, by any form of strike or lock-out to negotiate the issues referred to in subclause (1) above at any level other than the council.'

It is clear that in terms of this clause all and any negotiations in relation to wages and substantive issues must be negotiated at the bargaining council and that neither party may resort to industrial action (strike or a lock-out) concerning these

issues. The main collective agreement also goes on to define 'substantive issues' as 'all issues involving costs and affecting the wage packets of employees'.

According to the appellant the first three demands of the first respondent, described as 'wage discrepancies'; 'wage reduction' and 'coupling R500 pw' are all related to and connected with wages and are substantive issues and as such the first respondent is prohibited in terms of clause 50(1) and (3) read with s 65(1)(a) and (3)(a) (i) from calling upon its members to strike in order to secure these demands. I accept that where a demand is made for an increase in remuneration or for remuneration to be paid in relation to a particular aspect of employment such demands relate to wages and are substantive issues. If the demands as we have them here are about wages and substantive issues then, as appellant has properly argued, the first respondent is prohibited from calling on its members to embark on a strike in respect of those issues.'

The judgment in *Unitrans* makes it clear that in the context of prescribed centralized bargaining at sectoral level, a demand at plant level that would have the result of enhancing remuneration (with the phrase applied in its most general terms) in an individual employer would not be permitted any strike action at such an individual employer would be prohibited. I agree with this reasoning.

[42] The Court in *Cape Gate (Pty) Ltd v National Union of Metalworkers of SA and Others*[28] specifically considered and determined the very provisions of the MEIBC main agreement at stake in the current matter now before me. The Court concluded as follows with specific reference to clause 37:[29]

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[27] (2010) 31 ILJ 2854 (LAC) at para 16 and 18
[28] (2007) 28 ILJ 871 (LC) at para 38.
[29] Id at para 38 – 40

‘The objective underlying the clause is to ensure that negotiation of such matters takes place only at the level of the bargaining council and in no other forum, such as at plant level. It is also to preclude any strike action over such matters while they continue to be regulated by the main agreement. The clause would make little sense if it had the effect now contended for on behalf of NUMSA, namely that where wage increases are determined in the main agreement, employees and their unions are free to agitate for further increases by way of plant level negotiation and ultimately strike action. This would be subversive of the objective of promoting collective bargaining at the level of bargaining councils and the effectiveness of their agreements. This would not accord with the clear and worthy objectives of the LRA. Accordingly the interpretation which is advanced on behalf of NUMSA cannot be sustained.

Under clause 1 proviso (v) in part II of the main agreement, if an employer such as the applicant decides unilaterally to grant an increase over and above the increase laid down in the main agreement to a particular category of employees, it must consult with the union representing that category. But this does not have the effect of entitling any other category, such as the non-artisans in this matter, to engage in collective bargaining at plant level with a view to obtaining a similar increase for themselves, and when that fails, to embark on strike action. This in my view is a clear violation of clause 37 of the main agreement.

The issue in dispute relevant to the present strike is what wage increase, if any, non-artisans should receive. That seeks to reopen a matter already regulated by the main agreement, for that determined, for the currency of the agreement, the matter of wage increases, in what was agreed to be the exclusive forum, namely the bargaining council.’

In my view, the demand by the first respondent in the current matter for enhanced and improved conditions of employment would squarely resort within the ratio in the judgment of *Cape Gate* referred to above, and this ratio finds proper application in this instance.

[43] I find further support for my reasoning as set out above in the judgment of *SA Clothing and Textile Workers Union and Others v Yarntex (Pty) Ltd t/a Bertrand Group*[30], where it was held as follows, and which can equally be applied in this instance:

> '…. It would appear from the evidence that even where there may at times have been plant-level meetings, or even in fact interim agreements or informal exemptions, this does not render legitimate plant-level collective bargaining or strike action in respect of a wage demand. The constitution expressly prohibits plant-level and subsection-level bargaining and therefore strikes or lock-outs at these levels. This would mean that even if plant-level negotiations did not lead to consensus, wages in the entire section could not be said to have been agreed. The effect of this would be, in accordance with the constitution, that either SACTWU (at all four plants) or all four employers (as part of the employers' association) would be at liberty to embark upon industrial action. The only proviso would be that the requisite number of meetings and other procedural requirements of the constitution had been met. The simple fact of the matter is that, in terms of the constitution, consensus could not be compelled at the individual employers through the parties having recourse to industrial action, whether in the form of a protected strike or a lock-out. In my view this is indeed what the applicants sought to do.'

The Court concluded as follows:[31]

> 'I do not agree that the prohibition of strikes at subsection or plant level violates the fundamental right to strike. Indeed it is correct that the right to strike is guaranteed to every employee, but like other rights entrenched in the Constitution of the Republic of South Africa, it is not an absolute right and is subject to certain limitations. The LRA gives effect to the right to strike in the context of fair labour practices, and does so by creating a framework in which the right is to be exercised. Thus the statutory collective bargaining mechanisms, as well as other means of regulating strike action,

[30] (2010) 31 ILJ 2986 (LC) at para 45 – 46

> are necessary to ensure that the purpose of orderly collective bargaining, as set out in s 3 of the LRA, is met. …. On the facts it is clear that the applicants are not denied the right to strike - they are entitled to exercise this right provided it occurs at the level of the industry, the subsector or the section in which agreement on the demand submitted could not be reached.'

Again, I fully agree with the above reasoning. If the first respondent and its members seek those enhancements to or improvement of the conditions of employment they are now seeking, it must be done at a sectoral level and in the bargaining council.

[44] The Labour Appeal Court in *South African Clothing and Textile Workers Union and Others v Yarntex (Pty) Ltd t/a Bertrand Group*[32] upheld the judgment of the Labour Court referred to above. Several extracts from the Labour Appeal Court judgment in *Yarntex* is pertinent to the current matter, and especially serves to address the "*sui generis*" approach propagated by the first respondent. The Court firstly held as follows:[33]

> 'The submissions made by Mr Freund regarding the absence of a specific provision in the constitution prohibiting a strike, such as the one embarked upon by the appellants is correct. However, I do not agree with the further submission he made that the non-existence of such a provision specifically prohibiting the strike in question renders the strike immune from being declared unlawful and therefore unprotected. If it were so, chaos would reign in the industry. The resultant effect of which would be the selective crippling of those plants which did not conduct their affairs with SACTWU in the fashion adopted by Derlon in this case, i.e. entering into negotiations and concluding private agreements with SACTWU on the determination of wage levels to the exclusion of other role players, such as Bertrand.'

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[31] Id at para 56
[32] Unreported LAC judgment dated 30 April 2013 under case number PA 7 / 10 by Sandi AJA
[33] Id at para 57

In my view, this is precisely the mischief that the "*sui generis*" approach propagated by the first respondent would cause. The fact is that if this kind of conduct is permitted, chaos will reign in the industry, as the first respondent would be entitled to move from employer to employer, articulating different demands as it goes along, whilst still enjoying the overall protection and guarantees provided by the main agreement. This surely cannot be what is intended by prescribed centralized bargaining at a sectoral level.

[45] The Labour Appeal Court in *Yarntex* went further and said:[34]

> 'The constitution is premised on centralised bargaining between NAWTM and SACTWU, the main purpose of which is to create and maintain uniformity in the determination of wage levels so as to ensure that all employers in a given sub-sector or section level in this industry are treated in an equitable fashion. Employers and employees in these sub-sectors should enjoy the same treatment to ensure that employers compete with their counterparts in a fair manner in order to sustain the industry and to prevent job losses.

Any contrary interpretation of the relevant provisions of the Act and the constitution would result in catastrophic circumstances which would be inimical to the operation of the industry in question. Clearly the overarching purpose of the constitution was to avoid fragmentation of the bargaining process. This interpretation of the constitution is in accord with the intentions of the drafters thereof to outlaw plant level bargaining.

My interpretation of the constitution therefore is that the strike in question is not protected by the provisions of constitution. Neither is it protected by the LRA.'

[34] Id at para 58 – 60

The above clearly illustrates the very point I have sought to make above. By regulating conditions of employment at an industry level only, the situation of employers competing with one another in the industry off the back of their employees, so to speak, by providing the least beneficial conditions of employment and thus enabling them to reduce prices, is prevented. Where it comes to conditions of employment of employees in the industry, the playing field is level. Competition is then founded on other factors, such as for example quality of production or marketing or customer service, and not how cheaply an employer can get employees. Also, it prevents the individual targeting of what trade unions would consider to be more affluent employers who may have an appetite to accede to additional demands, which then distorts uniformity across the industry which is the every objective of centralized regulation. To only allow conditions of employment to be collectively bargained as industry level is the only fair and equitable solution in the circumstances of this matter.

[46] The issue of centralized collective bargaining in the security industry was dealt with in the judgment of *ADT Security*[35] and the Court said the following:

> 'The procedure to be followed for negotiations of a collective agreement is set out in clause 8 of the framework agreement. In terms of this clause, proposals relating to terms and conditions of employment within the sector are to be tabled by parties for purposes of negotiations at national level. If an agreement is reached at national level then such an agreement is forwarded to the minister for promulgation into a wage determination.

It has not been disputed that the framework agreement is a binding collective agreement as envisaged in the LRA. The agreement does not lapse with the promulgation of the wage determination by the minister. It continues to exist even after the promulgation and continues to bind the parties to it. Whilst the

agreement does not deal with substantive issues, like wages, it provides for a procedure through which such substantive issues may be tabled for negotiations. In terms of that procedure, parties are required to raise such issues at national level and thus are prohibited from raising them at regional or local level. It is important to emphasize that once an agreement is reached the terms of that agreement are forwarded to the minister for promulgation.

It is thus my view that, in seeking to rely on the distinction between the minimum and the actual wage demand to assert their right to strike, the respondents overlooked the procedural prohibition of strike action as envisaged in terms of s 65 of the LRA. ….'

In my view, the comparisons with the current matter is immediately apparent. The very same kind of dispute resolution process is prescribed by clause 36 of the main agreement as read with clause 4.1 of the dispute resolution process, as referred to above. The point is that all of the demands of the first respondent can only be tabled at bargaining council level in terms of this prescribed dispute resolution process, and cannot be tabled at plant level only in the applicant's undertaking.

[47] I therefore conclude that Section 65(3)(a) indeed finds application in this instance. The issue in dispute forming the subject matter of the respondents' strike in the current matter is an issue as regulated by the process prescriptions of the main agreement of the MEIBC. These process prescriptions prohibit plant level bargaining in an individual employer in respect of conditions of employment (service) of employees. Such issues can only be tabled for collective bargaining at sectoral level in the MEIBC in terms of the dispute resolution process prescribed for this very purpose. The first respondent is prohibited from raising

[35] (*supra*) footnote 18 at para 20 – 22

these issue kind of issues directly with the applicant at plant level, and any strike action pursuant to the same would thus be prohibited. The first respondent's attempted reliance on what it called a "*sui generis*" approach does not defeat what is in my view the clear prohibition imposed by the process prescriptions of the main agreement.

[48] I illustrate the point with some examples of what this "*sui generis*" approach propagated by the first respondent would result in. Assuming that only those conditions of employment specifically regulated in the main agreement would attract the application of Section 65(3) (a), then any trade union can simply think of whatever allowance or benefit they want and go from individual employer to individual employer in the industry demanding the same, and then initiating strike action if such employers do not agree. This surely cannot be consistent with the objective of orderly collective bargaining at sectoral level in the industry, and would be contrary to the very basis on which the principal stakeholders in the industry organized themselves. Centralized collective bargaining at sectoral level will in effect serve no purpose. The situation is made even worse by the fact that there can be no end to these demands, even at one employer. Today the trade union demands a housing allowance and profit share. Once this is resolved, it then demands a clothing allowance and a daily food allowance. Once this is resolved, it is followed by a demand for a travel allowance and fully subsidized medical aid. And so on. This will cause that kind of chaos to ensue as enunciated by the Labour Appeal Court in *Yarntex*, and flies in the face of orderly collective bargaining. The very objective of the main agreement and its provisions is that, at an industry level, and pursuant to a prescribed process, the parties at industry level thrash out what employees want and need as actual conditions of employment in the industry, considering the interests of all the industry parties and the industry itself. Nothing stops the first respondent from tabling all the issues that it called "job perks" there, and then seek to convince

the negotiating forum to accept these issues as demands in the next round of collective bargaining on conditions of employment.

[49] The further point is that all these issues can only be next bargained on at the next occasion when collective bargaining must take at sectoral level, and not as and when the first respondent may considered itself inclined to do so, which is what happened in the current matter. The prescribed next occasion would be when the current prior of operation of the main agreement expires. Pursuant to the objective of orderly collective bargaining, a provision similar to the once and for all rule must apply. This means, in my view, that all issues relating to conditions of employment must be tabled on a "once and for all" basis when the time comes for collective bargaining to determine the conditions of employment for the next period of operation of the main agreement.[36] In this case, it would be when the current main agreement period expires in 2014. The first respondent as trade union in the central bargaining forum can then table all those conditions of employment it requires to be the subject matter for industry collective bargaining. Those conditions of employment that are agreed on will then be incorporated into the next updated main agreement and all issues relating to conditions of employment will then be considered to be disposed of until the expiry of the new period of operation of the main agreement. It is only on this basis that a continuous demand after demand after demand can be avoided, which is clearly entirely at odds with the primary objective or orderly collective bargaining.

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[36] The Court in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835B-E formulated this rule in the context of delictual claims as follows: '…. *the rule is to the effect that in general a plaintiff must claim in one action all damages, both already sustained and prospective, flowing from one cause of action …. Its purpose is to prevent a multiplicity of action and to ensure that there is an end to litigation*.' ; See also *Sgt Pepper's Knitwear and another v SA Clothing and Textile Workers Union and Others* (2012) 33 ILJ 2178 (LC) at para 29 ; *Dial Tech CC v Hudson and Another* (2007) 28 ILJ 1237 (LC) at paras 57 – 59. There is no reason why this cannot equally apply to collective bargaining in respect of conditions of employment of employees for the period of currency of a collective agreement determining the same.

[50] I appreciate that at least the one demand by the first respondent relating to a full time shop steward is not an issue concerning conditions of employment, and will thus not be hit by the provisions of Section 65(3)(a) and the prohibitions as set out above. However, all the other demands would be, and are all relating to conditions of employment. I will specifically deal with the demand relating to the full time shop steward hereunder. I accordingly conclude that the strike of second to further respondents pursuant to the demands relating to the housing allowance, profit sharing, salary adjustments, medical aid, bursaries, and long service awards, are all regulated by the main agreement of MEIBC for the reasons given above. As such, any strike action pursuant to such demands by the second to further respondents would be prohibited by Section 65(3)(a)[37] and would thus be unlawful, and consequently, unprotected.

The issue of the strike notice

[51] The next issue to consider is the strike notice given by the first respondent to the applicant. As has been set out above, this notice does provide the requisite 48 hours' prior notice of the commencement of the strike as contemplated by Section 64(1) (b) and does stipulate the starting date of the strike, being 28 June 2013. Also, the strike then indeed started on that date. So far so good. The problem however, is that the strike notice does not articulate any issue in dispute nor does it refer to any demand. It does not prescribe what the applicant had to do (agree to) to end the strike. The question now is whether this *lacuna* would render the strike notice to be defective. This is an important question, because if the strike notice is defective, then the right to strike simply will not accrue to the respondents in terms

[37] As may be read with Section 65(1)(a)

of Section 64(1).[38]

[52] In answering this question, I will firstly refer to the judgment in *Moloto*[39] where the Court dealt with the requirements for a valid notice in terms of Section 64(1) (b) of the LRA and held as follows:

> 'That section 64(1)*(b)* does not go beyond the requirement of giving notice of commencement of the strike has been accepted and followed in many Labour Court cases, often in a generous manner. The notice need not specify the precise time of the day when the strike will start. Employees are not obliged to commence striking at the time indicated in the notice. If employees who have already commenced striking temporarily suspend the strike, they need not issue a fresh notice to strike or refer the dispute for conciliation again. Where strikers have given insufficient time in their original notice, but cured that in a later notice, the time given in the two notices is taken cumulatively. So-called 'grasshopper' strikes - brief repetitive work stoppages - do not require fresh notices.
>
> Provided that the strike notice sets out the issue over which the employees will go on strike with reasonable clarity, these cases show that orderly collective bargaining and the right to strike, in its proper sense as a counter-balance to the greater social and economic power of employers, has been considered to be well served by the acceptance of a single strike notice.' (emphasis added)

[53] It is in my view apparent that even pursuant to the judgment in *Moloto*, the issue in dispute that forms the subject matter of the strike the employer has been given notice of in terms of Section 64(1)(b) must be identified and described in that notice. I am further of the view that this must be done with at the very least sufficient particularity so that the employer can understand what the issue is and what it

[38] See *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building and Allied Workers Union (2)* (1997) 18 ILJ 671 (LAC) at 676 ; *Equity Aviation Services (Pty) Ltd v SA Transport and Allied Workers Union and Others* (2009) 30 ILJ 1997 (LAC) at para 146 ; *Moloto* (supra) para 89 – 90

[39] (*supra*) footnote 22 at paras 89 – 90

would need to do to end the strike (i.e. what it must agree to). In *SA Airways (Pty) Ltd v SA Transport and Allied Workers Union*[40] it was held as follows:

> 'The same purposive approach adopted by the Labour Appeal Court requires that a strike notice should sufficiently clearly articulate a union's demands so as to place the employer in a position where it can take an informed decision to resist or accede to those demands. In other words, the employer must be in a position to know with some degree of precision which demands a union and its members intend pursuing through strike action, and what is required of it to meet those demands.'

[54] In *City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union and Others*[41] the Court said the following:

> '…. At the very least the employer should know what the dispute is about and what is required to resolve the demand or dispute. I am of the view that this is in accordance with the purpose of the LRA which is to promote orderly collective bargaining and is in accordance with the spirit of the LRA which is to promote the effective resolution of disputes. ….'

[55] Of particular relevance is the judgment in in *Leoni Wiring Systems (East London) (Pty) Ltd v National Union of Metalworkers of SA and Others*[42] where the Court said the following:

> '…. I believe that it is always a requirement that, if any one of the parties is in dispute with the other, such dispute should be stated clearly and not be clothed in such a way that, objectively viewed, the other side does not know that it is in dispute at all. I am firmly of the view that parties should not conduct themselves in any manner which may lead to a situation where the other side is left in doubt as to whether there is a dispute between them in relation to a particular issue.

[40] (2010) 31 ILJ 1219 (LC) at para 27
[41] (2008) 29 ILJ 650 (LC) at para 18
[42] (2007) 28 ILJ 642 (LC) at para 27

> Likewise I hold the firm view that, if a dispute has arisen between parties, not only must the dispute be clearly stated and identified but also the outcome, or the solution, which a party requires to resolve the dispute should be unambiguously stated. ….'

I fully agree with this reasoning, which in my view must equally apply to strike notices in terms of Section 64(1) (b). This will completely prevent so many of the disputes that often arise about what exactly is the strike about and what is needed to resolve it, which is actually also an issue in the current matter. The Court in *SA Post Office Ltd v Communication Workers Union and Others*[43] also referred with approval to the above ratio in *Leoni Wiring* in the context of a strike notice.

[56] Accordingly, and on the basis of what is set out above, the strike notice in terms of Section 64(1) (b) given by the first respondent to the applicant on 25 June 2013 must be declared to be invalid and irregular. It does not articulate any demand, or better described, the issue in dispute forming the subject matter of the strike. It does not identify such issue with sufficient particularity so as to inform the applicant of what exactly the strike will be about and what the applicant would need to agree to in order to end the strike. Therefore, and for this reason as well, the strike action of the second to further respondents embarked upon on 28 June 2013 would be prohibited and thus unprotected. Because the strike notice is invalid and irregular, the right to strike simply did not accrue to them in terms of Section 64(1).

<u>The issue of the shop steward</u>

[57] This then only leaves the issue of the demand over the full time shop steward. Of course this demand is subject to the same difficulties that relate to the strike notice

[43] (2010) 31 ILJ 997 (LC) para 27

as discussed above, and for this reason this demand can equally not save the strike of the respondents from being declared to be unprotected.

[58] However, and this being said, the problem the respondents have is that there exists uncertainty about what exactly this demand would entail and what the applicant would be required to do pursuant to this demand. In fact, and as I have set out above, the applicant has conveyed in its supplementary affidavit that its understanding of this demand is simply that the applicant recognize the need for a full time shop steward and not actually appoint one. In the answering affidavits, and other than some bald denials, the respondents actually do not specifically contradict this understanding put forward by the applicant. It is never made clear what was in fact discussed about this issue and what is it that the first respondent actually wants. This in itself should be fatal to this demand being able to form the subject matter of protected strike action.

[59] There is however another difficulty. If it is to be accepted that the demand is for the appointment of a full time shop steward, the first respondent does not indicate on what basis they demand this. This is an important consideration. The fact is that a demand for a shop steward is clearly an issue relating to organizational rights.[44] This means that the demand is made pursuant to the provisions of Chapter III of the LRA, and then the first respondent first has to comply with Section 21 in pursuance of this demand. Strike action in this regard will be in accordance with the provisions of Section 21(7) as read with Section 65(2) (a) and (b) of the LRA, and not pursuant to a matter of mutual interest which formed the basis of the current dispute referred by the first respondent to MEIBC. This would render the strike unlawful as well, because the jurisdictional facts as prescribed by Section 21 have not been complied with.[45] Even if the first respondent pursued this issue not as an entitlement

[44] See Section 14 of the LRA
[45] See *SA Commercial Catering and Allied Workers Union v Speciality Stores Ltd* (1998) 19 ILJ 557 (LAC)

in terms of Chapter III of the LRA, but as an interest dispute to be determined by collective bargaining, then still such dispute would have to be pursued in terms of Section 20 of the LRA[46], and there is no indication that this was done. In itself, and on the papers as they stand before me, this demand for a full time shop steward, whatever it may mean, is not a valid demand that can form the subject matter of a strike in this particular matter, because of non compliance with Chapter III of the LRA.

[60] In any event, and even if the demand for a full time shop steward is the one and only valid demand remaining, can the strike still be regarded as protected for this reason alone. The first respondent actually suggested this approach in its answering affidavits. The problem with this however is that the respondents never abandoned the other demands. Even in the answering affidavits, they still persist with these demands. In this regard, I refer to the judgment in *Digistics (Pty) Ltd v SA Transport and Allied Workers Union and Others*[47] where the Court said:

> 'This leaves the issue of the effect, if any, of the demand for an expanded bargaining unit on the validity of the strike notice (which, as I have noted, incorporates all three demands) and the strike itself. In other words, does the single bad apple (in the form of the demand that concerns a refusal to bargain issue made in circumstances where no advisory award has been issued) taint the entire barrel? In *Samancor Ltd & another v National Union of Metalworkers of SA* (1999) 20 ILJ 2941 (LC), Landman J considered the same question and held that if it is possible to distinguish between the permissible and impermissible demands, once the impermissible demands have been abandoned, the strike is protected.'

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at paras 19 – 21

[46] See *Bader Bop* (*supra*) footnote 20 at para 40 and 43 ; 76

[47] (2010) 31 ILJ 2896 (LC) at para 14

The point is that the respondents had to abandon all their other impermissible demands for this alternative argument to work. They did not. The strike thus remains unprotected.

Conclusion

[61] I am therefore satisfied that the applicant has the necessary right to the final relief sought. The applicant has clearly demonstrated the existence of a clear right in its favour, on the grounds set out above. The issues of prejudice and an alternative remedy was not in contention and I accept that all these requirements for final relief, in the circumstances of this matter, have been met. The applicant thus remains entitled to the interdict it sought and as such, would be entitled to a confirmation of the rule *nisi*.

[62] This then only leaves the issue of costs. In this regard, I am compelled to make some observations about the contents of the respondents' answering affidavits. I find the nature of the allegations made therein to be entirely unacceptable, and on occasion even insulting. The case of the applicant is inter alia described as a dog, amongst some other derogatory statements also made. This kind of behaviour is simply not acceptable when conducting of courteous and responsible litigation, which is expected where the respondents are legally represented. In addition, there is no particular and long term collective bargaining relationship between the parties that require fostering or may mitigate against a costs order being granted. Added to this, the first respondent is actually a party to the centralized bargaining relationship in the MEIBC and I thus find its conduct in this matter rather opportunistic. I in any event have a wide discretion where it comes to the issue of costs. This matter was clearly driven by first respondent in circumstances, especially after being confronted with the *rule nisi*, when it should not have done so. As a result of all of these reasons, I am of the view that this is a

matter where I believe that the first respondent should pay the costs of this application.

[63] It is for all the above reasons that I make the following order:

1. The rule *nisi* issued 4 July 2013 by Rabkin-Naicker J is confirmed in its entirety.
2. The strike action embarked upon by the second to further respondents on 28 June 2013 is declared to be an unprotected strike.
3. The first respondent is ordered to pay the costs of this application.

_____

Snyman AJ

Judge of the Labour Court of South Africa

Appearances:

Applicant: Mr D Masher of Edward Nathan Sonnenbergs Inc

Respondents: Advocate P W Makhambeni

Instructed by: Finger Phukubje Inc