REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1931 / 2013

In the matter between:

UTATU SARWHU **First Applicant**

INDIVIDUALS WHOSE NAMES APPEAR ON

ANNEXURE "A" TO THE NOTICE OF MOTION **Second and Further Applicants**

and

AUTOPAX PASSENGER SERVICES

(SOC) LTD **First Respondent**

SOUTH AFRICAN TRANSPORT AND

ALLIED WORKERS UNION **Second Respondent**

Heard: **29 August 2013**

Delivered: **17 September 2013**

Summary: Summary: Collective bargaining – nature and purpose thereof – relationship between a lock-out and the collective bargaining process

Lock out – purpose of lock-out – application of Section 64(1)(c) and Section 64(3)(d) of the LRA – purpose of the lock-out discussed – can employees that tender their services also be locked-out

Lock-out notice – comparison to strike notice – applicability to entire bargaining unit whether members of striking union or not – importance of underlying issue in dispute

Issue in dispute for the purposes of a strike or lock-out – meaning of issue in dispute – includes demand and dispute as separate concepts

Demand in relation to a lock-out – meaning of – can include retention of the status quo – need not be only pursuant to employer's own offer

Practice and procedure – cannot rely on case not made out in notice of motion and founding affidavit – where the lawfulness of a strike or lock-out is challenged all the grounds for doing so must be set out in founding affidavit

Mootness – principles stated – issue not moot despite underlying issue in dispute being settled – still live matter which has practical consequences

Urgency – urgency based on non payment of salary – principles stated – urgency established

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter initially came before me as an urgent application on 26 August 2013 in terms of which the applicants sought relief in the form of an order compelling the first respondent to pay the remuneration of the individual applicants. The reason for the application was that it appeared that the first respondent instituted a lock out on the first applicant's members, and the applicants sought that this lock-out be declared to be unprotected which would mean that there was no basis for not paying the salaries of the individual applicants. When I considered the application on 26 August 2013, it became clear that there were several fundamental issues at stake that would have to be dealt with in the application, and I afforded the parties the opportunity to file answering and replying affidavits, and the matter was set down for argument on 29 August 2013.

[2] In the interim, the underlying dispute between the first and second respondents which initially gave rise to the lock-out was settled on 27 August 2013 and I was presented with a copy of the settlement agreement, which means that the impact of

this settlement agreement on the current proceedings must be considered as well.

[3] In the end, the matter came before me on 29 August 2013 on the basis of an order being sought by the applicants for final relief. The nub of the relief was that the first respondent be ordered to pay the salaries of the individual applicants for the period between 19 August 2013 (when the lock-out was implemented) and 28 August 2013, when all industrial action ended in terms of the settlement agreement. The basis for the relief was crisply that of a declaratory order that the lock-out implemented by the first respondent for this period was unlawful and thus unprotected. As the relief sought is that of final relief, the applicants must satisfy three essential requirements which must all be shown to exist, being: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[1]

[4] Fortunately in this matter, the factual matrix is, in essence, undisputed and common cause. Where factual disputes exist, which are as said fortunately minimal, I will apply the test enunciated in *Plascon Evans Paints v Van Riebeeck Paints*[2] and will accept the version of the first respondent only insofar as these factual disputes are concerned, as most of the facts, as I have said, set out by the applicants, are undisputed.[3] The factual matrix hereunder will be set out on this basis.

Factual matrix

[1] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V and A Waterfront Properties (Pty) Ltd and Another v Helicopter and Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) at para 20; *Royalserve 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) at paras 26 – 27; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) at para 38; *Geyser v MEC for Transport, Kwazulu-Natal* (2001) 22 ILJ 440 (LC) at para 32; *Denel Informatics Staff Association and Another v Denel Informatics (Pty) Ltd* (1999) 20 ILJ 137 (LC) at para 26.

[3] See also *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another* 2009 (3) SA 187 (W) at para 19.

[5] The first respondent is a state owned enterprise in the business of providing long haul road passenger coach services to passengers, on a variety of routes across the country. The first respondent is subject to the scope and jurisdiction of the South African Road Passenger Bargaining Council ("SARPBAC"), which is established by a collective agreement, referred to as the "main agreement".[4]

[6] The main agreement of SARPBAC defines the bargaining unit in the industry. This is done by definition of 'eligible employees'[5] which reads 'an individual, other than an individual who is part of an Employer's Management, Supervisory or Management Support Staff, who works in the Road Passenger Transport Trade and who is in the permanent employ of an Employer.' It is common cause that all of the individual applicants all resort under the scope and jurisdiction of this definition.

[7] The workplace of the first respondent is unionised. The majority union is SATAWU (the second respondent). The first applicant, UTATU, is also a recognised union. For ease of reference, these two unions will hereinafter be referred to as SATAWU and UTATU. The relationship between the first respondent and SATAWU and UTATU is regulated by way of a recognition agreement, which is also a collective agreement, concluded on 13 June 2008 and which is still operative and binding.[6] The salient terms of this recognition agreement, relevant to this matter, are the following:

7.1 The bargaining unit is defined as 'all permanent and fixed term contract employees below level 6 job grade except for employees in the following job categories: personal Assistant to the CEO, secretary to senior managers';

[4] The most current version of this agreement commenced on 1 April 2013 and is valid until 30 June 2014 – See page 157 para 1.2 of the pleadings.
[5] Pleadings page 158.
[6] See pleadings page 201 – 216.

7.2 “Dispute” is defined as ‘means a dispute declared arising from a deadlock between the parties after following the agreed processes and practices in terms of this agreement’;

7.3 “Workplace” is defined as ‘means for the purposes of this agreement the whole of Autopax as a business’;

7.4 “Bargaining Forum” is defined as ‘means a body of persons comprising of the representatives of both management and trade unions by agreement shall come together to negotiate and conclude an agreement’ (sic);

7.5 Clause 15 deals with collective bargaining. It records that both SATAWU and UTATU are recognised as collective bargaining representatives of their members and that all the members of the two unions resort under the bargaining unit as defined. A bargaining forum is established in which, *inter alia,* conditions of employment are consulted and negotiated on;

7.6 The dispute procedure is dealt with in clause 19. It requires written notice of the dispute to the other party followed by a meeting to attempt to resolve the dispute. If the dispute remains unresolved, either party may has the right to pursue the dispute resolution provisions in the LRA;

7.7 Clauses 20.1 and 20.4 confirm the right of both parties to resort to a strike or a lock-out as dispute resolution mechanism, provided all the provisions of the LRA are complied with.

[8] The applicants, in their founding affidavit, referred to a previous dispute between the first respondent and SATAWU and another union (Transport and Omnibus Workers Union) in April 2013. In that instance, and in response to a strike

embarked upon by these two unions on 19 April 2013, the first respondent implemented a lock-out. It appears that the strike itself was an industry level strike relating to wages and conditions of employment. The lock-out was applied to all "eligible employees', which, in terms of the definition as set out above, would include the members of UTATU.

[9] UTATU did not declare a dispute against the first respondent in this dispute of April 2013. UTATU and its members did not want to participate in the strike and UTATU tendered the services of its members to the first respondent. The first respondent, however, persisted in locking out the members of UTATU as well. During the currency of this lock-out, the members of UTATU were not paid by the first respondent. After the lock-out had been implemented by the first respondent, the members of UTATU continued to tender their services and there were numerous engagements by UTATU of the first respondent to uplift the lock-out, all without success. This persisted until the ultimate resolution of the underlying dispute and still the members of UTATU were not paid for this whole period.

[10] What was undisputed is that the members of UTATU would and did directly benefit from the agreement relating to wages and conditions of employment concluded with SATAWU and TOWU which gave rise to the strike by virtue of the application of the main agreement of SARPBAC to all employers and employees in the industry.

[11] Although full particulars in this regard are lacking, it appears that after the above dispute was resolved, SATAWU pursued a new dispute against the first respondent directly at plant level, in which SATAWU demanded additional payment for Sunday work and meal allowances. SATAWU did so despite these issues being regulated by the current main agreement, which became effective as from 1 April 2013.[7] SATAWU referred such dispute to SARPBAC where the dispute remained

unresolved, and on 16 August 2013, SATAWU and its members commenced strike action in support of these demands.

[12] UTATU and its members were not party to this dispute pursued by SATAWU. They declared no dispute against the first respondent in this regard. The members of UTATU continued to tender their services and did not join the strike embarked upon by SATAWU.

[13] On 16 August 2013, the first respondent then gave notice of a lock-out to both SATAWU and UTATU.[8] In terms of this notice, written notice was given in terms of Section 64(1)(c) of the LRA of a lock-out to commence on 19 August 2013, in respect of all "eligible employees". The issue in dispute was recorded as being that management's proposal to pay for Sunday work and meal allowances in terms of clauses 7 and 9 of the current main agreement must be accepted. It was also recorded that the lock-out will persist until this proposal was accepted. As the members of UTATU were "eligible employees" as defined, this notice also applied to them.

[14] This lock-out was then duly implemented by the first respondent on 19 August 2013. Despite the lock-out notice being given and the lock-out then implemented, the members of UTATU continued to tender their services. These members actually reported for work with the intention of working but were prevented from working in terms of the lock-out by the first respondent.

[15] It was undisputed that in terms of this lock-out, the members of UTATU (the individual applicants) would not be paid for the period the lock-out endured. This being said, once again, the members of UTATU would benefit from any agreement

[7] See Clauses 6.8 and 9.1 of the main agreement.
[8] Pleadings page 43 – 44.

concluded between the first respondent and SATAWU pursuant to the strike embarked upon by SATAWU and the consequent lock-out of the first respondent.

[16] In the settlement agreement concluded on 27 August 2013, the issue in dispute of Sunday pay and meal allowances was then settled between the first respondent and SATAWU. It was agreed that the first respondent would pay Sunday pay at a rate of 1.5 with effective date 1 August 2013. It was also agreed that a once off payment consisting of 65% of the cash portion of Sunday pay calculated at this newly agreed rate for the period between 1 April 2013 and 31 July 2013 shall be made. It was also agreed that a meal allowance of R60.00 per trip be made. The provisions of this agreement applied to all employees in the bargaining unit, which clearly included the UTATU members as well. In terms of this agreement, the industrial action would end on 28 August 2013.

[17] Just by way of comparison, the main agreement of SARPBAC provided for Sunday pay rate of 1.3 and made no provision for an additional meal allowance. The members of UTATU thus clearly benefitted from the agreement concluded.

[18] The consequence of the above still remained that the UTATU members would not be paid their salaries for the period between 19 August and 28 August 2013, despite their tender of services. The sole reason for this is the lock-out implemented by the first respondent on them in the above dispute for this period. The issue now to be determined in this judgment is whether this lock-out can serve as justification for such non-payment, and this issue, by necessary consequence, requires determination as to whether the lock-out is protected and thus lawful.

<u>The issue of urgency and mootness</u>

[19] In its answering affidavit, the first respondent raised the issue that the application

was not urgent because it, in essence, entails a claim for the payment of money which can never be urgent or entitle the applicants to "jump the queue", so to speak. Despite this being raised in the answering affidavit, the issue was not really addressed by Mr Mokhari, who represented the first respondent, in argument. I will, however, address it, having been raised in the pleadings, and in my view, and for the want of a better description, this matter is distinguishable from what can be called a "normal" payment of salary claim. The reason for this is that the very basis of the non-payment of the salary of the individual applicants is founded in industrial action and collective bargaining under the LRA. The LRA specifically allows for the Labour Court to intervene pursuant to urgent proceedings brought in such Court by litigants requesting such intervention.[9] The point is that the payment of the salary or failure thereof, of the individual applicants is merely the symptom of the true cause of these proceedings, being the issue of the interdicting of alleged unlawful industrial action (being the lock-out). In dealing with urgency in the case of interdicting a strike, the Court in *National Union of Mineworkers v Black Mountain - A Division of Anglo Operations Ltd*[10] said:

> '….Only once an applicant has persuaded the court that sufficient grounds exist which necessitate a relaxation of the rules and ordinary practice, will the court proceed to consider the matter as one of urgency. The extent to which the court will allow parties to dispense with the rules relating to time periods will depend on the degree of urgency in the matter.'

[20] The above being said, and considering the issue of financial hardship and the contention that this is just a salary claim, I refer to the judgment in *Jonker v Wireless Payment Systems CC*,[11] where the Court said:

[9] See Section 68(1) and (2) of the LRA.
[10] (2007) 28 ILJ 2796 (LC) at para 12.
[11] (2010) 31 ILJ 381 (LC) at para 16.

> 'The general rule that financial hardship and loss of income are not considered to be grounds for urgent relief was upheld in *Malatji v University of the North* [2003] ZALC 32 (LC) and *Nasionale Sorghum Bierbrouery (Edms) Bpk (Rantoria Divisie) v John NO en Andere* (1990) 11 ILJ 971 (T).'

I agree with this conclusion. That is, however, not the be all and end all. In *Jonker,* the Court in fact recognised that this general principle may be departed from should exceptional circumstances be shown to exist.[12] In the case of *Harley v Bacarac Trading 39 (Pty) Ltd,*[13] the Court held:

> 'If an applicant is able to demonstrate detrimental consequences that may not be capable of being addressed in due course and if an applicant is able to demonstrate that he or she will suffer undue hardship if the court were to refuse to come to his or her assistance on an urgent basis, I fail to appreciate why this court should not be entitled to exercise a discretion and grant urgent relief in appropriate circumstances. Each case must of course be assessed on its own merits.'

Therefore, the fact that this matter may also involve issues of financial hardship and non-payment of salary as part of the basis for urgency cannot, as a necessary consequence, always mean that it cannot be considered as one of urgency. There are exceptions and, in my view, this matter is one of them.

[21] Of particular relevance to the current matter is the judgment in *HOSPERSA and Another v MEC for Health, Gauteng Provincial Government,*[14] where one of the specific considerations causing the Court to conclude that the matter could be entertained as a matter of urgency was that:

> 'There is no basis in law why Kaplan's right to her salary and/or benefits should be

[12] Id at para 17 – 18.
[13] (2009) 30 ILJ 2085 (LC) at para 8.
[14] (2008) 29 ILJ 2769 (LC) at para 23.

> interfered with if regard is had to s 32(1) of Basic Conditions of Employment Act 75 of 1997. I have already referred to the fact that Kaplan had at all times tendered her services and expressed a willingness to perform her duties.'

The comparison to the current matter is clear. The very issue is whether, in terms of specific provisions of the LRA, it is lawful to withhold the salary of the individual applicants, in circumstances where they have always tendered services and were precluded by the first respondent from doing so. The fact that the very issue of the unlawfulness of the conduct of the first respondent pursuant to the specific prescriptions of a statute lies at the heart of this matter it has to push the matter into the realm of exceptional circumstances and thus provide the necessary urgency.[15]

[22] As to the issue of urgency in general, the Court in *Jiba v Minister: Department of Justice and Constitutional Development and Others*[16] held:

> 'Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self created when seeking a deviation from the rules.'

I accept that this matter is of sufficient urgency in general for me to entertain the same in line with these principles. Notice of the lock-out was given on 16 August 2013. Then there was an intervening week end and then followed attempted engagements by the applicants' attorneys with the first respondent and the first respondent's attorneys throughout the following week to convince the first respondent to uplift the lock-out in respect of UTATU's members. When success could not be achieved, the application was brought on 23 August 2013. I accept

[15] See also *Jonker v Wireless Payment Systems CC (supra)* at para 19.

that this is prompt and immediate action. In any event, and considering the order I gave on 26 August 2013, both parties have had the opportunity to fully state their respective cases and present proper argument and thus believe that it is in the interest of justice to finally determine this issue, and I thus conclude that there are proper grounds to finally determine this matter as one or urgency.[17]

[23] This then leaves the issue of mootness. This contention arose in the context that the underlying dispute between the first respondent and SATAWU having been settled on 27 August 2013, as referred to above, and with it, the lock-out had in fact been ended on 28 August 2013.

[24] In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs,*[18] the Court defined the concept of mootness as follows:

> 'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.'

The Court in the judgment of *MEC for Education, KwaZulu-Natal and Others v Pillay*[19] added the following to the definition:

> 'This court has however held that it may be in the interests of justice to hear a matter even if it is moot if "any order which [it] may make will have some practical effect either on the parties or on others".'

In applying these provisions in the context of employment law, the *Court in City of*

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[16] (2010) 31 ILJ 112 (LC) at para 18.
[17] See also *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W); *National Union of Mineworkers v Black Mountain - A Division of Anglo Operations Ltd* (2007) 28 ILJ 2796 (LC) at para 12; *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another* (2012) 33 ILJ 629 (LC) at para 21 – 24.
[18] 2002 (2) SA 1 (CC) at para 21.

Cape Town v SA Municipal Workers Union on behalf of Abrahams and Others[20] said:

> 'The principle implicit in this provision has been applied by our courts for some time to the effect that courts are there to resolve real and existing disputes and not to deal with issues that are academic or to provide advice on abstract questions.'

The Court in *City of Cape Town*[21] further confirmed that there still had to be a *lis* or dispute between the parties and the outcome of the case must have some or other practical effect, otherwise it was moot. A final issue with regard to the principle of mootness is as dealt with in *Independent Electoral Commission v Langeberg Municipality*[22] where the Court said that even if there may still be existing disputes in the future, the matter may be moot if future cases would present different factual matrixes in the determination of such disputes and thus no purpose would be served in resolving any existing disputes.

[25] Applying the above principles to the current matter, it is my view that the matter is not moot. There is clearly a live dispute between the parties, being the payment of the salaries of the applicants, which very much remains unresolved. Whilst it may be so that the issue in dispute giving rise to the lock-out has been settled and, consequently, the lock-out itself has been ended, the ramifications of the lock-out still persist until finally determined, being the crisp issue as to whether the first respondent is entitled to withhold the individual applicants' salaries for the period of the lock-out. In this context too, any judgment in this matter will have a clear practical effect, in that it will finally determine whether the individual applicants are entitled to the payment of their salaries, which is the very issue that was in dispute,

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[19] 2008 (1) SA 474 (CC) at para 32.
[20] (2012) 33 ILJ 1393 (LAC) at para 11.
[21] Id at para 13 and 14 ; See also *SA Transport and Allied Workers Union v ADT Security (Pty) Ltd* (2011) 32 ILJ 2112 (LAC).

and still remains in dispute. As to any possible further proceedings by the applicants to claim their salaries, the factual matrix will always be the same and there is nothing that can be added to any such proceedings not already put forward in this case. As a final consideration, I believe that the issue raised in this matter is of considerable importance to the collective bargaining process and the rights of the respective parties to such process and as such requires consideration and determination. I am supported in my views by the judgment in *Building Industry Bargaining Council (Southern and Eastern Cape) v Commission for Conciliation, Mediation and Arbitration*[23] where the Court*, inter alia*, considered the ratio in the judgment of *National Coalition for Gay and Lesbian Equality*[24] and concluded:[25]

> 'The question then is whether there is any practical purpose served by adjudicating a dispute about the terms of the applicant's accreditation in respect of a period that lapsed in May 2010. It seems to me that there are at least two reasons for doing so. The first relates to the CCMA's requirement that the applicant conclude a collective agreement capable of binding non-parties, as a prerequisite to accreditation in respect of disputes involving those non-parties. To the extent that the applicant's accreditation was limited on this basis both in respect of the period that expired in May 2010 and that due to expire in October 2011, the case presents a live controversy and the court is not being asked to give an opinion in the abstract. Secondly, it is not inconceivable (indeed it is more than likely) that the basis on which the decision that is the subject of these proceedings was taken is likely to serve as a basis for future, similar decisions, where the same or similar facts will present themselves. Thirdly, the parties acknowledge that the issue that presents itself is one that affects other bargaining councils, and that is of general interest to the industrial relations community. I intend therefore to consider the merits of the applicant's claim.'

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[22] 2001 (3) SA 925 (CC).

[23] (2011) 32 ILJ 1305 (LC).
[24] (*supra*) footnote 18.
[25] Id at para 9.

It is my view that the very same basis of reasoning applies to the current matter.[26]

[26] I, therefore, conclude that the current matter is not rendered moot just because the issue giving rise to the lock-out has been settled with SATAWU on 27 August 2013 and the lock-out has ended. I will, therefore, proceed to consider the merits of this matter.

[27] For the purposes of the determination of the issue whether the lock-out is unlawful, I will accept that the lock-out notice complies with the procedural requirements in terms of Section 64 of the LRA. No issue in this regard was in any event raised by the parties. I will also accept that the demand by SATAWU for additional Sunday pay and meal allowances which formed the subject matter of the strike and consequent lock-out is a matter of mutual interest as contemplated by the definition of a strike.[27]

[28] In this matter, one of the issues I have to consider and determine is the meaning of a "demand" in the context of collective bargaining and, consequently, any collective action pursuant thereto. I will determine the issue of the meaning of "demand" in this context separately and hereunder, in this judgment. For the purposes of the fundamental question as to whether the lock-out in this matter was lawful, as a matter of general legal principle, I will accept that a proper "demand" between the first respondent as employer and SATAWU and its members as the employee parties indeed exists.

<u>The issue of the application of Section 65(3)(a)</u>

[26] See also *Gcaba v Minister for Safety and Security and Others* (2010) 31 ILJ 296 (CC) at para 18; *Harley v Bacarac Trading 39 (Pty) Ltd (supra)* at para 33.

[27] In section 213 a strike is defined as 'the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee.'

[29] Mr Redding, who appeared for the first respondent, firstly, contended that the underlying dispute that formed the basis of the strike action by SATAWU could not be lawfully pursued and as such, the strike by SATAWU was unprotected and, consequently, unlawful. According to Mr Redding, this unlawfulness then has to find its way to the lock-out implemented by the first respondent for this very same dispute, as well, in turn rendering the lock-out unlawful. Mr Redding founded his submissions, in this regard, on what he contended to be the application of section 65(3)(a) of the LRA in this matter.[28] According to Mr Redding, this section found application because the issues of Sunday pay and meal allowances have already been regulated and determined in the current main agreement of SARPBAC which was still valid and binding and, in fact, binding to SATAWU and its members and the first respondent as well. I also wish to add that despite Mr Redding making no reference to this, clause 42 of the main agreement provides that:

> 'No Employer which is bound by any collective agreement concluded by Sarpbac shall be compelled by industrial action, litigation or otherwise to negotiate on matters contained in such collective agreement at any other level during the currency of such agreement.'

As I have referred to above, the main agreement of SARPBAC indeed determined and regulated the issues of Sunday pay and meal allowances. As to what constitutes "regulate" for the purposes of this Section, the Court in *Fidelity Guards v PTWU and Others*[29] said:

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[28] This Section reads 'Subject to a collective agreement, 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- (a) if that person is bound by- (i) any arbitration award or collective agreement that regulates the issue in dispute...'

[29] [1997] 11 BLLR 1425 (LC) at 1433F-H.

> '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.'

Considering these provisions of the main agreement which is a collective agreement, the issues in dispute are certainly regulated by the main agreement as a collective agreement.[30] On face value, therefore, there is certainly considerable merit in the submissions by Mr Redding.

[30] However, and despite what I have said above, there are two reasons why the applicants' case in respect of the application of section 65(3)(a) of the LRA as put forward by Mr Redding cannot be sustained. The first and most immediate reason is that no such case was made out in the founding affidavit.[31] It has never been contended as part of the applicants' case that the lock-out was unlawful because there existed a collective agreement that regulated the issues in dispute. The applicants' case was quite specific, being that the lock-out was unlawful simply because applicants were not party to the dispute between SATAWU and the first respondent forming the subject matter of the lock-out that there existed no dispute between the applicants and the first respondent and that the individual applicants, at all times, tendered their services and never joined any strike. Then and despite the first respondent raising a myriad of legal issues, in its answering affidavit, the

[30] See also *Air Chefs (Pty) Ltd v SA Transport and Allied Workers Union and Others* (2013) 34 ILJ 119 (LC) at para 27; *ADT Security (Pty) Ltd v SA Transport and Allied Workers Union and Another* (2012) 33 ILJ 2061 (LC) at para 18; *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.

[31] See *Early Bird Farm (Pty) Ltd v Food and Allied Workers Union and Ot*hers (2004) 25 ILJ 2135 (LAC) at para 37 in support of this point.

applicants still did not raise this issue in the replying affidavit. Mr Redding sought to raise the issue for the first time in argument.

[31] In *Betlane v Shelly Court CC,*[32] the Court said:

> 'It is trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit. A case cannot be made out in the replying affidavit for the first time.'

This approach applies equally in the Labour Court and I refer to *De Beer v Minister of Safety and Security and Another*[33] where it was held that:

'It is trite law that an applicant must stand or fall by his or her founding affidavit. The applicant is therefore not permitted to introduce new matter in the replying affidavit. The courts strike out such new matter.'

In this matter, the issue was not even raised in the replying affidavit but raised for the first time in argument, which is even worse. In dealing with new issues raised for the first time in heads of argument in a review application, the Court in *Northam Platinum Ltd v Fganyago No and Others*[34] held:

> 'The applicant has in its heads of argument raised further grounds of review which were not raised in the founding affidavit... In my view the law is very clear that a

[32] 2011 (1) SA 388 (CC) para 29; See also *Van der Merwe and Another v Taylor NO and Others* 2008 (1) SA 1 (CC) at para 122; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para 150; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at paras 29 – 30; *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2008 (2) SA 448 (SCA); *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 636A – B; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC); *Dutch Reformed Church Vergesig and Another v Sooknunan* 2012 (6) SA 201 (GSJ) at para 53.

[33] (2011) 32 ILJ 2506 (LC) ; See also *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) where the Court said 'It is trite that an applicant must make out its case in its founding papers'.

[34] (2010) 31 ILJ 713 (LC) at para 27.

> ground for review raised for the first time in argument cannot be sustained. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit'.

The fact that Mr Redding raised the issue for the first time in argument then surely justifies the conclusion that it should not be considered in the determination of this matter.

[32] I find further support for the proposition that the issue of section 65(3)(a) is improperly raised before me in the judgment of *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union and Others*.[35] In this judgment, the Court dealt with all the considerations as to why a strike would be unprotected in terms of section 65 as a whole, and considering that Section 65 equally applies to strikes and lock-outs, the ratio in this judgment must find equal application in the current matter. The Court in *Fidelity Guards Holdings* said:[36]

> 'A strike may be unprotected for any number of reasons, for example: on procedural grounds, such as that the issue in dispute has not been referred to the Commission for Conciliation, Mediation and Arbitration (CCMA), or that a certificate stating that the dispute remains unresolved has not been issued, or that a period of 30 days has not elapsed since the referral was received by the CCMA, or that 48 hours' notice of the commencement of the strike was not given timeously or in writing (s 64(1)); on the basis that the persons participating in the strike are disqualified from striking, for example, because they are bound by a collective agreement that prohibits a strike in respect of the issue in dispute or they are bound by an agreement that requires the issue in dispute to be referred to arbitration or they are engaged in an essential service or a maintenance service (s 65(1)*(a)*, *(b)* and *(d)* respectively); or the issue in

[35] (1999) 20 ILJ 82 (LAC).
[36] Id at para 9.

dispute is one that a party has the right to refer to arbitration or to the Labour Court (s 65(1)*(c)*).'

The Court then concluded:[37]

'…. In an application for a declaratory order and an interdict on the basis that a strike is unprotected, the employer is obliged to raise all its contentions in that application. It is not entitled to litigate piecemeal with the union and its members. Firstly, it is undesirable that one member of the Labour Court gives a judgment that a strike is protected (on one basis) and shortly afterwards another member of the same court gives a different judgment in regard to the same strike on a different basis - as happened in this matter. Secondly, parties should not be required to incur the expense of bringing or resisting more than one application when the facts are the same and the law is known. Thirdly, the consequences of a declaratory order that a strike is protected are important and far-reaching for the employer, the trade union and its members employed by the employer: a person does not commit a delict or a breach of contract by taking part in a protected strike (s 67(2)); an employer may not dismiss an employee for participating in a protected strike (s 67(4)); in the case of an unprotected strike the Labour Court may grant an interdict to restrain any person from participating in the strike (s 68(1)*(a)*) and may order the payment of compensation for any loss attributable to the strike (s 68(1)*(b)*). There should be certainty in regard to the rights and obligations of the parties….'

In the light of the above reasoning by the Court in *Fidelity Guards Holdings*, it is my view that because a lock-out could be unprotected for a number of reasons, an applicant challenging whether the lock-out is protected must specifically raise all the grounds for so contending in its notice of motion and founding affidavit in the application brought to Court. Because the single concept of "unprotected" can be founded on so many different grounds, absolute certainty on which grounds are

[37] Id at para 11.

relied on is essential.[38] If the applicant does not specify a particular ground supporting a contention of an unprotected strike or lock-out in the notice of motion and founding affidavit, it cannot be raised or considered by the Court in making a determination on this issue. The once and for all rule must find application in this regard in formulating such declaratory applications.[39] Accordingly, Mr Redding could not competently raise the issue of the ground of the application of section 65(3)(a) as basis for the lock-out being considered as unprotected without the applicants specifying the same in the notice of motion and founding affidavit, which they unfortunately did not do.

[33] Even if I am wrong in the above regard, there is a second reason why the argument of Mr Redding with regard to the application of section 65(3)(a) must fail. This is found in the application of section 64(3)(d) of the LRA which reads:

> 'The requirements of subsection (1) do not apply to a *strike* or a *lock-out* if- …. *(d)* the employer locks out its *employees* in response to their taking part in a *strike* that does not conform with the provisions of this Chapter….'[40]

[38] See *Dumisani and Another v Mintroad Sawmills (Pty) Ltd* (2000) 21 ILJ 125 (LAC) at para 9 where the Court said: 'It is highly desirable that employers and employees should have the largest possible measure of certainty in the conduct of their affairs'.

[39] In *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835B-E, the Court said: 'The "once and for all" rule applies especially to common law actions for damages in delict, though it has also been applied to claims for damages for breach of contract (see *Kantor v Welldone Upholsterers* 1944 CPD 388 at 391; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472A-D). Expressed in relation to delictual claims, 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 (see *Cape Town Council v Jacobs* 1917 AD 615 at 620; *Oslo Land Co Ltd v The Union Government* 1938 AD 584 at 591; *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) at 330; *Custom Credit Corporation (Pty) Ltd v Shembe* (supra at 472). This rule appears to have been introduced into our practice from English law (see *Coetzee v SAR and H* 1933 CPD 565 at 574; Prof C F C van der Walt Die Sommeskadeleer en die 'Once and for All' -Reël (doctoral thesis) at 304, 329, 378-9). Its introduction and the manner of its application have been subjected to criticism (see Van der Walt (op cit at 425-85)), but it is a well-entrenched rule. 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.

[40] This refers to Chapter IV of the LRA.

What this means, in simple terms, is that an employer is entitled to institute a protected lock-out in response to and as a defence to an unprotected strike by a trade union. To apply the factual matrix in this matter to this provision of the LRA, it is clear that what happened is that SATAWU pursued a dispute for increased Sunday pay and a meal allowance and initiated and pursued a strike in this regard. It is equally clear that in response to this strike which has started, the first respondent imposed a lock-out in which it is essence demanded that the provisions in the SARPBAC main agreement must apply. Accepting then for the purposes of the consideration of this issue that the strike of SATAWU is unprotected because of the provisions of section 65(3)(a), then clearly it is a strike that "does not conform with the provisions of this Chapter". Any lock-out then implemented by the first respondent as a defence to this, which was clearly the case, would be protected by virtue of the application of section 64(3)(d). It put it simply – it would be the unprotected nature of the strike action that would make the lock-out instituted in defence thereto protected. The lock-out, in such an instance, is a defence mechanism. The fact that this is indeed the case in the current matter is evident from the fact that the lock-out was only implemented when the strike had started and what was demanded in terms of the lock-out was application of the SARPBAC main agreement.

[34] In *Technikon SA v National Union of Technikon Employees of SA,*[41] the Court dealt with a lock-out and considered the provisions of section 64(3)(d) of the LRA. The Court, firstly, said the following:[42]

> '…. Employees have the right to strike and employers have a recourse to lock-out. In both cases the right to strike and the recourse to lock-out are subject to the limitations set out in s 65. In other words, there is no right to strike where any one of the limitations in s 65 applies. Accordingly, subject to the limitations to the recourse to

[41] (2001) 22 ILJ 427 (LAC).

> lock-out in s 65, an employer has recourse to lock-out which it may exercise when the requirements of s 64(1) have been complied with or even when they have not been complied with if any one of the exemptions in s 64(3) applies. That is the legal position in terms of the Act.'

The Court concluded as follows:[43]

> 'An employer is only entitled to resort to a lock-out under s 64(3)*(d)* where that is in response to an unprotected strike. Although it is clear that a s 64(3)*(d)* lock-out is a shield with which an employer can defend itself and is not a spear with which to attack, and, may, therefore, be referred to as a defensive lock-out, it does not follow that that is the only situation in which a defensive lock-out is available to an employer under the Act. As I have already said, s 64(1) permits both offensive and defensive lock-outs whereas s 64(3)*(d)* only contemplates a defensive lock-out and, even then, only if the strike to which the lock-out is a response is an unprotected strike. Whereas the lock-out in s 64(3)*(d)* can only be used if there is an unprotected strike, an employer is entitled to institute a lock-out under s 64(1) even if the strike resorted to by the employees is a protected one.'

[35] In the current matter, there can be no doubt that the first respondent actually complied with notice provisions as contemplated by section 64(1)(c) of the LRA. Therefore, and if the strike by SATAWU was protected, then the first respondent was entitled to institute a defensive lock-out because the first respondent has indeed complied with section 64(1)(c). If the strike by SATAWU was unprotected, then the first respondent in any event had the right to implement a protected lock-out by virtue of the application of the provisions of Section 64(3)(d). Either way, and from a procedural point of view, the lock-out of the first respondent would be protected. Any application of Section 65(3)(c) to the strike initiated and pursued by SATAWU in the current matter thus cannot stand in the way of the lock-out

[42] Id at para 35.

implemented by the first respondent still being regarded as protected. For this reason as well, any reliance by the applicants on the provisions of section 65(3)(a) fall to be rejected.

[36] Mr Mokhari also referred me to the judgment of *Autopax Passenger Services SOC Ltd v SATAWU and Others*[44] which judgment also concerned the current first respondent and SATAWU. In that case, the current first respondent sought to interdict a strike by SATAWU on the basis of the application of section 65(3)(a) of the LRA, contending that SATAWU was bound by the provisions of the SARPBAC main agreement in respect of the issue in dispute forming the subject matter of that SATAWU strike. I have read and considered this judgment but, unfortunately, this judgment concerns the previous SARPBAC main agreement that ended on 31 March 2013 and at the core of the issue before the Learned Cele J was also a dispute about unilateral change to employment conditions in the context of the application of that agreement. That judgment is thus of very little assistance to current matter and as such is, in my respect view, of no use to me in the determination of this matter. In any event and based on what is set out above, this matter can and falls to be determined without the need to actually find whether section 65(3)(a) applies.

[37] I, therefore, conclude that section 65(3)(a) is of no assistance to the applicants. This section, for the reasons mentioned, cannot be considered and even if it applies, would not cause the lock-out imposed by the first respondent in response to the strike by SATAWU to be unprotected.

<u>The issue of the lawfulness of the lock-out</u>

[43] Id at para 38.
[44] Unreported judgment under case number J1213 / 13 dated 15 July 2013 of Cele J.

[38] This then brings me to the true crux of this matter, being whether, considering that UTATU and its members did not raise any dispute against the first respondent and considering that UTATU and its members did not join the strike of SATAWU or declare their association with the same, the first respondent was still entitled to implement a lock-out against UTATU and its members as well, as part and parcel of the collective bargaining process in the dispute with SATAWU. This is an issue which clearly concerns fundamental rights, and in particular, what is contemplated by the collective bargaining process.

[39] I would first like to give some context to the proper determination of this issue. The first principle is that the right to strike and with it the recourse of employers to lock-out are part and parcel of the process of collective bargaining. As the Court said in *SA Transport and Allied Workers Union and Others v Moloto NO and Another*:[45]

> '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.'

[40] The right of trade unions and employees to strike and the right of employers to implement a lock-out are not an end in itself but a means to an end and exist specifically in the context of the process of collective bargaining. That end is the resolution of the impasse which exists in the collective bargaining process at the time when these mechanisms are invoked. This is evident from the significant similarities between the definitions of a "strike" and a "lock-out' in section 213.[46] In the context of the right to strike as being part and parcel of the collective bargaining

[45] (2012) 33 ILJ 2549 (CC) at para 59.
[46] For the definition of a 'strike' see footnote 27 above. A lock out is defined as 'the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer *breaches those employees' contracts of employment in the course of or for the purpose of that exclusion'*

process, the Court in *SA Airways (Pty) Ltd v SA Transport and Allied Workers Union*[47] 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.'

There is no reason why the same conclusions should not equally apply to a lock-out.

[41] In *Equity Aviation Services (Pty) Ltd v SA Transport and Allied Workers Union and Others,*[48] Zondo JP (as he then was) said 'collective bargaining is normally expected to result in the conclusion of a collective agreement.' As the outcome of collective bargaining is ultimately a collective agreement, the issue agreed upon must be one that has a nexus with the employment or work terms and/or conditions and circumstances of the employees. The Collective Bargaining Convention, 1981, of the ILO,[49] provides that:

> 'For the purpose of this Convention the term *collective bargaining* extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for- *(a)* determining working conditions and terms of employment; and/or *(b)* regulating relations between employers and workers; and/or *(c)* regulating relations between employers or their organisations and a workers' organisation or workers' organisations.'

[47] (2010) 31 ILJ 1219 (LC) at para 22.

[48] (2009) 30 ILJ 1997 (LAC) para 76.

[49] Article 2.

This means that collective bargaining contemplates agreement on terms and conditions of employment of employees and the right to strike and lock-out must be applied for this purpose.

[42] Therefore, it is in the above context that the issue of strikes and lock-outs must be considered. In fact, strikes and lock-outs fulfil the same purpose in the collective bargaining process than the purpose fulfilled by an adjudicator in the resolution of rights disputes. The point is that whatever the process, there is an impasse, and this required a deadlock breaking mechanism. In the case of rights disputes, this impasse would be the opposing views of the two parties presented in the litigation process and the adjudicator resolving the impasse by finding which view prevails. In the process of collective bargaining, the situation arises when a final position is adopted by the two parties when impasse is reached and it is then the strike or the lock-out, as the case may be, that is designed to resolve the issue in dispute and which position prevails. Turning then to the current matter now before me, the issue in dispute forming the subject matter of the opposing views of the first respondent and SATAWU applies to and concerns the conditions of employment of employees in the first respondent in the bargaining unit as defined. This transcends union membership of employees. It is about the conditions of employment of all employees to which such conditions of employment would apply. In the current matter, that would be all the "eligible employees" in the bargaining unit and not just the members of SATAWU. The Court in *SBV Services (Pty) Ltd v Motor Transport Workers Union of SA and Others*[50] said that:

> 'The Constitutional Court in the *Bader Bop* case confirmed the important principle that unions (and their members) should have the right to strike to enforce collective bargaining demands which demands are usually aimed at ensuring a better labour

[50] (2008) 29 ILJ 3059 (LC) para 46.

> dispensation to employees in the workplace be it for better wages or better working conditions….'

It is thus, in my view, about all the employees in the workplace as defined, where it comes to this matter.

[43] In *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another*[51] O'Regan J held as follows:[52]

> 'Where employers and unions have the right to engage in collective bargaining on a matter, the ordinary presumption would be that both parties would be entitled to exercise industrial action in respect of that matter. There is nothing in s 64 or 65 suggesting that there is a limitation on the right to strike in this regard….'

Similarly, Ngcobo J in *Bader Bop* said:[53]

> '...The right to strike is essential to the process of collective bargaining. It is what makes collective bargaining work. It is to the process of bargaining what an engine is to a motor vehicle….'

Again and being part and parcel of the very same process and purpose, there is no reason why the same reasoning should not apply to lock-outs. I accept that lock-outs do not enjoy the same level of fundamental protection as the right to strike and, in this regard, the Court in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of SA*[54] said:

> '…. Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need

[51] (2003) 24 ILJ 305 (CC).
[52] Id at para 43.
[53] Id at para 67.

> to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lock-out). The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out. The argument that it is necessary in order to maintain equality to entrench the right to lock out once the right to strike has been included, cannot be sustained, because the right to strike and the right to lock out are not always and necessarily equivalent.'

[44] However and even if the right to lock-out is not equivalent to the right to strike, the ratios in the *Bader Bop* and the *First Certification* judgments still support the contention the purpose the existence of the right to strike and the right to lock-out certainly is equivalent. The point I make is that in the absence of specific statutory regulation to the contrary, a strike and a lock-out are birds of a feather and should be treated the same where it comes to the issue of their purpose. In *Ntimane and Others v Agrinet t/a Vetsak (Pty) Ltd*[55] the Court held as follows:

> 'A strike is the workers' weapon to ensure, as Prof Roger Blanpain has so vividly expressed it, that collective bargaining does not become collective begging. The right to strike is enshrined in the Constitution of the Republic of South Africa (see s 23(2)*(c)*). On the other hand, employers also have a right to collective bargaining but they do not have a constitutional right to lock out their workers (see s 23(5)). Instead, their right to lock-out stems from their property rights and their right to economic activity.'

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[54] (1996) 17 ILJ 821 (CC) at para 66.
[55] (1999) 20 ILJ 896 (LC) at para 12.

[45] This then brings me to the judgment in *SA Transport and Allied Workers Union and Others v Moloto NO and Another*.[56] In a sharply divided Court, the majority judgment was written by Yacoob ADCJ, Froneman J and Nkabinde J and I only intend to refer to the majority judgment. The issue the Court had to determine was the interpretation of section 64(1)(a) of the LRA, which is the notice provisions in the LRA which precedes the right to strike accruing to employees. The mirror image of this provision is of course Section 64(1)(c) which is the provision in terms of which the right to lock-out accrues to employers. The Court commenced its reasoning as follows:[57]

> 'The point of departure in interpreting s 64(1)*(a)* is that we should not restrict the right to strike more than is expressly required by the language of the provision, unless the purposes of the Act and the section on 'a proper interpretation of the statute... imports them'. The relevance of a restrictive approach is to raise a cautionary flag against restricting the right more than is expressly provided for. Intrusion into the right should only be as much as is necessary to achieve the purpose of the provision and this requires sensitivity to the constraints of the language used.'

On the basis of this approach, the Court then held:[58]

> 'The regulatory scheme of the Act and the provisions of s 64 envisage only one strike in respect of one 'issue in dispute' or 'dispute'. The definite article, 'the', before the words 'issue in dispute' and 'dispute' in s 64(1)*(a)* and before the second use of the word 'strike' in s 64(1)*(b)* makes this clear. '[T]he strike' in s 64(1)*(b)* can only be in relation to 'the [unresolved] dispute' of s 64(1)*(a)*. And if there can only be one strike in relation to one dispute, there seems to be little in language or logic to suggest that more than one notice in relation to the single strike is necessary.'

[56] (*supra*) footnote 45.
[57] Id at para 54.
[58] Id at para 64.

The Court further held as follows:[59]

> 'The applicants accepted that, in relation to lock-outs, the express provisions of s 64(1)(c) of the Act require notice only to a trade union, if there is one at the workplace, and not to non-unionized employees as well. To hold otherwise would, in relation to s 64(1)(c), mean that the express wording would have to be disregarded. There is no need to do that either to fulfil the purposes of the Act.
>
> The argument that it is crucial for the employer to glean from the strike notice how many employees may be involved in the strike is discounted by the decision in CWIU, where the Labour Appeal Court held that a single strike notice by a union, in respect of a dispute that affected only certain of its members, was nevertheless sufficient to allow other members of the union, not so affected, to join the strike. The Labour Appeal Court again confirmed this in Early Bird Farm. We agree with these decisions.'

The Court finally concluded:[60]

> 'In the context of this case this means that the union, which represented the dismissed strikers in the wage negotiations and in the referral for attempted conciliation under s 64(1)*(a)* before embarking on strike action, was competent also to give the single notice required under s 64(1)*(b)*. Our concluding observation is this: to hold otherwise would place a greater restriction on the right to strike of non-unionized employees and minority union employees than on majority union employees. It is these employees, much more than those who are unionized or represented by a majority union, who will feel the lash of a more onerous requirement. There is no warrant for that where they were already denied the right to bargain collectively on their own behalf in the preceding process.'

[59] Id at para 87 – 88.
[60] Id at para 92.

[46] The simple issue is whether the basis of the above reasoning can equally apply to a lock-out implemented by an employer. I can see no reason why not. A lock-out fulfils the same purpose in and is part and parcel of the same process of collective bargaining. It is also clear from the passages quoted above that the Court in *Moloto* accepted the provisions relating to lock-outs should equally not be restrictively interpreted. The fact is that section 64(1)(a) as a point of departure applies to both strikes and lock-outs. It contemplates one issue in dispute and as such, one notice that applies to all parties that are affected by the issue in dispute. In the current matter, the issue in dispute would certainly apply to the members of UTATU. They are part and parcel of the very same specifically defined bargaining unit to which the very issue in dispute directly applies. The first respondent was thus entitled to consider all the eligible employees in the bargaining unit as being party to the issue in dispute and issue its lock-out notice accordingly.

[47] The Court in *Technikon SA*[61] dealt with the requirements, in general, for a lock-out to exist and held:

> 'It is clear from the definition of a lock-out in the Act that a lock-out has three essential elements. They are that: *(a)* there must be an exclusion of employees by the employer from the employer's workplace; and *(b)* the purpose of the exclusion of employees from the workplace must be to compel them to accept the employer's demand; and *(c)* the demand must be in respect of any matter of mutual interest between employer and employee…
>
> In the light of the above it goes without saying that, for a lock-out to exist, the exclusion of employees from the employer's workplace must be for the authorized purpose. The authorized purpose is to compel the employees to accept the employer's demand in respect of a matter of mutual interest between employer and employee.

[61] (*supra*) footnote 41 at paras 15 – 16.

From the above ratio it is clear that the employer for the purposes of a lock-out may have any demand relating to a matter of mutual interest, and that the lock-out fulfils the exact same purpose as a strike in resolving this demand, with the only difference that the employer conducts an exclusion of employees whilst in the case of a strike, the employees withhold their labour or retard work. The underlying *causa* and purpose is however clearly the same.

[48] From the extracts of the judgment in *Moloto* referred to above, it is clear that the Court in that judgment referred with approval to the judgments in *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd*[62] and *Early Bird Farm (Pty) Ltd v Food and Allied Workers Union and Others*.[63] I will, accordingly, consider these judgments as well. In firstly dealing with the judgment in *Plascon Decorative*, the Court, of relevance to the current matter, held as follows:[64]

> 'Strikes and lock-outs are regulated by chapter IV (ss 64 to 77) of the LRA. Section 64(1) provides in general terms that "every employee has the right to strike and every employer has the right to lock-out", subject to certain conditions. These are set out in paras *(a)* to *(d)*, read with subsections (2) and (3). They comprise an attempt at conciliation in regard to "the issue in dispute" (para *(a)*), and notice (paras *(b)*, *(c)* and *(d)*). Section 65 is headed "Limitations on right to strike or recourse to lock-out". It provides that "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" if (in summary terms) a collective agreement prohibits it, the issue in dispute is arbitrable or justiciable or (subject to exceptions) the person is engaged in an essential or a maintenance service….'

The Court in *Plascon Decorative*, in the light of the above reasoning then said:[65]

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[62] (1999) 20 ILJ 321 (LAC).
[63] (2004) 25 ILJ 2135 (LAC).
[64] Id at para 17.
[65] Id at para 22 – 24.

'The most notable feature of the definition of 'strike' in the LRA is its wide terms. It comprises three elements: (i) the non-performance of work; (ii) by employees; (iii) for the purpose stated. That purpose is to remedy a grievance or resolve a dispute 'in respect of any matter of mutual interest between employer and employee'. The absence of any article, definite or indefinite, before either 'employer' or 'employee' is conspicuous. It has the effect of rendering at its most general and non-specific the employer-employee relationship to which the strike dispute must relate. (Mr Loxton's phrase was 'generic'.) It follows that while it is clear that the employees not performing work must all share the purpose of remedying a grievance or resolving a dispute, the definition imposes no other requirements of mutuality - whether a shared employment relationship with an employer or a shared interest in the grievance or dispute - upon them.

The terms of the definition are thus wide enough to encompass both primary strikes (s 64) and secondary strikes (s 66). They are obviously also broad enough to cover a strike involving employees of the same employer who are not directly affected by the strike dispute.

The broad terms of the definition of 'strike' correspond with the definition of 'issue in dispute'. This offers no identification of the parties to the dispute, and thus imposes no limitation on who they may be. It also corresponds to the scheme of chapter IV. Section 64 regulates strikes and lock-outs by parties to the same employment relationship. The specificity of this association appears from the use of the definite article ('the employer' and 'the employees' in the notice requirement (s 64(1)*(b)* and *(c)*) and in the provisions providing for a freeze on or reversal of unilateral changes to terms and conditions of employment (s 64(4) and (5)), as well as from the use of the possessive pronoun ('the employees... their employer'; 'the employer... its employees' in s 64(3))….'

Once again and in my view, there no reason why this reasoning cannot equally apply to lock-outs, for the reasons already given. The fact is that the employer (first respondent) is entitled to pursue its rights in terms of Chapter IV of the LRA without

having to specifically designate the exercise of the rights to specific parties to the issue in dispute for it to be lawful. As is clear from the factual matrix set out above in the current matter, the issue is dispute applies to the whole of a defined bargaining unit and there is no need to limit the right of the employer to that of only being entitled to impose a lock-out on one of the parties in the bargaining unit who was the instigator in bringing the dispute to the fore. The current parties are clearly in the same employment relationship and in fact are all directly affected by the same issue in dispute. The Court in *Plascon Decorative* concluded as follows:[66]

> 'This reading of the chapter's provisions entails that employees employed by the same employer who are not directly affected by the strike demand must, if they are to be capable of striking at all, fall within the terms of s 64….
>
> The arguments of both Mr van der Riet and Mr Loxton proceeded, also in my view correctly, on the premise that a proper appreciation of the statutory provisions concerning strikes depends on their purpose. Mr van der Riet contended that the purpose of s 64(1)'s procedural requirements is to compel employees to explore the possible resolution of their dispute through negotiations before exercising their right to strike. The concept of a protected strike presupposes such negotiations. Once that purpose has been fulfilled, no further statutory object would be served by limiting the right to strike only to employees directly affected by the demand. Instead, the restriction envisaged would place a substantive limitation on the right of non-bargaining unit union members to strike for which the provisions of the statute offer no explicit or implicit support. I agree with the submission.'

What has to follow from the above, in my view, is that the first respondent is entitled to implement a lock-out on all the employees in the defined bargaining unit, even if some of these employees were not actually party to the dispute pursued by SATAWU.

[66] Id at para 26 – 27.

[49] The Court in *Early Bird*[67] adopted a similar approach to the judgment in *Plascon Decorative* where the Court in *Early Bird* held as follows:[68]

> *'*However, to the extent that the individual respondents' participation in the strike may be said to have been in support of wage demands for their colleagues who were based in the processing plant, the Afrox judgment of the Labour Court, the *Plascon Decorative* judgment of this court as well as another judgment of this court, namely, *SACTWU v Free State and Northern Cape Clothing Manufacturers' Association* (2001) 22 ILJ 2636 (LAC); [2002] 1 BLLR 27 (LAC) are in point and this matter would not be distinguishable from them. We have already stated what was decided in *Afrox* and that the principle in Afrox was approved by this court in *Plascon Decorative*….*'*

The Court held that the true inquiry to determine of the strike was protected was:[69]

> 'On the facts of this case to say that the individual respondents participated in the strike in support of their own demands makes no difference. This is because, if the position is that they were pursuing their own demands, those demands would have been part and parcel of the demands put forward by FAWU for the other FAWU members as well. The real question is whether the demands which they sought to support by participating in the strike formed part of the issue in dispute as contemplated in s 64(1)*(a)* of the Act and whether that issue in dispute was referred to conciliation as required by s 64(1) and is not hit by any of the limitations in s 65 of the Act.'

The Court then concluded:[70]

> 'The principle established in Afrox and other cases is that once a union has complied with the requirements of s 64 by referring a dispute to conciliation, it is not necessary

[67] (*supra*) footnote 63.
[68] Id at para 45.
[69] Id at para 35.
[70] Id at paras 47 – 48.

> to refer the same dispute again to conciliation when other members of the same union who are employed by the same employer want to join the strike in respect of the same dispute which is protected. They can join the strike even if they are not directly affected by the dispute as long as the dispute was referred to conciliation. This is the legal position as correctly pronounced in Afrox, Plascon Decorative and Free State & Northern Cape Manufacturers' Association.
>
> In the light of the above we hold that, to the extent that the individual respondents' participation in the strike was in support of demands relating only to the FAWU members based in the processing plant, such participation was lawful and protected….'

Once again, and with a lock-out just being the other side of the same coin, there is, in my view, no reason why the same reasoning could not apply to lock-outs and thus the application of a lock-out to all other employees in the bargaining unit (including UTATU members) even if they did not take issue with the first respondent or actually participate in or align themselves with the dispute pursued by SATAWU is permitted in law.[71]

[50] I have to add to the melting pot in considering this issue the fact that the LRA unashamedly supports the principle of majoritarianism. In *Kem-Lin Fashions CC v Brunton and Another,*[72] the Court said that:

> 'The legislature has also made certain policy choices in the Act which are relevant to this matter. One policy choice is that the will of the majority should prevail over that of the minority. This is good for orderly collective bargaining as well as for the democratization of the workplace and sectors. A situation where the minority dictates

[71] See also *SA Clothing and Textile Workers Union v Free State and Northern Cape Clothing Manufacturers' Association* (2001) 22 ILJ 2636 (LAC) at para 26 and 33; *Plastics Convertors Association of SA v Association of Electric Cable Manufacturers of SA and Others* (2011) 32 ILJ 3007 (LC) at para 23.
[72] (2001) 22 ILJ 109 (LAC) at para 19.

> to the majority is, quite obviously, untenable. But also a proliferation of trade unions in one workplace or in a sector should be discouraged. There are various provisions in the Act which support the legislative policy choice of majoritarianism.'

[51] It does not matter if the application of the principle of majoritarianism causes hardship to or prejudice to the rights of minorities, such as UTATU and its members. The Court in *Ramolesane and Another v Andrew Mentis and Another*[73] said:

> 'By definition, a majority is, albeit in a benevolent sense, oppressive of a minority. In those circumstances, therefore, there will inevitably be groups of people, perhaps even fairly large groups of people, who will contend, with justification, that a settlement was against their interests. Nonetheless, because of the principle of majoritarianism, such decision must be enforceable against them also.'

The will of the majority must prevail over and bind the minority as a matter of general principle. If UTATU and its members are the unfortunate collateral damage in the dispute between the two majority parties and the deadlock breaking mechanisms applied by these majority parties, then so be it.[74]

[52] I conclude in this regard by the following reference to the judgment in *National Police Services Union and Others v National Negotiating Forum and Others*[75] where it was held as follows:

> '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

[73] (1991) 12 ILJ 329 (LAC) at 336A.

[74] See also *Public Servants Association of SA v Safety and Security Sectoral Bargaining Council and Others* (2007) 28 ILJ 1300 (LC) at para 52; *Mzeku and Others v Volkswagen SA (Pty) Ltd and Others* (2001) 22 ILJ 1575 (LAC) at para 55; *Ngcobo and Others v Blyvooruitzicht Gold Mining Co Ltd* (1999) 20 ILJ 1896 (LC) at paras 54 – 55.

> influence collectively bargained outcomes. Those outcomes must depend on the relative power of each party to the bargaining process.'

In my view, to intervene in the current matter will cause precisely the mischief the above *dictum* warns against.

[53] It also cannot be ignored that the individual applicants would directly benefit from the settlement ultimately concluded with SATAWU. They will get extra Sunday pay and a meal allowance. Therefore, the benefit that accrued from the strike action implemented pursuant to this issue in dispute would apply to and directly affect all in the bargaining unit. On the opposite side of this coin and if for example SATAWU acceded to the lock-out implemented by the first respondent and not vice versa, this would similarly apply to all the employees in the bargaining unit as well. As such and from a practical point of view, I cannot see why the lock-out cannot be applied to all that has a direct interest in it, whether they have declared solidarity with the employee parties initiating the dispute or not.

[54] I am, therefore, satisfied that in the current matter, the first respondent was entitled to implement a lock-out on all the employees in the defined bargaining unit, which lock-out was as an integral part of the dispute resolution mechanism the first respondent was entitled to pursue in the collective bargaining process to effect a resolution of the issue in dispute. It simply does not matter if UTATU and its members declared their solidarity with the issue in dispute or strike. In simple terms, in my view, the sword must cut both ways. Just as UTATU and its members would have been entitled of their own volition and discretion to join the strike of SATAWU and its members as a matter of course to the prejudice[76] of the first respondent, so

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[75] (1999) 20 ILJ 1081 (LC).

[76] In this context "prejudice" means the exerting of economic pressure to compel the employer to accept the demand. I refer to *Nasecgwu and Others v Donco Investments (Pty) Ltd* (2010) 31 ILJ 977 (LC) para 8 where the Court said '…. Once parties resort to industrial action they are given boxing gloves to engage in a boxing

can the first respondent of its own volition and in its own discretion implement a lock-out as part and parcel of the same process and issue in dispute on them as well.

[55] Mr Redding referred me to the judgment of Moshoana AJ in *Transport and Allied Workers Union of South Africa obo Members v Algoa Bus Company (Pty) Ltd*[77] where the Court dealt with a similar issue and in which the Learned Judge had found that the lock-out was unlawful because the employees concerned were not in dispute with the employer and were thus unable to satisfy the demand of the employer. Mr Mokhari suggested that I was not bound by this judgment and it has persuasive authority only. This suggestion by Mr Mokhari is not correct. The principle of *stare decisis* applies in the Labour Court which means that I am bound by the judgment of Moshoana AJ unless I am of the view that it is "clearly wrong".[78] It is, accordingly, necessary to properly consider this judgment.

[56] It is clear that the judgment in *Algoa Bus Company* had a similar factual premise insofar as it concerns the issue at stake in the current matter and is thus not distinguishable on the facts and in fact applicable on the facts. What is, however, clear from the judgment is that Moshoana AJ followed a different approach in law than that set out in this current judgment. Moshoana AJ found, with reference to the strike and lock-out definitions in section 213, that a lock-out can only be directed at those employees that have tabled a demand, as it is illogical to compel someone

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match with the aim of inflicting as much pain on the other as possible. The sole aim of this contest is to bring the other party to submission by exerting as much economic power on the other as possible.'

[77] [2013] 8 BLLR 823 (LC).

[78] *Public Servants Association on behalf of Liebenberg v Department of Defence and Others* (2013) 34 ILJ 1769 (LC) at para 22; *SA Transport and Allied Workers Union and Another v Garvas and Others* (2012) 33 ILJ 1593 (CC) at para 114; *Gcaba v Minister for Safety and Security and Others* (2009) 30 ILJ 2623 (CC) at para 58; *Chizunza v MTN (Pty) Ltd and Others* (2008) 29 ILJ 2919 (LC) at para 7; *National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 24 ILJ 95 (CC) at para 26; *National Union of Metalworkers of SA v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1634 (LC) at para 22; *Eskom v Hiemstra NO and Others* (1999) 20 ILJ 2362 (LC) at para 17.

that does not resist.[79] The Learned Judge further held that in terms of section 64(1)(c), a lock-out notice can only be given to a trade union that is a party to the dispute because of the specific wording of the section and because it serves no purpose to forewarn someone an employer is not in dispute which is the primary reason for giving notice in the first place.[80] The Learned Judge sought to distinguish the judgment in *Moloto*[81] on the basis that this judgment concerns the right to strike and a lock-out is not such a right but was only a recourse.[82] The Learned Judge concluded that the purpose of a lock-out could only be to compel acceptance of a specific offer made by the employer to specific employees.[83] As a fellow Judge in the same Court, it is not my place to dispense criticism on the reasoning and findings of Moshoana AJ. That is the function of the Labour Appeal Court. What I am, however, entitled to do, should I believe the judgment of Moshoana AJ to be clearly wrong, is then not to follow such judgment and not consider myself bound by it. With respect and in the light of approach followed in this judgment above, which I believe to be the correct approach and the reasoning I have applied in terms of that approach, I am compelled to conclude that the judgment of Moshoana AJ in *Algoa Bus Company* is clearly wrong and I shall not consider myself bound by it.

[57] I will suffice by concluding that the purpose of a lock-out is simply not just to compel specific employees to accept a specific offer. It is rather the implementation of the deadlock breaking mechanism bestowed on employers in the collective bargaining process to resolve the issue in dispute between the parties, whatever the issue in dispute may be. This issue in dispute may be articulated by different offers by the respective parties or it may not. To use the current matter as a specific example – the issue in dispute concerns the demand by SATAWU and its members for

[79] See paras 12 – 14 of the judgment.
[80] Paras 16 – 17 of the judgment.
[81] (*supra*) footnote 45.
[82] Paras 36 – 37 of the judgment.
[83] Id at para 38.

additional Sunday pay and a meal allowance and a strike is implemented as the deadlock breaking measure to get the first respondent to agree to this demand, which process UTATA and its members were always entitled to join for as long as the issue in dispute remains unresolved. Opposed to this, the demand by the first respondent is the application of the SARPBAC collective agreement in this regard and the lock-out is implemented as the deadlock breaking mechanism to get all employees to accede to this demand. All that UTATU and its members had to do in response was to agree to (accede to) this demand of the first respondent. This would actually end the issue in dispute insofar as it concerns them and as a result, the lock-out against them would have to be lifted. On the facts in this current matter, UTATU and its members never so agreed, and all they did was not to declare a dispute against the first respondent, not join the strike, and continued to tender their services. They could, however, only defeat the lock-out by actually agreeing to the position adopted as the first respondent as articulated in the lock-out notice.

[58] Therefore and in the light of all of the above, I conclude that the lock-out implemented by the first respondent on 19 August 2013 was lawful and thus protected. For as long as the lock-out endured, which in this case was until the underlying issue in dispute was settled by the agreement of 27 August 2013 and the employees returned to work on 28 August 2013 in terms of such settlement, the first respondent is thus entitled to withhold the salaries (remuneration) of the individual applicants.[84]

<u>The issue of the meaning of a demand</u>

[59] This then brings me to the second issue raised by Mr Redding, being that a lock-out can only be instituted pursuant to a specific demand by the employer and in this

[84] See *SA Commercial Catering and Allied Workers Union and others v Rea Sebetsa* (2000) 21 ILJ 1850 (LC) at para 20.

case, the first respondent had no demand. According to Mr Redding, a demand cannot be a restoration or maintenance of the status quo. A demand, according to Mr Redding, requires some or other position being adopted other than the status quo – even if only minimal. To illustrate by an example – according to Mr Redding, where the employees demand a wage increase and the employer does not want to offer any increase, the employer cannot lock-out the employees pursuant to the issue of not wanting to give an increase. The employer could not lock-out the employees, in the submission of Mr Redding, unless the employer at least made some move from the status quo such as offering a R1 increase. For the reasons set out hereunder, I cannot accept these submissions of Mr Redding.

[60] In addressing this issue, the pertinent question to be answered is what, in the context of collective bargaining, constitutes a "demand". The starting point in this enquiry is the definitions in the LRA,[85] which defines a "dispute" as 'a dispute includes an alleged dispute', and "issue in dispute" as 'in relation to a strike or lock-out, means the demand, the grievance, or the dispute that forms the subject matter of the strike or lock-out'. What is clear from these definitions is that to use the word "demand" in the context of the sole subject matter of a lock-out is not really correct. The definition provides for both a "demand" and a "dispute" as being susceptible to forming the subject matter of a lock-out. The problem that arises in respect of this issue is that "demand" and "dispute" are often regarded as synonyms, when they are not. In my view, this approach of considering a "demand" and "dispute" as one and the same is exactly what the contention of Mr Redding propagates.

[61] The Court in *SA Broadcasting Corporation Ltd v Communication Workers Union and Others*[86] dealt with the meaning of "dispute" and said:

[85] See Section 213.
[86] (2010) 31 ILJ 161 (LC) at para 34.

> '… for a dispute to be said to exist, the parties must holding different positions on an issue and have reached a stage where none of the parties would like to change its stance.'

Similarly, in *SACCAWU v Edgars Stores Ltd and Another,*[87] the Court referred with approval the following definition of a dispute:

> '... whatever other notions the word may comprehend, it seems to me that it must, as a minimum, so to speak, postulate the notion of the expression by the parties, opposing each other in controversy, of conflicting views, claims or contentions.'[88]

I also wish to refer to *City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union and Others*[89] where the Court referred with approval to the following quotations:

> 'In *Estate Bodasing v Additional Magistrate, Durban and Another* the court held that a dispute must 'denote at least the positive state of the parties having disagreed'. Brassey in Employment and Labour Law: Commentary on the Labour Relations Act states as follows: 'A dispute can exist only when the one person in effect says ''yea' and the other ''nay'; it requires, in other words, a clash in the stances adopted by contending parties. Normally they will communicate their respective standpoints by an exchange or words, but a dispute can arise by conduct and will typically do so when one party demands a concession and the other fails to make it by the appointed time.'

[62] From these authorities, it is clear that "dispute", in its simplest terms, means the final opposing and irreconcilable views by the two parties. The concept of "dispute" does not require any offer by one party and a demand for acceptance from the other

[87] (1997) 18 ILJ 1064 (LC).
[88] See also *Leoni Wiring Systems (East London) (Pty) Ltd v National Union of Metalworkers of SA and Others* (2007) 28 ILJ 642 (LC) at para 27 where the Court said: 'I am of the view that a dispute only arises when the parties in fact express their differing views and assume different positions in relation to a specific factual complex.' See also para 28 of this judgment.
[89] (2008) 29 ILJ 650 (LC) at para 16.

party. What is needed is a final view, and the adopting of a position that the other party change its stance to accept the final view of the party initiating the industrial action.

[63] In then dealing with the concept of "demand" for the purposes of the definition of "issue in dispute", this would be the situation as contented for by Mr Redding. This is the case of an offer by the one party, which is then coupled with a counter offer by the other party, in the context of a collective bargaining process. This would be the stock standard wage negotiation conducted all the time between trade unions and employers. Each party demands that the other accepts its offer and an "issue in dispute" then exists for the purposes of a strike or lock-out where deadlock is reached and no further compromise is possible.[90] In *City of Johannesburg Metropolitan Municipality,*[91] the Court held:

> 'I am of the view that, although it is not a prerequisite that one of the disputing parties must formally or even expressly declare a dispute (as was the case under the previous Labour Relations Act), at the very least the issue referred to conciliation must be an issue over which the parties have reached a ''stalemate' in the sense that the employer has had the opportunity to reject or accept a demand put forward by the employees or their representatives…. Once the employer has rejected or indicated through its conduct that it is not willing, for whatever reasons, to accede to the demand, then the parties will have reached a stalemate to the extent that it may be concluded that there is now ''an issue in dispute' between the parties which is capable of being conciliated and, if unsuccessful, be the subject matter of strike action.'

Similarly the Court in *Chemical Energy Paper Printing Wood and Allied Workers*

[90] See also *Sappi Fine Papers (Pty) Ltd v Pienaar NO and Others* (1994) 15 ILJ 137 (LAC).
[91] Id at para 18.

Union v National Magazine Printers[92] said:

> '…. the most common form of dispute is one where there are bilateral or multilateral demands by the parties involved which are unable to be reconciled.'

These are the kind of disputes that normally exist in the case of strikes and lock-outs, but are not the only kind of "issues in dispute" that may exist.

[64] The fact is that for the purposes of the definition of "issue in dispute" that may form the subject matter of a strike or lock-out, "dispute" and "demand" are not the same thing. In addition, to what I have set out above in this regard, this is evident from the following extract from the judgment in *TSI Holdings (Pty) Ltd and Others v National Union of Metalworkers of SA and Others*[93] where the Court said:

> '…. A dispute will exist where a demand has been made on the employer and he has rejected it or where there is disagreement between the parties on a particular issue.'

The Court concluded:[94]

> 'The reference to a demand, a grievance or a dispute in relation to a strike or lock-
>
> out in the definition of the phrase 'issue in dispute' confirms the existence of three categories of strikes, namely, those which have a demand, those where there is no demand but there is a grievance and those in which there is a dispute.'

In my view, the same ratio clearly applies to lock-outs as well, save for the simple distinction that a lock-out cannot be implemented to resolve a grievance.

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[92] (1999) 20 ILJ 2864 (LC) at para 37.
[93] (2006) 27 ILJ 1483 (LAC) at para 26.
[94] Id at para 27.

[65] Therefore, and for an "issue in dispute" to legitimately form the subject matter of a lock-out, all the employer has to show is that the parties have reached an impasse where there is either a demand in the context of an offer and counter offer or where the two parties have two opposing stances and no further compromise is possible. All that the employer has to do, in implementing its lock-out, is to describe the issue in dispute in its lock-out notice[95] with sufficient particularly so as to inform the other parties of what the issue in dispute and position of the employer is so that they would know what they need to do to resolve the same. As the Court said in *Leoni Wiring Systems (East London) (Pty) Ltd v National Union of Metalworkers of SA and Others*:[96]

> '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. 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.'

[66] In any event, it has been held that a dispute can exist in the case where there is a demand by one party and the refusal by the other party to comply with it even if the other party makes no proposal of its own. In *Chemical Energy Paper Printing Wood and Allied Workers Union v National Magazine Printers*[97] the Court held:

> 'It is possible that a dispute can consist of a demand by one party and a point blank

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[95] The notice in terms of Section 64(1)(c).
[96] (2007) 28 ILJ 642 (LC) at para 27.

refusal by another to comply with it.'[98]

Mr Redding referred me to the judgment in *SA Commercial Catering and Allied Workers Union and Others v 3M SA (Pty) Ltd*[99] where Waglay J (as he then was) said that an exclusion from the workplace does not constitute a lock-out if not coupled with a specific demand from the employer and further for an employer to seek compliance with existing terms and conditions of employment by employees is not a demand for purposes of a lock-out. This judgment in *3M* however concerned the situation where the employees after embarking on a strike then tendered their services in circumstances where the underlying dispute forming the subject matter of the strike remained resolved and the employer then sought to exclude the employees until such time as the underlying issue in dispute was resolved. Not only is there a material factual distinction with the current matter now before me but the Labour Appeal Court in *3M SA (Pty) Ltd v SA Commercial Catering and Allied Workers Union and Others*[100] overturned the judgment of Waglay J and held:[101]

> 'The reason why a tender by strikers to resume their work on the basis that they may later on resume their strike is not conditional is that, when strikers do that, they place themselves in the position in which they were prior to going out on strike. Prior to the commencement of their protected strike, the employer would not, in the absence of a protected lock-out, be entitled to reject their tender simply because they had indicated that they would be going on a protected strike but would be so entitled if there was a lock-out. The position cannot be different when they have gone on strike but later tender their services on the basis that they may later resume their protected strike.'

The point is that it is clear from the judgment of the Labour Appeal Court in *3M* that an employer would be entitled to use a lock-out to exclude employees where the

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[97] (1999) 20 ILJ 2864 (LC) at para 37.
[98] See also *NTE Ltd v Ngubani and Others* (1992) 13 ILJ 910 (LAC) at 920H-I.
[99] (2000) 21 ILJ 1657 (LC) at paras 26 – 29.
[100] (2001) 22 ILJ 1092 (LAC).

underlying issue in dispute forming the subject matter of the strike remains unresolved, even if the employer did not table its own demand. In fact and if the employer did not implement such a lock-out, it would not be able to exclude the employees.

[67] I conclude with the following reference to *Leoni Wiring*[102] which, in my view, is a correct summary of the enquiry that needs to be made in order to determine whether an issue in dispute exists that can lawfully form the subject matter of a strike or lock-out:

> 'What is apparent is that as the existence of a dispute is not always a simple and determinable event, it underscores the proposition I made earlier, namely that it is important that, if parties arrive at a point where the one or the other forms the view in its mind that it is now in dispute with the other, it should say so and do so in the clearest of terms possible so as not to leave any doubt, as I said, about what it is in dispute about and what resolution it demands.'

[68] In the light of all the above, there clearly existed an issue in dispute between the first respondent and SATAWU and its members. SATAWU demanded extra Sunday pay and meal allowances. The first respondent adopted the view that the SARPBAC main agreement as it stood must apply. The parties were at an impasse in this regard. Whether one calls this a "demand" or a "dispute", it matters not. The fact is that SATAWU gave strike notice and indicated what the dispute was and what it wanted. The first respondent in turn gave a lock-out notice once the strike started indicating what the dispute was and what it wanted. The lock-out notice of the first respondent made it clear what was needed for the first respondent to uplift the lock-out. I therefore conclude that a proper issue in dispute existed in this instance

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[101] Id at para 29.

[102] (supra) footnote 96 at para 29.

which could form the subject matter of the lock-out by the first respondent and I am compelled to reject the submission by Mr Redding to the contrary.

Conclusion

[69] I am, therefore, not satisfied that the applicants have the necessary right to the relief sought and have failed to demonstrate the existence of a clear right I find that the first respondent was entitled as a matter of law to implement a lock-out against UTATU and its members. I also find that there existed a proper issue in dispute that entitled the first respondent to implement such lock-out. The first respondent also gave proper and lawful notice of the lock-out as contemplated by the LRA. In the light of all of these conclusions, it is my finding that the first respondent's lock-out was lawful and thus protected. The applicants are, therefore, not entitled to the payment of their salaries (remuneration) for the period that the lock-out endured, being the period between 19 August 2013 and 28 August 2013.

[70] This then only leaves the issue of costs. The fact is that the issues in this matter were important and complex. There is also the issue of the existence of the judgment in *Algoa Bus Company* which I decided not to follow. The applicants had proper cause for bringing this application and, in my view, acted responsibly in doing so. There is further an ongoing relationship between the parties in terms of a continuing recognition agreement, which agreement actually records that parties are entitled to use their remedies in terms of the LRA. I, in any event, have a wide discretion where it comes to the issue of costs. This is a matter where I believe that it is in the interest of justice and fairness and the relationship between the parties that no order as to costs be made.

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

1. This application is heard as one of urgency in terms of Rule 8 and the time limits imposed by Rule 7 are hereby and herewith dispensed with.

2. In terms of the order granted on 26 August 2013, the first respondent shall pay the salaries of the second to further applicants up to 19 August 2013.

3. Save for the order in terms of paragraph 2 above, the applicants' application is dismissed.

4. There is no order as to costs.

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Snyman, AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant:	Advocate A S Redding SC and Advocate A N Snider
Instructed by:	Fluxmans Inc
For the Respondent:	Advocate W R Mokhari SC
Instructed by:	Maserumule Inc