THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1785 / 16

In the matter between:

SIBANYE GOLD LIMITED **Applicant**

and

THE ASSOCIATION OF MINEWORKERS AND

CONSTRUCTION UNION **First Respondent**

PERSONS AS LISTED IN ANNEXURE "A" **Individual Respondents**

Heard: **18 August 2016**

Delivered: **26 August 2016**

Summary: Strike – issues in dispute determined by collective agreement prohibiting strike action – Section 65(1)(a) and (b) applicable – Section 65(3)(a) applicable – proposed strike unprotected

Strike – true nature of issues in dispute determined – issues in dispute disposed of by making collective agreement applicable – strike unprotected

Strike – issue on dispute – issue about unilateral change to conditions of employment – constitutes a rights dispute – any right to strike having lapsed upon the expiry of the time period in Section 64(1)(a) as read with Section 64(4)

Collective agreement – allegations of breach – appropriate remedies – collective agreement cannot simply be negated – collective agreement remains applicable – *exceptio* does not apply

Interdict – principles stated – prima facie right shown and other requirements satisfied – interdict granted

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter came before me on 18 August 2016 as an opposed application by the applicant to interdict contemplated strike action by the respondents, due to commence that very evening. The application was brought in terms of Section 68 of the LRA.[1] Only the applicant filed a founding affidavit, and Mr Boda representing the respondents indicated that the respondents would not be seeking to file an answering affidavit, but would oppose the applicant's application on the basis of the founding affidavit as it stood. After considering the founding affidavit, and hearing submissions by both parties in Court, I issued the following interim order on 18 August 2016:

> '1. The provisions of the Rules of this Court relating to the times and manner of service referred to therein are dispensed with and this matter is dealt with as one of urgency in terms of Rule 8 of this Court's Rules.
>
> 2. A *rule nisi* is hereby issued calling on the Respondents to appear and show cause on 10 November 2016 at 10h00 why a final Order should not be granted in the following terms:

[1] Labour Relations Act 66 of 1995.

2.1 The intended strike called by the First Respondent commencing on the night shift on Thursday, 18 August 2016 is unprotected;

2.2 The First Respondent is interdicted and restrained from inciting or otherwise encouraging its members and/or any other employees from embarking on an unprotected strike due to commence on 18 August 2016, or from embarking on acts or omissions in support, contemplation or furtherance of such a strike;

2.3 The First Respondent is ordered to immediately after the granting of this Order, communicate the content thereof to its members by any means possible and to ensure that its members report for work on the night shift commencing on 18 August 2016;

2.4 The First Respondent is ordered to present proof to this Court on the return day of the efforts it made to communicate the content of this Order to its members;

2.5 The Second to Further Respondents are interdicted and restrained from embarking on such a strike, or from embarking on or continuing with any conduct in contemplation or furtherance of such strike action; and

2.6 The Respondents who oppose this application are ordered to pay the costs of the application, jointly and severally, the one paying the others to be absolved.

3. The provisions of paragraphs 2.1 to 2.5 shall operate with immediate effect, as an interim order, pending the finalization of this application.

4. Service of the Rule *nisi* upon the Respondents be effected as follows:

4.1 by service per facsimile on the First Respondent's head office;

4.2 by attaching copies of the Order to the notice boards at the Applicant's premises at Driefontein Mine, which are usually used by the Mine to communicate with its employees; and

4.3 by distributing copies of the Order to as many of the Second to Further Respondents as may request the same.

5. Written reasons for the order will be handed down on 26 August 2016.'

[2] The matter was argued on the basis of interim relief being sought by the applicant. That being the case, the applicant must show, as was said in *National Council of SPCA v Openshaw*[2]:

> '*(a)* A *prima facie* right. What is required is proof of facts that establish the existence of a right in terms of substantive law; *(b)* A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; *(c)* The balance of convenience favours the granting of an interim interdict; *(d)* The applicant has no other satisfactory remedy.'

[3] This judgment now constitutes the written reasons referred to in paragraph 5 of my order, *supra*.

Background facts

[4] The facts in this matter, considering that the respondents chose not to file an answering affidavit, are undisputed. The second to further respondents as cited in the application and as listed in annexure "A" to the notice of motion will be referred to in this judgment as the 'individual respondents'. The first respondent will be referred to as 'AMCU'.

[5] The individual respondents are all members of AMCU and are employed at the applicant's Driefontein mining operation. The applicant in turn is affiliated to the Chamber of Mines. Other trade unions active in the applicant's operations, which includes mining operations other than Driefontein Mine, include NUM, UASA and Solidarity.

[6] In this instance, there are two broad categories of issues in dispute that form the subject matter of the contemplated strike action by AMCU and the

[2] 2008 (5) SA 339 (SCA) at 354.

individual respondents, which proposed strike the applicant seeks to interdict. The first category relates to 17(seventeen) individual demands concerning matters of mutual interest, first tabled by AMCU in March and June 2015. The second category relates to alleged unilateral changes effected by the applicant to 12 (twelve) policies and procedures, without consultation with AMCU, which was first raised by AMCU on 24 February 2016.

[7] In respect of the mutual interest dispute, and as touched on above, AMCU formally tabled 17(seventeen) individual demands on 29 June 2015 as part and parcel of the wage negotiations being conducted under the auspices of the Chamber of Mine, between the applicant and all the trade unions in its operations, including AMCU. These wage negotiations had commenced on 22 June 2015. The seventeen demands tabled by AMCU related to: remuneration, allowance and bonus increases, introduction of new allowances, long service awards, overtime payment, contribution towards accommodation, parity in payments and providing for vehicles for AMCU branch leaderships. These are clearly interest disputes which, in the normal course, could legitimately form the subject matter of protected strike action.

[8] As to the dispute relating to policies, AMCU raised a dispute on 24 February 2016 to the effect that the applicant had unilaterally changed the conditions of employment of the individual respondents at Driefontein Mine, when the applicant sought to amend twelve individual policies as listed by AMCU in its letter of 24 February 2016. The applicant's answer to this dispute was that 6(six) of the policies were not amended at all, but just underwent a name change, 3(three) of the policies are new policies which are related to work practices and have nothing to do with terms and conditions of employment at all, the amendment of 2(two) policies do not constitute any amendment to terms and conditions of employment, and finally only 1(one) policy that was amended could be seen as an amendment to terms and conditions of employment. Whether this issue, as an issue in dispute, could legitimately form the subject matter of protected strike action is much more difficult question to answer, and will be addressed fully hereunder.

[9] AMCU proceeded to refer a dispute about a unilateral change to employment conditions to the CCMA. The referral document was attached to the founding

affidavit, and is dated 7 March 2016. This dispute was in essence the same policies dispute raised on 24 February 2016, save for the fact that date the dispute arose was reflected in the referral to be 4 March 2016. It was alleged by AMCU in the referral document that the applicant had unilaterally amended the existing terms and conditions of employment of the individual respondents, and the outcome sought was that the applicant revert back to the former policies prior to the unilateral amendment. In its referral, AMCU also signed the provision in terms of Section 64(4) to the effect that the applicant restore the *status quo ante*. It appears that the referral was served and filed by telefax on 9 March 2016.

[10] This unilateral change to employment conditions dispute was only conciliated in the CCMA on 4 July 2016. Conciliation was unsuccessful, and a certificate of failure to settle was issued on the same date. The certificate described the issue in dispute was one of "mutual interest'.

[11] On the facts, this matter however has an added, and crucial, nuance. As touched on above, the wage negotiations conducted at the applicant in 2015, for its entire operations, and of which Driefontein Mine is a part, was being conducted between the applicant and all the representative unions at the applicant (including AMCU), under the auspices of the Chamber of Mines. These collective wage negotiations culminated in the conclusion of a collective agreement on 21 October 2015, which I will hereinafter refer to as 'the Chamber agreement'. The Chamber agreement was signed by NUM, UASA and Solidarity, but not AMCU.

[12] The Chamber agreement was not extended in terms of Section 23(1)(d) of the LRA to AMCU and its members. As a result, the Chamber agreement did not apply to the applicant's Driefontein Mine operations, where the individual respondents as AMCU members were working.

[13] Dealing then with the substance of the Chamber agreement, the parties had agreed to wages and conditions of employment for the employees employed by the applicant, and was concluded in full and final settlement of all issues and disputes relating to wages, terms of conditions of employment, and benefits, for the period commencing 1 July 2015 and ending 30 June 2018.

[14] Clause 15 of the Chamber agreement confirms the full and final settlement of all disputes relating to wages, conditions of employment and benefits for the duration of the agreement. The Clause further contains an undertaking that none of the parties to the agreement shall seek to vary, review or negotiate these issues. Finally, the clause prohibits strike action on any of these issues for the duration of the agreement.

[15] Clause 16 of the Chamber agreement prescribes a compulsory arbitration process in respect of any dispute arising out of any issue determined by the Chamber agreement.

[16] Because AMCU and its members were not bound by the Chamber agreement, as aforesaid, all of the demands and disputes raised by AMCU in the course of the wage negotiation, as has been dealt with above, remained unresolved. As such, AMCU would be entitled to still pursue strike action in respect of the same, which it then did on at the beginning of April 2016, by giving formal notice of intention to embark upon strike action on 4 April 2016.

[17] The applicant and AMCU, with the view of avoiding the intended strike, entered into negotiations and on 15 April 2016, managed to conclude a collective agreement in order to resolve all the outstanding issues in dispute between them. This collective agreement was labelled the 'Settlement Premium Agreement' and was signed by AMCU. This agreement will hereinafter be referred to as 'the Premium agreement'.

[18] The Premium agreement bestowed an additional monetary benefit on AMCU members. The Premium agreement further specifically recorded that AMCU and its members would be bound by the terms of the Chamber agreement. Finally, the Premium agreement contained its own prohibition on strike action in respect of any issue covered by the Chamber agreement.

[19] An important consequence of the conclusion of the Premium agreement was that the terms and provisions of the Chamber agreement also now applied equally to AMCU and its members, which would include the applicant's Driefontein Mine operations and the individual respondents.

[20] The final event in the chronology is on 15 August 2016, when AMCU proceeded to issue the applicant with two separate notices of intention to strike in terms of Section 64(1) of the LRA. The first notice related to the mutual interest dispute (the 17 individual demands) referred to above, which dated back to 2015. The second notice related to the policies dispute. The strike notices are somewhat lacking in particularity and appear to be in the form of a template, simply referring to the date and time when the strike is to commence, and attaching a certificate of failure to settle as constituting the identification of the issue in dispute the proposed strike would be about. But the applicant understood what the strike was to be about.

[21] On 16 August 2016, the applicant's attorneys wrote to AMCU, calling on it to withdraw the strike notices, on the basis that it was the applicant's view that the proposed strike would be unprotected. This view of the applicant, in terms of the letter, was founded on the provisions of the Chamber agreement and the Premium agreement. This letter also served as prior notice that the applicant intended to apply for an interdict to prevent the strike from taking place.

[22] The applicant then brought this application on 17 August 2016 to interdict the proposed strike of the respondents due to commence on 18 August 2016. With applicant taking action and the application having been brought virtually immediately upon the strike notice being received, as considered with the fact that it is of critical importance to decide this matter before the strike was actually due to start on the evening of 18 August 2016, I am satisfied that the matter is indeed one of urgency. The respondents in any event took no issue with the application being urgent, and accepted that it was in the interest of both parties that it be decided. I thus condone any non-compliance with the Court Rules, the time limits in terms of such Rules and the provisions of the LRA, and accept that this matter be considered as one of urgency in terms of Rule 8.

<u>The issue of a prima facie right</u>

[23] Two issues lie at the heart of the applicant's case relating to its prima facie right to the relief sought. The first is based on the application of the Chamber

agreement and Premium agreement. The second is based on the nature of the issue in dispute, where it comes to the proposed strike relating to the policies dispute.

[24] In presenting argument in Court, the respondents did not dispute the terms of the Chamber agreement and the Premium agreement, and that, as a matter of principle, these agreements would stand in the way of the respondents' proposed strike action. It was however the case of the respondents that because the applicant acted in breach of the Chamber agreement, the applicant could not rely on the same agreement to interdict the proposed strike. It is a defence principally based on the *exceptio non adimpleti contractus*. The respondents further argued that in the absence of the application of the Chamber agreement, the dispute about the unilateral change to conditions of employment, where it came to the amendment of the policies, could legitimately form the subject matter of protected strike action in terms of Section 64(4) of the LRA.

[25] I will now deal with the arguments of both parties, under separate headings, hereunder.

The collective agreements

[26] Starting with the Chamber agreement and Premium agreement, there can be little doubt that these agreements in fact determine the very issues in dispute forming the subject matter of the proposed strike by the respondents.

[27] Firstly, and where it comes to all wages, conditions of employment, and benefits, this has been fully and finally settled and determined by the Chamber agreement. As stated above, the Premium agreement in effect applies the Chamber agreement to AMCU and its members, with the added addition of a premium to be paid to AMCU members over and above the wages agreed to in the Chamber agreement. The effective date of the application of the Chamber agreement was 1 July 2015 and it would endure for three years until 30 June 2018.

[28] The Chamber agreement, as read with the Premium agreement, thus specifically disposed of the 17(seven) demands raised by AMCU in its first strike notice referred to above. It is clear that these demands were tabled and formed part of the wage and conditions of employment negotiations in 2015, prior to the conclusion of the Chamber agreement. The Chamber agreement specifically prescribes that the agreement is concluded in full and final settlement of the issue of wages, terms and conditions of employment and benefits, for the three year period of the agreement, and this would clearly include the demands referred to. An added consideration is that AMCU pursued intended strike action on these demands in April 2016, on its own (without the other unions), which led to the Premium agreement being concluded which in turn applied the Chamber agreement. It simply cannot be gainsaid that when AMCU gave notice of the intended strike relating to these demands on 15 August 2016, there was no longer any live dispute in this respect in existence which could form the subject matter of the intended strike. In *Wilson Bayly Homes (Pty) Ltd v Maeyane and Others*[3], the Court said:

> 'The contract in the present case was one of compromise. The nature of such a contract is that it is concluded because the rights of the parties are uncertain, and they choose not to resolve that uncertainty. By the very nature of such a contract, there can be little room for finding that the parties must have intended their contract to depend upon the existence of one or other of the factors relevant to their respective rights. It is precisely to avoid testing them that they compromise.'

I am satisfied that the same considerations apply *in casu*. The 2015 mutual interest dispute raised by AMCU has been compromised, and resolved. For this reason alone, the proposed strike by AMCU relating to the 17(seventeen) mutual interest demands of 2015 would be unprotected, and the applicant has demonstrated a *prima facie* right to the interdict sought, where it comes to this issue in dispute.

[29] But that is not the end of it. It is so that where some or parts of the demands raised by a trade union and its members in the course of contemplated strike

[3] 1995 (4) SA 340 (T) at 345E-F. See also *Van As v African Bank Ltd* (2005) 26 *ILJ* 227 (W) at 231C-G.

action would render the strike to be unprotected, others may not. Provided the demands are properly severable, the proposed strike action would still be protected, but only in respect of those demands that remain and which would not render the strike unprotected.[4]

[30] *In casu*, I am satisfied that the dispute relating to the 17(seventeen) mutual interest demands tabled in 2015 are readily severable from the dispute and accompanying demand relating to the policies dispute tabled in 2016. It must therefore now be considered whether this policies dispute may competently on its own serve as basis for a protected strike. The first consideration in deciding this question has to be a determination as to what the true or real nature of this issue in dispute would be, no matter how the parties may have sought to describe or label the dispute. In *Coin Security Group (Pty) Ltd v Adams and Others*[5] the Court said:

> 'It is the court's duty to ascertain the true or real issue in dispute (*Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building Workers Union & others (2)* (1997) 18 ILJ 671 (LAC) and *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers' Union & others (1)* (1998) 19 ILJ 260 (LAC)). In conducting that enquiry a court looks at the substance of the dispute and not the form in which it is presented (*Fidelity* at 269G-H; *Ceramic* at 678C). The characterization of a dispute by a party is not necessarily conclusive (*Ceramic* at 677H-I; 678A-C). ….'

And in *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members and Others*[6] it was held that: ' It is our duty to look at the true nature of the dispute and not the manner in which it has been packaged by the employees '.

[31] As to what must be considered by the Court when establishing the true or real issue in dispute, the Court in *TSI Holdings (Pty) Ltd and Others v National Union of Metalworkers of SA and Others*[7] said:

[4] See *Unitrans Fuel and Chemical (Pty) Ltd v Transport and Allied Workers Union of SA and Another* (2010) 31 *ILJ* 2854 (LAC) at para 26. See also *Transport and Allied Workers Union of SA and Others v Unitrans Fuel and Chemical (Pty) Ltd* (2015) 36 ILJ 2822 (LAC).
[5] (2000) 21 *ILJ* 924 (LAC) at para 15.
[6] (2014) 35 *ILJ* 983 (LAC) at para 47; see also *Unitrans Supply Chain Solutions (Pty) Ltd v SA Transport and Allied Workers Union and Others* (2014) 35 ILJ 265 (LC) at para 9.
[7] (2006) 27 *ILJ* 1483 (LAC) at paras 29 and 31.

> 'The purpose of the concerted refusal to work must be determined in the light of all the conduct of the respondents. This includes what the respondents wrote in the referral of the dispute to conciliation and in the strike notice where these can shed light on such purpose. In the form used for the referral of the dispute to conciliation there is a space where the form required the respondents to state what they desired as an outcome of the conciliation process.
>
> What is said in the strike notice is particularly important because it will probably reflect the views of the union or the strikers at the time that they were notifying the employer of the commencement of their strike '

[32] Similarly the Court in *City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union and Others*[8] held:

> 'The issue in dispute in relation to a strike (in these proceedings, the demands made by the union) is to be ascertained from the relevant facts. These include the referral form, any relevant correspondence, the negotiations between the parties and the affidavits filed in this court'. And in *SATAWU v Coin Reaction*[9], the Court held that the real or true dispute should be determined with reference to all the relevant facts 'including the referral form to conciliation, the correspondence immediately before and after conciliation, the negotiations and discussions which took place at the conciliation and the content of the advisory award and affidavits filed with this court'.

[33] The correspondence between the parties, followed by the CCMA referral, as well as what is contained in the founding affidavit, shows that in its simplest form, the issue in dispute can be described as one where AMCU was contending that the applicant had taken existing policies, as applicable to its members, and changed these policies without consultation or agreement with AMCU.AMCU further contended that these policies constituted part and parcel of the existing conditions of employment of its members. Because, according to AMCU, the applicant was not entitled to unilaterally change actual

[8] (2009) 30 *ILJ* 2064 (LC) 2069G-H. See also *Unitrans Supply Chain Solution (Pty) Limited v South African Transport and Allied Workers Union and Another* (2014) 35 ILJ 265 (LC) at paras 9 – 11.
[9] (2005) 26 *ILJ* 1507 (LC) at 1512D.

conditions of employment, AMCU then demanded that the *status quo ante* be restored.

[34] Considering that the aforesaid is the issue in dispute raised by AMCU, several issues must then be decided relating to this specific issue in dispute. The first would be whether or not the policies, and thus conditions of employment, were actually unilaterally changed, because if that is not the case, then there is simply no dispute. In *Unitrans Supply Chain Solutions (Pty) Ltd v SA Transport and Allied Workers Union and Others*[10] the Court said:

> '…. the first question is whether the conduct of G the employer as set out above in fact constitutes a unilateral change of employment conditions. If it does not, then that is the end of the enquiry, as the right to strike simply does not accrue to the respondents.'

Secondly, and even if policies were actually changed, the next question is whether these policies were of the kind that can be said to be part and parcel of terms and conditions of employment of the applicant's individual employees. Finally, and even if policies that were changed formed part of the terms and conditions of employment of employees, the ultimate question would be whether strike action relating to the same nonetheless be prohibited by virtue of the application of Section 65 of the LRA.

[35] As referred to above, and in its letter of 24 February 2016, AMCU contends that 12(twelve) individual policies were unilaterally changed by the applicant. In its founding affidavit (which is undisputed) the applicant says that 6(six) of these policies were not changed at all, but just renamed. These are the Matshidiso programme, the workplace smoking policy, the home based care policy, the subsistence allowance policy, the phone reimbursement policy, and the memorial services policy. Accordingly, and in answering the first question articulated above, it must be said that there can be no existing issue in dispute relating to these 6(six) policies that can serve to substantiate a case that the proposed strike action by the respondents would be protected, because there has been no change.

[10] (2014) 35 *ILJ* 265 (LC) at para 13. See also *Ram Transport SA (Pty) Ltd v SA Transport and Allied Workers Union and Others* (2011) 32 *ILJ* 1722 (LC) at para 7; *SA Airways (Pty) Ltd v SA Transport and Allied Workers Union* at para 32.

[36] Secondly, the applicant states in the founding affidavit that a further 3(three) of the policies referred to do not relate to the unilateral change to terms and conditions of employment of the individual respondents, as these are newly introduced policies relating only to work practices. These policies are the policy relating to the combatting of illegal mining activities, the policy relating to dangerous weapons in the workplace, and lastly the junior engineer development programme. Because these newly introduced policies do not actually constitute a unilateral change to terms and conditions of employment of the individual respondents, these 3(three) policies can equally not serve to substantiate a case that the proposed strike action by the respondents would be protected, for the simple reason that a work practice does not constitute terms and conditions of employment.

[37] In *Johannesburg Metropolitan Bus Services (Pty) Ltd v SA Municipal Workers Union and Others*[11] the Court held:

> 'In the case before me, SAMWU has not been able to point to any term contained in a collective agreement or in the bus drivers' contracts of employment that accords them a vested right to a specific shift schedule. They have vested rights with regard to maximum working hours, and the right to pick shifts according to seniority. These rights have not been changed or infringed. The change implemented by Metrobus comprises no more than a change in work practice. It does not amount to a unilateral change in the bus drivers' terms and conditions of employment. Therefore, the trade unions representing the drivers do not have the right to strike over a unilateral change to terms and conditions of employment in terms of s 64(4) of the LRA.'

The same reasoning applies *in casu*.

[38] This then leaves 3(three) existing policies that were indeed amended by the applicant. The first is the home adaptions policy, which was amended by including a provision that in the case where an employee is met with a fatality,

[11] (2011) 32 *ILJ* 1107 (LC) para 40 – 41. See also *Motor Industry Staff Association and Another v Silverton Spraypainters and Panelbeaters (Pty) Ltd and Others* (2013) 34 *ILJ* 1440 (LAC) at para 40; *National Union of Metalworkers of SA on behalf of its Members v Lumex Clipsal (Pty) Ltd* (2001) 22 *ILJ* 714 (LC) at para 25; *SA Police Union and Another v National Commissioner of the SA Police Service and Another* (2005) 26 *ILJ* 2403 (LC) at para 84; *SA Transport and Allied Workers Union v Bidair Services (Pty) Ltd* (2013) 34 *ILJ* 2637 (LC) at para 19; *Unitrans* (*supra*) at para 17.

the employee's spouse (or beneficiary) would be built a home if the employee did not have one or the home would be upgraded if the employee had one. The second policy is the business travel policy, in terms of which business travel can now only be claimed from the workplace, and not from an employee's home. The third policy is the acting and relieving policy, which was amended to the effect that the 10% acting allowance paid to an employee acting in a position would be based on 10% of the employee's existing salary, and not 10% of the salary associated with the post in which the employee was acting.

[39] I accept that all 3(three) these policies determine benefits that accrue to employees, out of their employment with the applicant. As to what constitutes a 'benefit', the Court in *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[12] held:

> 'In my view, the better approach would be to interpret the term 'benefit' to include a right or entitlement to which the employee is entitled (ex contractu or ex lege including rights judicially created) as well as an advantage or privilege which has been offered or granted to an employee in terms of a policy or practice subject to the employer's discretion. In my judgment 'benefit' in s 186(2)*(a)* of the Act means existing advantages or privileges to which an employee is entitled as a right or granted in terms of a policy or practice subject to the employer's discretion.'

In terms of this reasoning, the 3(three) policies referred to above would convey an entitlement or advantage to employees by virtue of what is contained in those very policies. That would thus be a 'benefit'.

[40] Because these three policies relate to a benefit, the Chamber agreement comes into play. In terms of the Chamber agreement, no party bound by the agreement is entitled to institute or participate in any strike action in respect of any demand relating to inter alia benefits or conditions of employment, for the entire period of the duration of the Chamber agreement. The Chamber agreement then further specifies a dispute resolution process, in terms whereof any dispute about the interpretation, implementation or application of

[12] (2013) 34 *ILJ* 1120 (LAC) at para 50.

the agreement would be subjected to arbitration. This would clearly include the enforcement of the agreement.[13]

[41] The Premium agreement was concluded between the applicant and AMCU on 15 April 2016. This was concluded after the policies dispute was first raised by AMCU in February 2016 and referred to the CCMA in March 2016. The Premium agreement incorporates the Chamber agreement, and specifically the settlement provision therein relating to benefits and conditions of employment, already touched on above. The Premium agreement also has its own distinct undertaking not to institute or participate in any strike action in respect of any demand relating to inter alia benefits or conditions of employment, for the entire period of the duration of the Chamber agreement.

[42] Do these provisions in the Chamber agreement and the Premium agreement affect the respondents' right to strike? The relevant provisions of the LRA which need to be considered in this respect are Sections 65(1) (a) and (b), and also 65(3)(a), which provide:

> '(1)(a) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out if - (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute; (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration ….
>
> (3) Subject to a collective agreement, no person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or lock-out - (a) if that person is bound by - (i) any arbitration award or collective agreement that regulates the issue in dispute …. '

[43] *In casu*, it is undoubtedly so that both the Chamber agreement and the Premium agreement, to which AMCU and the individual respondents are bound, prohibits strike action in respect of any issue or demand dealt with or resolved in terms of the agreement, whilst it remains in force. What is dealt with includes benefits and conditions of employment. The dispute pursued by the respondents in respect of the 3(three) policies referred to above is such an

[13] See *Health and Other Services Personnel Trade Union of SA on behalf of Tshambi v Department of Health, Kwazulu-Natal* (2016) 37 *ILJ* 1839 (LAC) at paras 22 to 25.

issue. Not only that, the Chamber agreement prescribes compulsory arbitration for any such dispute. Section 65(1)(a) and (b) thus squarely stand in the way of the respondents' proposed strike action in respect of the 3(three) remaining policies. As the Court said in *CSS Tactical (Pty) Ltd v Security Officers Civil Rights and Allied Workers Union and Others*[14]:

> '….Section 65 of the LRA limits the right to strike in several respects. One of the limitations gives expression to so-called peace clause in terms of which the parties agree that neither employers nor employees may lock out or strike for the period and concerning the issues agreed upon.
>
> Section 65(3)*(a)* permits parties to limit the right to strike by regulating the issue in dispute. The term 'regulate' includes regulation by way of creating a process to resolve the issue.'

[44] Further, and where it comes to the concept of 'regulation' in Section 65(3)(a), the Court in *Fidelity Guards v PTWU and Others*[15] said:

> '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.'

[45] The judgment in *Fidelity Guards* was approved of in *Air Chefs (Pty) Ltd v SA Transport and Allied Workers Union and Others*[16] where the Court said: 'In summary, …. an issue is regulated if it is contained in a substantive rule, or if the process for dealing with the issue is set out in the regulating agreement. In this case, the parties did agree on a process regulated by a procedure.' Further reference is made to the judgment in *ADT Security (Pty) Ltd v SA Transport and Allied Workers Union and Another*[17] where it was held also with specific reference to Section 65(3)(a) that: 'the prohibition against a strike action where there is a binding

[14] (2015) 36 *ILJ* 2764 (LAC) at paras 17 – 18.
[15] [1997] 11 BLLR 1425 (LC) at 1433F-H.
[16] (2013) 34 *ILJ* 119 (LC) at para 27.
[17] (2012) 33 *ILJ* 2061 (LC) at para 18.

collective agreement is not limited to substantive issue/s in dispute but includes the procedure laid out in the collective agreement'.[18]

[46] The settlement provisions and the dispute resolution process as prescribed by the Chamber agreement would be the kind of process regulation as contemplated by the judgment in *Fidelity Guards*. This means that Section 65(3)(a) also finds application, and the respondents' proposed strike on the 3(three) policies would be unprotected for that reason as well.

[47] Mr Boda, representing the respondents, was clearly alive the above difficulties to the respondents' intended strike. This is where the defence of the *exceptio non adimpleti contractus* ('the *exceptio*') then comes in, which he raised. The nub of the argument of the respondents is that the Chamber agreement imposes reciprocal obligations on the parties. Simply described, the argument is that in terms of the Chamber agreement, on the one hand, AMCU undertakes not to strike about benefits, whilst on the other hand the applicant undertakes not to unilaterally change benefits. It is argued that because the applicant repudiated (breached) its obligations under the Chamber agreement by unilaterally amending the three policies, AMCU is entitled, in terms of the *exceptio*, not to comply with its undertaking not to strike.

[48] On face value, such an argument may seem to have merit. But proper consideration of the principles relating to the *exceptio*, as well the terms of and intention behind the Chamber agreement, strips away any merit in the argument.

[49] Firstly, and before even considering the substance of the argument that the *exceptio* applies, the difficulty the respondents have is that the entire policy dispute arose before the conclusion of the Premium agreement. The Premium agreement then settled all disputes relating to benefits and conditions of employment by way of incorporation of the Chamber agreement into it. It follows that this would include any disputes about the policies which arose

[18] See also *Transnet Ltd v SA Transport and Allied Workers Union and Others* (2011) 32 ILJ 2269 (LC) at paras 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.

prior to the Premium agreement being concluded. In my view, the following ratio in *ADT Security*[19] is applicable:

> 'It is clear that the right to strike may be prohibited in terms of s 65 of the LRA where the collective bargaining agreement between the parties makes provision for a peace clause either regulating the substantive issues that may be raised subsequent to the conclusion of that agreement or the process through which substantive issues may be raised for negotiations thereafter'

[50] In short, the applicant's obligations not to unilaterally change policies and to restore the *status quo ante*, which may have existed prior to the conclusion of the Premium agreement, has been novated. In *Tauber v Von Abo*[20] the Court aptly described novation as follows, which in my view is exactly what happened *in casu*:

> 'Novation can be described as the replacing of an existing obligation by a new one, the existing obligation being discharged by the new obligation.'

If the applicant sought to unilaterally amend policies relating to benefits or conditions of employment after the conclusion of the Premium agreement that would be a different story, and would certainly validly and justifiable expose the applicant to appropriate action by AMCU to counter the same. But, and as stated, the policies dispute arose before that. For the aforesaid reasons, the *exceptio* cannot apply, as there is no existing breach of the Chamber agreement by the applicant.

[51] However, and even if I am wrong in my conclusion as set out above, a consideration of the principles that need to be satisfied for a sustainable reliance on the *exceptio* have not been met by the respondents, for the reasons I will now elaborate on. The principles that must be satisfied for the valid reliance on the *exceptio* was authoritatively set out in the well known judgment of *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms)*

[19] (*supra*) at para 26.
[20] 1984 (4) SA 482 (E) at 485C.

Bpk[21]. In summarizing the *exceptio* defence as articulated in *BK Tooling*, the Court *Thompson v Scholtz*[22] said:

> '…. It is a defence entitling a party from whom performance is demanded to withhold it until the party demanding performance has rendered or tendered his own performance; it arises where performance and counter-performance are contractually dovetailed and the party demanding performance is to render his own performance either in advance of or in conjunction with performance from the other side …. As such it is a stalemate defence to a claim *ex contractu* and not a remedy for breach of contract; indeed, it will frequently be available to a contracting party where no breach of contract has been committed by his opposite number ….'

[52] Similarly, and in *Motor Racing Enterprises (Pty) Ltd (In Liquidation) v NPC (Electronics) Ltd*[23] the Court said:

> 'Firstly, it is well established that the *exceptio* presupposes the existence of mutual obligations which are intended to be performed reciprocally, and that the parties' intention is to be sought primarily in the terms of their agreement: *Wynns Car Care Products (Pty) Ltd v First National Bank Ltd* 1991 (2) SA 754 (A) at 757F.
>
> Secondly, in *Rich v Lagerwey* 1974 (4) SA 748 (A) at 761-762, Wessels JA rightly said that common sense seems to indicate that inter-dependent promises are *prima facie* reciprocal, unless a contrary intention clearly appears from a consideration of the terms of the agreement.'

[53] In deciding now to determine when obligations are in fact reciprocal, the Court in *MAN Truck and Bus (SA) (Pty) Ltd v Dorbyl Ltd t/a Dorbyl Transport Products and Busaf*[24] said the following:

> '…. In contracts which create rights and obligations on each side, it is basically a question of interpretation whether the obligations are so closely connected that the principle of reciprocity applies …. But reciprocity of debt in law does

[21] 1979 (1) SA 391 (A).
[22] [1998] 4 All SA 526 (A) at 531.
[23] [1996] 4 All SA 601 (A) at 603 – 604.
[24] [2004] 2 All SA 113 (SCA) at para 12.

> not exist merely because the obligations which are claimed to be reciprocal arise from the same contract and each party is indebted in some way to the other. A far closer, and more immediate correlation than that is required: *Minister of Public Works and Land Affairs and another v Group Five Building Ltd* 1996 (4) SA 280 (A) …. The overriding consideration is the intention of the parties; and the question whether the performance of respective obligations was reciprocal, depends upon the intention of the parties as evident from the terms of their agreement seen in conjunction with the relevant background circumstances ….'

The Court in *MAN Truck and Bus* further held that the materiality of an obligation does not render it *per se* reciprocal.[25]

[54] There have however been further and more recent developments where it comes to the very principle of reciprocity that forms one of the cornerstones of the *exceptio*. The Constitutional Court in *Botha and Another v Rich NO and Others*[26] dealt with a situation of an instalment sale agreement to buy immovable property, which had a cancellation clause stating that breach by the purchaser would entitle the seller to cancel the agreement and retain all payments made to point of cancellation. After having made most the payments, the purchaser defaulted on the remaining instalments, and the seller successfully sued for cancellation and eviction. The purchaser however claimed transfer of the property against a tender of payment of the outstanding balance of the purchase price and interest. The Court held as follows:[27]

> 'It is true that Ms Botha was in arrears and had failed to rectify her breach. It is an accepted principle of our law that where a contract creates reciprocal obligations, own performance or tender of own performance by a claimant is a requirement for the enforceability of her claim for counter-performance. This is an instance of the principle of reciprocity. The other side of the coin is that the party from whom performance is claimed may raise the failure of counter-performance as a defence. …. In bilateral contracts the obligations of parties are prima facie reciprocal. For the principle to operate the obligations of the

[25] Id at para 20.
[26] 2014 (4) SA 124 (CC).
[27] Id at para 43.

> parties must be reciprocal in the sense that performance of the one cannot be enforced without performance of the other. ….'

Having held as above, the Court then concluded:[28]

> '…. The principle of reciprocity falls squarely within this understanding of good faith and freedom of contract, based on one's own dignity and freedom as well as respect for the dignity and freedom of others. Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interests. Good faith is the lens through which we come to understand contracts in that way.'

[55] Applying the above principles *in casu*, what the respondents need to show, in order to successfully rely on the *exceptio*, is that the obligation on the applicant not to unilaterally amend benefits is an actual reciprocal obligation as against the respondents' obligation not to strike, meaning in simple terms that the one is 'interwoven' with the other. Secondly, the respondents would have to tender compliance on their own part with their obligations against compliance by the applicant with its obligations. And finally, the respondents must act in good faith and not simply pursue their own self-interest.

[56] What is apparent from that which I have set out above, is that deciding whether obligations are reciprocal to the extent required for the valid application of the *exceptio* entails establishing that the intent of the parties with the conclusion of the agreement was, with proper consideration of the agreement and a whole and relevant surrounding circumstances. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[29] the Court said:

> '…. Interpretation is the process of attributing meaning to the words used in a document having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature

[28] Ibid at para 46.
[29] 2012 (4) SA 593 (SCA) at para 18. See also *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at para 12.

> of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. '

[57] In actually interpreting a collective agreement, the Court in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*[30] said that proper effect must be given to every clause in the document and if there is a contradiction in clauses, these clauses must be reconciled so as to do justice to the intention of the drafters of the document.

[58] Considering the Chamber agreement as a whole, together with all the events that gave rise to its ultimate conclusion, I have little hesitation in concluding that the parties never had the intention of establishing the obligations in clause 15 of the Chamber agreement, as read with the dispute resolution provisions in clause 16, to be reciprocal obligations. The performance or application of one obligation in any of the subclauses of clause 15 is not dependent on the reciprocal or simultaneous or related application of the other subclauses by the other parties. Each obligation has its own and independent existence. It simply cannot be said that the obligation not to unilaterally amend a policy is dependent upon the simultaneous or related obligation not to strike. If there exists any reciprocity, it exists as between each individual obligation as established by each of the subclauses of clause 15, and the dispute resolution process in clause 16. This means that a contravention of an obligation under clause 15 (or any of the provisions of the Chamber agreement for that matter) is met with the invoking of the dispute resolution process in clause 16. In simple terms, giving effect to one of the obligations under one of the subclauses of clause 15 by one party is not reciprocal to simultaneous compliance with the other subclauses of clause 15 by the other parties. Therefore, and because of the absence of the required reciprocal obligations,

[30] (2008) 29 *ILJ* 2461 (CC) at para 90.

the respondents cannot rely on the *exceptio*, which does not find application in this case.

[59] I am fortified in my conclusion as set out above by a consideration of the surrounding circumstances. It is clear to me that the primary purpose of the agreement was to finally settle a large number of outstanding disputes where it came to wages and other material conditions of employment of the applicant's employees. The bulk of the agreement deals with these issues, and it came about as a result of collective bargaining on the same. The Chamber agreement was primarily intended to finally determine, and then usher in an era of labour peace, where it comes to wages and conditions of employment of employees, for the period of duration of the agreement until 2018. The further intention of the parties is that any dispute between the parties about any of the issues determined by the Chamber agreement must be resolved by arbitration, and not by way of industrial action. To permit the subversion of this primary intention by seeking to apply the *exceptio* is contrary to what I would consider to be good faith. In line with the principles articulated in the judgment of *Botha*, I consider that the requirement of good faith necessitates that as a matter of first instance, effect must be given to the primary requirement of labour peace, prohibition on industrial action, and dispute resolution by arbitration, as enshrined in the Chamber agreement. If this consideration operates to the exclusion of the *exceptio* in this instance, then that has to be so.

[60] I also cannot help to think that the conduct of AMCU in pursuing strike action in this case and seeking to apply the *exceptio* to escape the clear terms of what it has agreed, is clearly serving its own self-interest. This has to be especially so considering that part of the issues it again sought to strike about concerned wages and conditions of employment expressly settled. I get the distinct feeling that AMCU raised all it could where it came to demands that could possibly form the subject matter of a proposed strike, and hoped one stuck in the face of challenge. Why AMCU would want to do this, only it can answer. Further, AMCU certainly never tendered compliance of its obligations under the Chamber agreement against compliance by the applicant.

[61] Based on the above reasoning, I am satisfied that the *exceptio* cannot be utilized by the respondents, *in casu*, in order to escape the clear application of the provisions of clauses 15 and 16 of the Chamber agreement, which applies to them. The respondents remain bound by the obligations contained therein. It follows that the respondents' proposed strike action, in respect of the policies dispute, is not only specifically and per se prohibited by the Chamber and Premium agreements, but also by the dispute resolution process of arbitration as prescribed in the Chamber agreement. For these reasons as well, the strike proposed by the respondents would be unprotected in terms of Sections 65(1)(a) and (b), as well as Section 65(3)(a).

The benefits dispute *per se*

[62] Finally, and even assuming that the respondents are entitled to invoke the *exceptio*, and are thus not bound to comply with the provisions of the Chamber and Premium agreements, there is nonetheless a final obstacle in the way of the respondents pursuing protected strike action on the 3(three) policies. This obstacle is found in the fact that the issue in dispute relates to a unilateral change of benefits established as a matter of right, as discussed above, which would be an issue in dispute susceptible to being resolved by way of arbitration, and in particular, the unfair labour practice provisions of the LRA. Section 186(2)(a) defines an unfair labour practice as follows:

> '… any unfair act or omission that arises between an employer and an employee involving- (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee'

Disputes involving an unfair labour practice must be resolved by way of arbitration in terms of Section 191[31] of the LRA.

[63] Mr Boda, for the respondents, stated that *in casu* the policies concerned and the benefits bestowed in terms thereof, were actually part of the individual respondents' conditions of employment, as a right, and the applicant was not

[31] See Sections 191(1) and 191(5)(a) of the LRA.

entitled to unilaterally change the same. This sentiment is echoed in the CCMA referral of this dispute by AMCU, to the CCMA, in which it is sought that the applicant revert to what was the entitlement prior to the change. Mr Boda is undoubtedly correct where he submits that in the case of benefits that form part and parcel of employees' conditions of employment, this cannot, as a matter of law, be unilaterally (without agreement with the employees) changed by an employer, and an attempt to do so would actually be breach of contract. In *Department of Community Safety: Western Cape Provincial Government v General Public Service Sectoral Bargaining Council and Others*[32] the Court said the following:

> 'Had the existing employees indeed had a contractual entitlement to only work fixed hours and at fixed times from Monday to Friday, a unilateral amendment to the duty roster could not have been implemented by the employer. Consent to a variation to terms and conditions would indeed have been required in those circumstances …'

[64] Normally, this kind of benefit, forming the subject matter of the respondents' dispute *in casu*, is that of entitlement as a matter of right, bestowed by contract and/or policy. As a result, the appropriate means of dispute resolution relating to this dispute is not strike action, but arbitration, as discussed above. In fact, strike action to resolve such a dispute would be prohibited by virtue of the application of the provisions of section 65(1)(c), which reads:

> 'No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if … (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law …'.

[65] In *Mawethu Civils (Pty) Ltd and Another v National Union of Mineworkers and Others*[33] the Court held:

> 'The issue the court had to decide was whether the respondents had the right to refer the issue in dispute to arbitration or to the Labour Court in terms of the

[32] (2011) 32 *ILJ* 890 (LC) at para 55.
[33] (2016) 37 *ILJ* 1851 (LAC) at para 19.

> LRA. The answer to that question appears to me to be in the affirmative. … If and when conciliation failed, the respondents would at that point have acquired the right to request arbitration in terms of s 191(5)*(a)*(iv) of the LRA.'

The Court in *Mawethu Civils* concluded:[34]

> 'In the premises, the prohibition in s 65(1)*(c)* of the LRA did apply both in fact and in law. The issue in dispute was one which the respondents had the right to refer to arbitration in terms of s 191(5)*(a)*(iv) of the LRA and thus the strike was indeed prohibited and unprotected ….'

[66] However, and where the dispute relating to a benefit is coupled with a contention that the employer has also unilaterally changed employment conditions (the benefit being part of employment conditions), a further contention comes into play where it comes to dispute resolution. When referring a dispute about such unilateral change to employment conditions relating to a benefit to the CCMA (or the bargaining council as the case may be), the referring party can call upon the employer to restore the status quo ante within 48(fourty eight) hours.[35] If the employer does not comply with such demand, the employee parties may immediately embark upon protected strike action without further notice to compel or demand compliance.[36] This is what the respondents contend is the case in this instance. It is thus clear that the respondents have pinned the case that the proposed strike would be protected squarely on Section 64(4), as read with Section 64(5), of the LRA.

[67] The difficulty with relying on Section 64(4) as the basis for the proposed strike being protected is that the right to strike in the case of the application of section 64(4) is only an interim measure until such time as either 30 days have elapsed since the referral, or a certificate of failure to settle has been issues. After the expiry of this period, the dispute resolution process continues on the

[34] Ibid at para 21.
[35] See Section 64(4) which reads: 'Any employee who or any trade union that refers a dispute about a unilateral change to terms and conditions of employment to a council or the Commission in terms of subsection (1) (a) may, in the referral, and for the period referred to in subsection (1) (a)- (a) require the employer not to implement unilaterally the change to terms and conditions of employment; or (b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change'. And see Section 64(5) which reads: 'The employer must comply with a requirement in terms of subsection (4) within 48 hours of *service* of the referral on the employer'.
[36] See Section 64((3)(e).

basis of that normally prescribed by the LRA. If the normal dispute resolution process is one that requires arbitration, the right to strike lapses at this point. As I said in *Unitrans Supply Chain*:[37]

> '…. the provisions of Section 64(4) are intended to constitute status quo relief and is clearly an interim measure. It is a measure where the employees can resort to strike action immediately to compel the employer to restore the status quo pending conciliation of the matter if the employer does not respond to a call to restore the status quo. Once the conciliation period prescribed in Section 64(1) expires, the issue of entitlement to the status quo relief expires along with it.'

[68] I will illustrate the point by way of two examples. The first example is an instance where employees are entitled to a transport allowance for transport to and from work, as part and parcel of their actual vested conditions of employment. One day, the employer unilaterally takes this transport allowance away. The employees refer a unilateral change to employment conditions dispute to the CCMA, demanding restoration of their transport allowance. In the referral, the employees invoke Section 64(4), but the employer does not restore the *status quo ante*. The employees may then immediately strike. However, and once conciliation is concluded where the matter is not settled, the employees cannot continue with the strike, and the dispute must be referred to arbitration for determination.

[69] The second example is an instance where the employees and the employer are in fact in the process of collectively bargaining a transport allowance for employees. The employer then takes it upon itself to simply implement a transport allowance, far less than what the employees are demanding. Once again, the employees refer a unilateral change to employment conditions dispute to the CCMA, demanding restoration of the *status quo ante* and that the transport allowance be agreed with them, and further invoke Section 64(4), but the employer does not restore the *status quo ante*. Clearly the employees may then embark upon strike action immediately. Once conciliation is unsuccessfully concluded, the employees would not be able to refer that dispute to arbitration, since they have no vested right to the benefit of a transport allowance, susceptible to being enforced. In this case, the

[37] (*supra*) at para 21.

employees would be entitled to issue a notice of intention to strike as contemplated by Section 64(1)(b) and continue their strike action on the issue.

[70] In simple terms, it is about what forms the basis of the alleged unilateral change in employment conditions. If the unilateral change if founded on a vested right, whether by policy, contractually or *ex lege*, the right to strike lapses when the time period as contemplated by Section 64(1)(a)(i) or (ii) expires. If not, then the employees may continue with their strike after the time period as contemplated by Section 64(1)(a)(i) or (ii) expired, provided proper notice of intention to strike is then given in terms of Section 64(1)(b).

[71] In *Eskom v National Union of Metalworkers of SA and Others*[38] the Court dealt with a case of the unilateral implementation of a wage increase by the employer, which resulted in the union referring a unilateral change to employment conditions dispute to the CCMA. In that case, the union and employees however did not pursue the remedy of immediate strike action in terms of Section 64(3)(e), but sought to rather approach the Labour Court for an interdict on the basis of the provisions of Section 64(4). The Court held as follows:

> '…. The above interpretation of s 64(4) accords with the clear purpose of s 64(4) and (5) which is to retain or restore the status quo until the conciliation stage regarding a dispute about a unilateral change to terms and conditions of employment is over and both parties are in a position to resort to the use of economic power. I conclude that the words 'for the period referred to in subsection (1)*(a)* ' where they appear in s 64(4) refer to either the period mentioned in s 64(1)*(a)* (i) or to the one referred to in s 64(1)*(a)* (ii), as the case may be. …. When the application was brought in this case and also when the court a quo issued the order, the period referred to in s 64(1) *(a)* (i) had expired. The second dispute had been referred to the CCMA and the latter had issued a certificate stating that the second dispute remained unresolved. It follows that, when the court a quo issued its order, even on the assumptions I have made, the appellant no longer had an obligation not to implement the wage increase. The court a quo should accordingly not have issued the order it did. The appeal must succeed.'

[38] (2002) 23 *ILJ* 2208 (LAC) at para 11 – 14.

[72] The point made in *Eskom* is in my view clear. The right to rely on the application of Section 64(4), which includes both seeking an interdict or embarking upon an immediate strike, ends when the period as contemplated by Section 64(1)(a)(i) or (ii) expires. The Court in *Cape Clothing Association v SA Clothing and Textile Workers Union and Another*[39] applied the same reasoning, and said:

> 'In any event, I am not persuaded that the provisions of s 64(4) give rise to a right to strike in the present circumstances. That section is concerned to preserve the status quo, pending the outcome the conciliation process prescribed by the Act. Secondly, the temporary nature of the status quo relief is a clear indication that it is not intended to apply in circumstances such as the present. Du Toit et al in *Labour Relations Law: A Comprehensive Guide* (5 ed) observe that s 64(4) does not apply to changes that may be referred to arbitration or adjudication in terms of the Act, because such disputes are excluded altogether from the ambit of protected industrial action.'

[73] In *SA Commercial Catering and Allied Workers Union v Ellerine Holdings (Pty) Ltd t/a Ellerine Furniture (Pty) Ltd and Ellerine Trading (Pty) Ltd*[40] the Court was dealing with another instance of an application for an interdict in terms of Section 64(4), and where the Section 64(1)(a) time period had already expired, and held:

> '…. Section 64(4) is a temporary remedy. It may be invoked when a party refers a dispute to the CCMA in circumstances where an employer party has or intends unilaterally to change terms and conditions of employment. The employer must restore the status quo or agree not to implement the changed terms, as the case may be. The penalty for a failure to comply with the requirements of s 64(4) is that the time-limits otherwise applicable to the acquisition of the right to strike fall away - a union may immediately commence strike action. In these circumstances, it is doubtful whether this court is empowered to grant interdicts enforcing the restoration or maintenance of the status quo - the section contains its own remedy. But the remedy is limited - s 64(4) applies only for so long as the conciliation process continues; once the period for conciliation lapses, or once a certificate of

[39] (2012) 33 *ILJ* 1643 (LC) at paras 12 – 13.
[40] (2009) 30 *ILJ* 2476 (LC) para 8

outcome is issued, the protection offered by the section falls away. The purpose of the section is clear - once it is invoked, equality in the bargaining position of the parties is maintained for the duration of the conciliation process. In the present instance, s 64(4) ceased to have any effect once the agreed-to extension to the 30-day period lapsed during December 2008. To the extent that the present application relies on a right derived from s 64(4), it is misconceived.'

[74] Mr Boda sought to rely on the judgment in *Maritime Industries Trade Union of SA and Others v Transnet Ltd and Others*[41] as authority for the proposition that the right to strike remained as having accrued to the respondents in terms of Section 64(4), even after the expiry of the time limit in Section 64(1)(a). Such reliance is misplaced, as the judgment in *Maritime Industries*, in my view, is no support for such a proposition. Firstly, the Court in *Maritime Industries* said that an assertion that a dispute about a unilateral change of conditions of employment is necessarily a dispute of interest is not correct.[42] The Court accepted that a unilateral change of terms and conditions of employment includes a case where an employer changes existing terms and conditions of employment of an employee embodied in a contract of employment to the detriment of the employee without the employee's consent, and that this is in fact a rights dispute because the employer takes away employees' existing rights or benefits. Considering this, the Court then in fact held as follows:[43]

'It is clear that s 64(4) relates to a dispute about a unilateral change to terms and conditions of employment. It is also clear that it affirms that such a dispute can be the subject of a referral in terms of s 64(1) which is a referral of a dispute that can be the subject of a strike. Accordingly, it can be accepted that a strike is competent in respect of a dispute about a unilateral change to terms and conditions of employment. However, if a dispute about a unilateral change of conditions of employment can properly fall within the provisions of item 2(1)*(b)* of schedule 7, it will nevertheless be arbitrable. '

[41] (2002) 23 *ILJ* 2213 (LAC).
[42] Id at para 99.
[43] Id at para 106.

The Court concluded:[44]

> 'It is therefore clear from the above that the fact that a strike is competent in respect of a dispute does not mean necessarily that it is not arbitrable in terms of the Act. What needs to be done in each case is to examine the provisions of the Act to determine whether such a dispute is, indeed, not arbitrable. Where the court a quo seems to have gone wrong, in my view, is that it adopted the attitude that, because the Act has provisions which made a strike competent in respect of a dispute about a unilateral change of conditions of employment, such a dispute could not be arbitrable. …'

[75] In my view, the Court in *Maritime Industries* therefore accepted that a dispute about unilateral changes to conditions of employment, where it concerns existing rights or benefits being infringed, could be arbitrable in terms of the unfair labour practice provisions of the LRA. Even though the Court accepted that employees may have a choice between striking or referring a matter to arbitration in the case of a dispute relating to unilateral changes to conditions of employment, the Court never dealt with the implications of the expiry of the time period in terms of Section 64(1)(a) of the LRA where Section 64(4) finds application, and what may follow thereafter. This situation has however been dealt with in the authorities discussed above. *Maritime Industries* simply does not assist the respondents.

[76] I therefore conclude that insofar as the respondents seek to rely on Section 64(4) so as to establish their right to strike, this reliance is misplaced. The underlying *causa* of the unilateral change to employment conditions dispute is one of right, which must ultimately be referred to arbitration. The right to strike in terms of Section 64(4), as an interim measure, has already lapsed *in casu*, because the time limit in terms of Section 64(1)(a) has already expired. For this reason as well, the proposed strike action by the respondents would be unprotected.

[77] Based on all of the above reasons, I am satisfied that the applicant has established a prima facie right to the relief sought, and I so determine.

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[44] Id at para 108.

Other considerations

[78] The issues of prejudice, balance of convenience and an alternative remedy were not in contention and I accept that all these requirements, in the circumstances of this matter, have been met. The applicant is thus entitled to the declaratory relief and the interdict it sought.

[79] In the end, and even if the applicant contravened the Chamber agreement where it comes to the 3(three) policies referred to, the respondents have full and proper redress available to them. The respondents can pursue this dispute to arbitration in terms of clause 16 of the Chamber agreement, and if their case is found to have merit, they would be entitled to claim relief in the form of the enforcement of the restoration of the *status quo ante*. There is no need to have embarked upon the current course of action, which in my view subverts the collective agreements concluded between the applicant and AMCU, and the very primary objectives these agreements sought to achieve.

[80] It is for all the above reasons that I made the order that I did on 18 August 2016, as referred to in paragraph 1 of this judgment.

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Sean Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Advocate G Fourie
Instructed by:	ENS Africa Attorneys
For the Respondents:	Advocate F Boda SC together with Advocate A Cook
Instructed by:	Larry Dave Attorneys