THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 949 / 17

In the matter between:

SOUTH AFRICAN AIRWAYS (SOC) LTD **Applicant**

and

SOUTH AFRICAN CABIN CREW ASSOCIATION **First Respondent**

INDIVIDUAL RESPONDENTS LISTED IN ANNEXURE "A" **Second to Further Respondents**

Heard: **3 May 2017**

Delivered: **3 May 2017**

Reasons: **10 May 2017**

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 an increase to meal allowances – not considered to be a condition of employment in terms of collective agreement – issue dealt with as part of earlier collective bargaining – strike action on this issue prohibited

Collective agreement – extension of agreement – Section 23(1)(d) considered – collective agreement applicable – agreement determines issue and dispute and prescribes process to deal with issue – strike action prohibited

Certificate of failure to settle and conciliation proceedings – consequences considered – certificate not a determination of issue in dispute by CCMA – certificate and conciliation not binding in deciding whether strike competent

Interdict – final order – principles considered – clear right shown and other requirements satisfied – interim order confirmed

---

REASONS

SNYMAN, AJ

Introduction

[1] This matter arose from an urgent application brought by the applicant on 26 April 2017 to interdict strike action by the respondents, which application was brought in terms of Section 68 of the LRA.[1] The strike started early the morning of 26 April 2017. The application came before Prinsloo J early afternoon on 26 April 2017, and at the time was not opposed by the respondents. After considering the application, Prinsloo J granted an order in terms of which the learned Judge accepted the matter was urgent, condoned any non-compliance with Section 68(2) of the LRA, and issued a *Rule Nisi* with

[1] Labour Relations Act 66 of 1995.

a return date of 23 June 2017, calling on the respondents to show cause why the following final order should not be granted:

> '3.1 The conduct of the First to Further Respondents constitute an unprotected strike;
>
> 3.2 The First to Further Respondents are interdicted and restrained from continuing with the unprotected strike;
>
> 3.3 The First to Further Respondents are interdicted and restrained from encouraging or inciting any of the Applicant's non striking employees to participate in the unprotected strike …'

[2] The respondents duly complied with the *Rule Nisi*, after it was granted, and stopped their strike action. Having done so, the respondents however decided not to wait for the return day of 23 June 2017. A notice of anticipation[2] of the return date was filed by the respondents on 28 April 2017, in terms of which the return date was anticipated to 3 May 2017. This notice was followed by an answering affidavit by the respondents on 2 May 2017, and a replying affidavit by the applicant the morning of the hearing on 3 May 2017. All considered, the matter was therefore ripe for final determination when it came before me on 3 May 2017.

[3] The applicant sought confirmation of the aforesaid paragraphs of the *Rule Nisi*, whilst the respondents sought that the entire Rule Nisi be discharged. Both parties were *ad idem* that what was being sought was final relief. That being the case, the applicant must satisfy three essential requirements, being: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[3]

[4] Further, and as these are motion proceedings in which final relief is sought, any factual disputes that exist between the parties must be resolved and

---

[2] Filed in terms of Rule 8(10), which reads: 'Unless otherwise ordered a respondent may anticipate the return date of an interim interdict on not less than 48 hours' notice to the applicant and the registrar.'
[3] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & 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.

determined on the basis as set out in the regularly referred to judgment of *Plascon Evans Paints v Van Riebeeck Paints.*[4] These principles are aptly summarized in *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another*[5], as follows:

> '… where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected.'

[5] Having considered all the pleadings filed, and after hearing argument by Advocate Redding SC for the applicant and Advocate Mooki for the respondents, I made the following order on 3 May 2017:

> '1. Paragraphs 3.1, 3.2 and 3.3 of the Rule Nisi issued on 26 April 2017 is confirmed as a final order.
>
> 2. There is no order as to costs.
>
> 3. Written reasons for this order will be handed down on 10 May 2017.'

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

Background facts

[4] 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.
[5] 2009 (3) SA 187 (W) at para 19.

[7] For the sake of convenience in this judgment, I will refer to the applicant as 'SAA', the first respondent as 'SACCA' and the second to further respondents as cited in the application and as listed in annexure "A" to the notice of motion, as the 'individual respondents'. Fortunately, and in the end, a substantial part of the factual matrix important to deciding this matter, turned out to be undisputed.

[8] SAA is a state owned enterprise and the national airline carrier. The individual respondents are all employed by SAA to serve as cabin crew on its aircraft, in respect of both its domestic services and international services. The individual respondents are also members of SACCA, a registered trade union representing the cabin crew in SAA. There are also a number of other recognized representative trade union in SAA, which includes National Transport Movement ('NTM'), United Association of South Africa ('UASA'), and South African Transport and Allied Workers Union ('SATAWU').

[9] Collective bargaining is SAA is currently regulated on the basis of what can be described as an internal central level. On 17 December 2014, a 'Main Bargaining Forum Constitution' was concluded between SAA and all the representative trade unions, which will be referred to in this judgment as 'the Constitution'. The Constitution is a collective agreement under the LRA. The Constitution created what was called the 'Main Bargaining Forum' ('MBF'), which also had two sub-committees, being the Cabin Crew Sub-Committee and the Ground Staff Sub-Committee. Further, the Constitution created what was called the 'Main Consultation Forum' ('MCF'). The difference between these two forums will be dealt with hereunder.

[10] The bargaining unit for the purposes of the MBF and MCF under the Constitution was defined as all permanent employees below management level S3 and M3, and in particular, the cabin crew and ground staff combined. Employees in turn are defined as all persons employed by SAA, save for pilots, managers at levels S3, M3 and above, trainees, interns, fixed term contract employees and independent contractors. A final definition in the Constitution of relevance is that of a 'substantive issue', which reads:

> '… any matter of mutual interest or any issue relating to Employees' terms and conditions of employment or any substantive agreement concluded between the

Company and the Party Trade Union/s or any other issues with financial implications not covered by the Employees' contracts of employment.'

[11] Part 4 of the Constitution deals with collective bargaining. Clause 16 records that collective bargaining shall take place in the MBF, but may be delegated to the two sub-committees, if required. In terms clause 17, bargaining on all 'substantive issues', as defined above, shall be conducted in the MBF, through what is defined as 'simple majority of fifty percent plus one votes'. In the event of a deadlock in the MBF, the dispute resolution provisions in clause 41.4 of the Constitution would be applied. Clause 18 deals with the composition of the MBF, which is based on a system of proportional representation, based on the percentage membership of the trade unions in the bargaining unit. Finally, clause 22 of the Constitution applies a time frame to collective bargaining. Bargaining relating to wages and substantive issues are to commence by 15 December of each year, and be concluded by 31 March of the following year. The process commences by the exchange of written submissions. Thereafter, meetings are convened by mutual agreement, to conduct the requisite bargaining.

[12] The Constitution also regulates issues which would not normally be the subject matter of collective bargaining, such as issues relating to operations and management prerogative. This is where the MCF, and part 5 of the Constitution, comes in. In clause 24, it is specifically recorded that substantive issues and matters of mutual interest will not be dealt with in the MCF. It is provided that the MCF will deal with what is called 'operational issues'. The purpose of the establishment of the MCF is so the parties can share information and consult on operational decisions to be taken by SAA. In terms of clause 26, no decisions are taken in the MCF by way of vote, and should the parties not achieve consensus, any party would be entitled to pursue their rights under the LRA.

[13] Part 7 of the Constitution deals with dispute resolution. Of relevance in this case is clause 41.4, which provides that unresolved disputes in the MBF shall be determined by way the dispute resolution processes under the LRA, which would clearly be Section 64 and strike action under the LRA.

[14] National Union of Metalworkers of SA ('NUMSA') is also involved in SAA. But, and as is clear from the Constitution, NUMSA is not a party to the MBF, nor is it a recognized trade union in terms of the Constitution. However, on 24 February 2016, NUMSA and UASA concluded what was called an 'agreement of coalition'. In terms of this agreement, NUMSA and UASA would act as an 'alliance' in bargaining collectively with SAA in the MBF on matters of mutual interest. Clause 3.4 of this agreement provided that any agreement concluded between SAA and the coalition had to be signed by both parties to the coalition.

[15] Pursuant to the collective bargaining time fames in the Constitution, there was indeed collective bargaining between all the parties for the 2016 year, in the MBF. SACCA was also a party to these negotiations. Following these negotiations in the MBF in 2016, a collective agreement was entered into on 7 June 2016. This agreement would apply for the period from 1 April 2016 to 31 March 2017, as contemplated by clause 22 of the Constitution. This collective agreement was signed by NTM and UASA on 7 June 2016, but was not signed by SACCA and NUMSA. This collective agreement will be referred to in this judgment as 'the wage agreement'.

[16] The wage agreement, in clause 2 thereof, contained a provision in terms of which this agreement was specifically extended to all non-parties by virtue of the provisions of Section 23(1)(d) of the LRA. It was specifically recorded in the wage agreement that the agreement bound NTM, UASA and SACCA, as well as all their members. The agreement further specified that the agreement was extended to all employees in the bargaining unit. The wage agreement specifically dealt with and determined a number of conditions of employment, including home owners assistance allowances, medical aid subsidy, and maternity leave, in addition to determining the annual wage increase as being 8%.

[17] Of critical importance to the current matter is however the issue of meal allowances, dealt with in clause 11 of the wage agreement. It is essential to precisely set out how the wage agreement deals with the issue of meal allowances. It is written as follows: '… meal allowances are an operational cost intended to provide sustenance to employees on official business and it therefore

does not constitute a term and condition of employment …'. The clause goes on to specifically provide that meal allowances must be dealt with in the MCF. The clause then records that SAA had decided to increase the domestic meal allowances to R250 per day with annual CPIX increases.

[18] Clause 12.1 of the wage agreement records that it is concluded in full and final settlement of all issues relating to wages and conditions of employment for the 2016 / 2017 year, ending 31 March 2017. It is also provided in clause 12.5 that any dispute about the interpretation of the wage agreement must be resolved by arbitration under the LRA.

[19] On 7 June 2016, SAA sent a letter to the trade unions, including SACCA, recording that meal allowances are an operational issue to be dealt with in the MCF, and stated that it was the intention of SAA to review meal allowances in that forum. SAA committed in this letter to consult the trade unions about this, in the MCF, over the next three months.

[20] Against all of the above background, I now turn to the actual facts giving rise to this dispute. A number of disputes arose between SAA and SACCA, following the conclusion of the wage agreement. The first dispute was about the extension of the wage agreement to SACCA in terms of Section 23(1)(d) of the LRA, which, as set out above, SACCA refused to sign. On 10 June 2016, SACCA referred a dispute to the CCMA, seeking a determination as to whether the wage agreement was validly extended to SACCA and its members, and whether the wage agreement resolved the conditions of employment dispute between SAA and SACCA. This dispute came before commissioner Yusuf Nagdee for determination, under case number HO 2361 – 16. In an award dated 21 July 2016, commissioner Nagdee determined that NTM and UASA had as their members the majority of the employee in the bargaining unit. Commissioner Nagdee concluded that that the disputes between SAA and SACCA had been 'extinguished', because the wage agreement was validly extended to SACCA and its members under Section 23(1)(d) of the LRA and they were bound by that agreement. This award by commissioner Nagdee was never challenged by SACCA, and stands.

[21] On 14 September 2016, SACCA then referred what it called a mutual interest / refusal to bargain dispute to the CCMA. This was because SAA refused to

negotiate an increase in meal allowances with SACCA, as a result of all the above events. SAA countered by simultaneously, also on 14 September 2016, referring a dispute to the CCMA concerning the interpretation / application of a collective agreement, recording that the basis of the dispute was that the parties disagreed as to whether meal allowances was a matter of mutual interest to be negotiated on the MBF, or was an operational issue to be dealt with in the MCF. This referral by SAA was founded on the fact that the award of commissioner Nagdee had determined that the wage agreement applied to SACCA and its members.

[22] Both these disputes were consolidated and dealt with by the CCMA under case number HO 2837 – 16. At conciliation held on 8 November 2016, these disputes were then settled on the basis that the parties agreed to meet in the MBF on 11 November 2016 for the purposes of 'objective discussion'. The other unions would then also be invited to this discussion. The discussion would be facilitated by an agreed independent facilitator.

[23] The parties met on 1 and 2 December 2016 in a session facilitated by commissioner Dadabhai from the CCMA, about the issue of the international meal allowances, but failed to reach consensus. A further meeting was convened on 30 January 2017. Again, the issue of international meal allowances was raised, but still it could not be resolved. In one final attempt to resolve the impasse, a final facilitated cession was agreed to, and was then held on 24 February 2017, in which commissioner Hilligenn from the CCMA was the facilitator. The parties finally agreed to disagree.

[24] On 27 February 2017, SACCA then referred a new dispute to the CCMA. This dispute was described as one of 'mutual interest', and it was recorded in the referral that 'The employer party refused to pay meal allowance for more than seven years.' The result required in the referral was the payment of a daily meal allowance of US$165 per day, or the issue of a certificate of non-resolution.

[25] Following this referral, commissioner Hilligenn again became seized with the matter under case number HO 873 – 17. The matter was set down as one of 'mutual interest' at the CCMA head office in Johannesburg, for conciliation. All the parties attended and SAA raised a number of points *in limine*. Commissioner Hilligenn determined that SACCA was 'in a position' to refer a

matter of mutual interest to the CCMA, as the parties had tried to resolve the matter but were at an impasse. Commissioner Hilligenn then issued a certificate of failure to settle, in terms of Section 135(5) of the LRA, on 17 April 2017. This certificate reflected that the matter concerned was one of mutual interest about the issue of an international meal allowance, and that strike action was competent.

[26] On 21 April 2017, SACCA then served a notice of intention to strike on SAA, indicating that the strike would commence on 26 April 2017 at 04h00. In this notice, SACCA demanded an increase of the international meal allowance. This notice then gave rise to the application by SAA to this Court, referred to above.

[27] With the issues of urgency and compliance with the notice provisions as contemplated by Section 68(2) of the LRA having been already disposed of in the order of Prinsloo J referred to above, I need not dwell on this any further. I will therefore turn directly to the applicant's prayer for final relief, starting with a consideration of the issue of a clear right.

The issue of a clear right

[28] Two issues lie at the heart of the applicant's case relating to its clear right to the relief sought. The first is based on a contention that the issue in dispute forming the subject matter of the envisaged strike is regulated by collective agreement (in particular the wage agreement), and as such, strike action would be prohibited under Section 65 of the LRA. The second issue is a contention that the issue in dispute had been resolved by the collective bargaining process in the MBF, and if SACCA wanted to table demands in this regard, it had to do so in the next round of negotiations on substantive issues, in the time frames and in the manner as prescribed by the Constitution. For this reason as well, the applicant contends that the strike is prohibited under Section 65 of the LRA.

[29] In the answering affidavit, the respondents contend that SACCA and the individual respondents are not bound by the wage agreement. The reason for this contention was based on an argument that the agreement was not concluded with the majority of the employees in the bargaining unit, and thus

could not be validly and competently extended to SACCA and its members under Section 23(1)(d) of the LRA. According to the respondents, and since they were not bound by the wage agreement, they were still free to pursue strike action in respect of the dispute relating to the meal allowances.

[30] The respondent also had a second string to their bow, in the answering affidavit. This was a case founded on the fact the issue in dispute was always one of mutual interest, that a mutual interest dispute had been properly referred to the CCMA, and a certificate of failure to settle had been issued declaring the dispute to be one of mutual interest and that strike action was competent. According to Mr Mooki, the representative for the respondents, the CCMA is an administrative organ that made a determination about the nature of the dispute in issuing the certificate, which determination remains binding until set aside.[6] The proposition is therefore that the respondents are entitled to rely on the certificate as it stands, to render their strike protected, and this Court is in effect hamstrung to go beyond what it contains.

[31] The principal arguments of the parties, as set out above, can in essence be crystalized into two broad categories of issues for determination. The first issue concerns deciding whether the respondents are bound by the wage agreement, and whether the wage agreement then determines the issue of meal allowances. If this is so, then the strike may very well be unprotected. The second issue is whether the respondents' mutual interest referral to the CCMA on 27 February 2017 with the resulting certificate of failure to settle issued on that basis, rendered strike action about the meal allowance competent, even if the respondents were bound by the wage agreement. I will now deal with these two principal issues, under separate headings, hereunder.

<u>The wage agreement</u>

[6] This argument was based on the "Oudekraal principle", emanating from the judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at para 26. See also *Plastics Convertors Association of SA on behalf of Members v National Union of Metalworkers of SA and Others* (2016) 37 ILJ 2815 (LAC) at para 40; *Karoo Hoogland Municipality v Nothnagel and Another* (2015) 36 ILJ 2021 (LAC) at paras 20 – 21; *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) at paras 84.

[32] Considering the wage agreement, it is clear that it was concluded in the context of collective bargaining in the MBF in terms of the Constitution. It is part of a process and outcome envisaged by the Constitution. It applied to the period prescribed by the Constitution. It is also undisputed that the wage agreement was signed by SAA, NTM and UASA, but not by NUMSA or SACCA.

[33] Because SACCA did not sign the wage agreement, the first question to be answered would be whether SACCA is indeed bound by the wage agreement. In this regard, both the wage agreement and the Constitution must be considered. In the Constitution, it is provided that decisions taken following bargaining on wages and conditions of employment, in the MBF, are done by way of a simple majority vote, ultimately based on membership numbers. Then, and in the wage agreement, specific provision is made for the extension of the wage agreement to all employees in the bargaining unit, including both union members and non-union members, and specific reference is made to Section 23(1) of the LRA in this respect.

[34] There can be no doubt that the wage agreement is a collective agreement. That being the case, and in terms of Section 23(1)(d) of the LRA, a collective agreement concluded between a majority trade union[7] and an employer can be competently extended to non-parties to the agreement, provided specific conditions are met. These are as follows:

> '(i) the employees are identified in the agreement;
> (ii) the agreement expressly binds the employees; and
> (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.'

[35] It is specifically recorded in the wage agreement that it is extended to and specifically binds all employees in the bargaining unit, and in particular, employees who are or may become members of the trade union parties, which includes SACCA. The provisions of Section 23(1)(d)(i) and (ii) have thus been

[7] This includes trade unions acting together to form a majority.

complied with. In *Sasol Mining (Pty) Ltd v Association of Mineworkers and Construction Union and Others*[8] the Court held:

> 'Section 23(1)(d)(ii) is clear. It requires the agreement expressly to bind employees who are not members of any trade union or members of the trade union not party to the agreement. This principle was confirmed by the Labour Appeal Court in *Concor Projects (Pty) Ltd t/a Concor Opencast Mining v Commission for Conciliation, Mediation & Arbitration & others* when it held that reliance on s 23(1)*(d)* was misplaced where the agreement does not state that it binds employees who are not members of the trade unions that are signatories to the agreement.'

Therefore, and considering what is specified in the wage agreement, it is my view that the abovementioned requirements are clearly satisfied.

[36] This only leaves to the consideration as to whether the wage agreement was concluded with the trade unions representing the majority of the employees in the bargaining unit, as contemplated by Section 23(1)(d)(iii) of the LRA. This issue was pertinently raised as part of the respondents' defence as contained in the answering affidavit. In this respect, the respondents contend that because of the coalition agreement between UASA and NUMSA, and with NUMSA not signing the wage agreement, UASA was not authorized to sign the agreement for its members. Further, the respondents contend that UASA and NTM in any event did not represent the majority of the employees in the bargaining unit.

[37] It must be said that Mr Mooki, representing the respondents, did not press this part of the respondents' case in argument, and in my view, wisely so. The insurmountable obstacle in the way of the respondents raising this case in the application now before me, is the fact that this very same case was advanced by the respondents before commissioner Nagdee in the CCMA, who found against the respondents in this respect by determining that UASA and NTM did represent the majority of the employees, that Section 23(1)(d) indeed applied and extended the wage agreement to SACCA, and that SACCA was bound by the wage agreement. This ruling by commissioner Nagdee, which

[8] (2017) 38 ILJ 969 (LC) at para 47.

also included a determination on these same particular facts, was never contested and thus remains valid and binding on the parties. What the respondents are in effect doing is to raise a collateral challenge on the same issues, but now in this Court, albeit in a different context. In *National Education Health and Allied Workers Union on behalf of Kgekwane v Department of Development Planning and Local Government, Gauteng*[9] the Court said:

> 'The rule against collateral challenges has been accepted in South African law with one qualification: unless proceedings of a coercive nature have been brought against a party, he or she is not entitled to launch a collateral challenge against an earlier juridical act, until the earlier act is itself set aside. Allied to the rule against collateral challenges is the exceptio res judicata, which is available where another court (or tribunal) of competent jurisdiction has already pronounced finally on the same issue between the same parties. The previous judgment must have been given by a competent court, the matter must have involved the same parties (or their successors-in-title) and must have been based on the same cause of action with respect to the same subject-matter or thing. These elements were all present in the dispute before the commissioner in this matter. Importantly, in this regard, the exceptio res judicata is applicable also to arbitration awards whether obtained in private arbitration proceedings or in proceedings under the LRA.'

[38] Accordingly, the respondents' entire defence where it comes to the wage agreement not being binding on them, has been already decided, and would be subject to the *exceptio res judicata*. All the respondents have now done is to raise the exact same thing, but now as a defence to an interdict in respect of their proposed strike. This change of basis of proceedings does not in my view change the fact that essentially what was pursued by the respondents in the proceedings before commissioner Nagdee, was founded on the exact same facts as now relied on. In simple terms, what can be called the 'subject matter' of the respondents' defence in this regard remained the same throughout, in this respect.[10] The approach of the respondents falls foul of the

[9] (2015) 36 ILJ 1247 (LAC) at para 26. See also *Bidvest Food Services (Pty) Ltd v National Union of Metalworkers of SA and Others* (2015) 36 ILJ 1292 (LC) at para 24.
[10] Compare *Score Supermarket Kwathema v Commission for Conciliation, Mediation and Arbitration and Others* (2009) 30 ILJ 215 (LC) at paras 29 – 31.

following clear *dictum* in *Dumisani and Another v Mintroad Sawmills (Pty) Ltd*[11] where the Court held as follows:

> 'It is against public policy that a litigant should on the same grounds be able to keep demanding the same relief from the same adversary. The rule is expressed by saying that a valid defence of res judicata may be raised where the same thing has on the same grounds earlier been demanded from the party:
>
> 'Where a court has come to a decision on the merits of a question in issue, that question, at any rate as a causa petendi of the same thing between the same parties, cannot be resuscitated in subsequent proceedings.'
>
> African Farms & Townships Ltd v Cape Town Municipality 1963 (2) SA 555 (A) at 562D per Steyn CJ, approved in Horowitz v Brock & others 1988 (2) SA 160 (A) at 178H-J.'

[39] Even if I am wrong in the above regard, I am satisfied that on the evidence, properly considered, NTM and UASA indeed represent the majority of the employees in the bargaining unit when the wage agreement was signed, being 57.76% of such employees. So, and even without NUMSA, there is still a requisite majority. There is equally no doubt that UASA signed the wage agreement. There is nothing in the coalition agreement between UASA and NUMSA that prohibits UASA from concluding a collective agreement on behalf of its own members. In my view, all that the coalition agreement seeks to do is to provide NUMSA with access to the MBF through UASA, as a recognized union in the forum, and it is for that reason that it would be required, as the coalition agreement specifically stipulates, that NUMSA would need to sign any agreement concluded with the coalition. UASA however concluded the agreement, not on behalf of the coalition, but only on behalf of itself, and its members. It must also be considered that there is certainly what can be called a majority vote under the Constitution, in this respect.

[11] (2000) 21 ILJ 125 (LAC) at para 6. See also *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union and Others* (1999) 20 ILJ 82 (LAC).

[40] In all of the above circumstances, I am satisfied that the respondents are indeed bound by the wage agreement, as matters now stand. Any case to the contrary must be rejected. That being the case, and as said in *Sasol Mining*[12]:

> 'If a collective agreement has been extended to non-parties, it binds those parties and the legal effect is that s 65(1)(a) or 65(3)(a)(i) of the LRA will apply. No person would be allowed to strike if bound by a collective agreement that prohibits a strike or that regulates the issues in dispute. The extension of collective agreements to non-party employees effectively denies them the right to strike in respect of the issues regulated by the collective agreement.'

[41] The applicant contends that it is this wage agreement that rendered the strike unprotected. This means that the relevant provisions of the LRA which need to be considered are Sections 65(1) (a) and 65(3)(a), which provide:

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

[42] Mr Mooki submitted that there was nothing in the Constitution or the wage agreement that expressly prohibited strike action on the issue of increased meal allowances, as demanded by the respondents. Whilst this submission is indeed correct, it is not as simple as that. What is contemplated by the above provisions of the LRA is not only an out and out prohibition of strike action specifically described as such in a collective agreement. Simply put, regulation or prohibition in this context is wider than just saying strike action is not allowed. What is necessary to be done is to specifically consider the issue in dispute forming the subject matter of the proposed strike, and then decide whether that issue is already directly or indirectly regulated and determined by a collective agreement. If that is indeed the case, then Section 65(3)(a)(i) itself

[12] (*supra*) at para 28.

would render the proposed strike unprotected. But it may also be argued that the particular collective agreement, by way of its application to the issue in dispute, prohibits the strike, thus bringing Section 65(1)(a) into play.

[43] The issue in dispute forming the subject matter of the respondents' strike is plain, and clear. They want an increase in the meal allowances paid to the individual respondents on the international routes. I accept that as a matter of principle, the issue of an increase in meal allowances would be an issue in dispute that can competently form the subject matter of collective bargaining as a mutual interest dispute, to be followed by strike action if it remains unresolved. Accordingly, there is nothing where it comes to the nature of the issue in dispute itself that would stand in the way of protected strike action in this case, considering that it is clear in this case that the procedural requirements in Section 64(1) of the LRA have been complied with.[13]

[44] The question that must thus be answered is whether the wage agreement determined or regulated the issue in dispute of an increase in the international meal allowances of the individual respondents, to the extent of rendering the strike action pursuant to this demand to be incompetent.

[45] Mr Mooki sought to answer this question by contending that issue in dispute was always a dispute about a matter of mutual interest, and as such, it could not be dealt with in the MCF under the Constitution. According to Mr Mooki, and once a dispute did not find home in the MCF, it could only be bargained upon in the MBF, this is what SACCA did, and when agreement was not reached, SACCA and its members were entitled to strike. The problem with this argument, although on face value appealing, is that it flies in the face of the clear wording of the wage agreement to which SACCA and the individual respondents are bound. The wage agreement specifically determines that meal allowances are not considered to be a condition of employment, but are in fact considered to be an operational issue that must be dealt with in the MCF. The wage agreement specifically leaves it up to SAA to decide the issue of international meal allowances, following consultation in the MCF. The wage agreement however specifically determines the issue of domestic meal

[13] See Sections 64(1)(a) and (b) – The dispute was referred to the CCMA, a certificate of failure to settle was obtained, and proper notice of intention to strike was given.

allowances, and records that SAA has 'revised' the meal allowance to R250.00 per day following consultation.

[46] Added to the above, the wage agreement also specifically records that it is concluded in full and final settlement of all issues relating to conditions of employment for the period of the currency of the wage agreement.

[47] Because of these specific provisions in the wage agreement, it is simply not permissible for SACCA to still categorize the issue of meal allowances as a mutual interest issue to be bargained in the MBF. This would be directly contrary to the dispensation brought about by the wage agreement, properly interpreted and applied. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[14] 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 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. ….'

Applying the above *ratio*, it is apparent that in terms of the clear language used in the wage agreement, what that agreement sought to determine, and applying a sensible and businesslike approach as to its effect, the parties intended, and then agreed, not to consider meal allowances as a matter of mutual interest but an operational issue, and then leave the determination of such allowance up to SAA as employer, subject only to consultation in the MCF. The wage agreement thus specifically precluded bargaining on this issue in the MBF.

[14] 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.

[48] Mr Mooki argued that that there was in effect a contradiction between clause 24.1 of the Constitution and the wage agreement, in that clause 24.1 of the Constitution specifically provided that substantive issues and matters of mutual interest could not be dealt with in the MCF, and a meal allowance was as a matter of principle one of mutual interest. But this argument does not constitute a correct interpretation of the Constitution and resultant wage agreement. In actually interpreting a collective agreement, the Court in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*[15] 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. Bearing this in mind, there is nothing prohibiting the bargaining parties from designating, by agreement, what would normally be a condition of employment (mutual interest issue), to be an operational issue to be dealt with in the MCF. Any substantive issue as defined in the Constitution (which could feasibly include a meal allowance) can be resolved by agreement in the MBF on whatever basis the parties decide. And this they did, *in casu*.

[49] It does not matter if SACCA disagreed with this approach and determination, and refused to sign the agreement, which it clearly did because of the meal allowance issue. It must be held bound by the will of the majority, considering what is specifically contained in the wage agreement and the Constitution. In *Association of Mineworkers and Construction Union and Others v Chamber of Mines of SA and Others*[16] the Court said:

> '… A collective agreement extended to non-parties does not apply to them indefinitely. It applies only for the duration of the agreement and regarding the specific issues it covers. Section 23 (1) does not countenance indefinite or far-reaching extension. It directly ties the limitation of the right to strike to the outcome of the collective bargaining. It is narrowly tailored to the specific goal — orderly collective bargaining. Given the carefully circumscribed ambit of the limitation and the importance of its purpose, it is reasonable and justifiable.'

[15] (2008) 29 ILJ 2461 (CC) at para 90.
[16] (2017) 38 ILJ 831 (CC) at para 58.

[50] The above *ratio* in *Chamber of Mines* then also provides the answer of what SACCA and its membership can do, should they wish to still pursue the issue of meal allowances. The wage agreement, that determined the issue of meal allowances, has a sell by date. What would normally follow is a new wage agreement upon expiry, which new agreement is then arrived at in terms of the process prescribed by the Constitution. This process has a time frame, from December to March, a method of negotiation, which includes written submissions setting out demands, and then bargaining on one central level between SAA and all unions on one joint basis in the MBF, where an agreement is ultimately arrived at on the basis of majority vote. This is the dispensation the parties have agreed to for themselves, and they are all bound by it, including SACCA. Accordingly, and what SACCA has to do is to declare, in the next round of bargaining for wages and conditions of employment, its dispute about international meal allowances, in its submissions. This dispute would include that the issue of meal allowances must be considered to be a condition of employment to be bargained on. It is then up to SACCA to convince its fellow unions in the MBF to support this demand, and not to conclude any agreement that does not provide for this demand. If SACCA is unable to do so, and the majority of unions decide to retain the *status quo* and so agree in the MBF, then so be it. This is the nature of majority rule, as agreed to in the Constitution. In *Chamber of Mines*[17] the Court said:

> 'It may be posited that if there is to be orderly and productive collective bargaining, some form of majority rule in the workplace has to apply. …'

[51] It is simply not permissible for SACCA to in effect subvert the agreed collective bargaining process and the clear terms of the wage agreement and Constitution, by pursuing its and its members' own singular demand for an increase in the international meal allowance outside the central forum, as a mutual interest and employment condition issue, and then contend that they are entitled to strike just because they have complied with the procedures under the LRA. In *BMW SA (Pty) Ltd v National Union of Metalworkers of SA*

[17] (*supra*) at para 44.

on behalf of Members[18], Waglay DJP (as he then was), and writing for the majority, said:

> 'The respondent on the other hand argues that it is not obliged to comply with the procedure set out in clause A.8.3 because its demand is one of mutual interest and it is entitled to embark on a strike in support of its demand as long as it does so in compliance with the provisions of the Labour Relations Act 66 of 1995 (as amended) (the Act). I disagree. Where parties have concluded an agreement which does not deny any of the parties to the agreement the rights and obligations provided in the Act, I see no reason why that agreement cannot be enforced. In fact the Act seeks to promote collective bargaining, particularly at the sectoral level and gives primacy to collective agreements.
>
> A collective agreement concluded between the parties is binding between them. It is a contract that sets the agreed terms between them and as long as what is agreed upon is not in conflict with the applicable legislation or contra bones mores it is binding and enforceable between them. …'

[52] In the end, it is thus contemplated by the provisions of Section 65(3)(a)(i) that the issue in dispute forming the subject matter of the strike can be regulated by collective agreement not only by way of determining the substance of the issue in dispute itself, but in prescribing a process or structure in terms of which or in which the issue in dispute must be bargained and determined. The failure to then adhere to such kind of provisions in a collective agreement would render a strike unprotected under Section 65(3)(a)(i), even if the procedural requirements under Section 64 of the LRA have been satisfied. As the Court said in *Fidelity Guards v PTWU and Others*[19]:

> '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

[18] (2012) 33 ILJ 140 (LAC) at paras 9 – 10.
[19] [1997] 11 BLLR 1425 (LC) at 1433F-H. 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 paras 21 – 24.

> 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.'

[53] A pertinent and comparable example of this scenario can be found in the provisions in bargaining council collective agreements which prescribe that conditions of employment can only be negotiated at central level in the council, and not in individual employers at plant level. The judgment in *Cape Gate (Pty) Ltd v National Union of Metalworkers of SA and Others*[20], which dealt with this scenario, contains a number a *ratios* which can readily be applied to the conduct of the respondents *in casu*. In this respect, the Court in *Cape Gate* held:[21]

> 'The objective underlying the clause is to ensure that negotiation of such matters takes place only at the level of the bargaining council and in no other forum, such as at plant level. It is also to preclude any strike action over such matters while they continue to be regulated by the main agreement. The clause would make little sense if it had the effect now contended for on behalf of NUMSA, namely that where wage increases are determined in the main agreement, employees and their unions are free to agitate for further increases by way of plant level negotiation and ultimately strike action. This would be subversive of the objective of promoting collective bargaining at the level of bargaining councils and the effectiveness of their agreements. This would not accord with the clear and worthy objectives of the LRA. Accordingly the interpretation which is advanced on behalf of NUMSA cannot be sustained. …
>
> The issue in dispute relevant to the present strike is what wage increase, if any, non-artisans should receive. That seeks to reopen a matter already regulated by the main agreement, for that determined, for the currency of the agreement, the matter of wage increases, in what was agreed to be the exclusive forum, namely the bargaining council.'

[20] (2007) 28 ILJ 871 (LC).
[21] Id at paras 38 and 40.

[54] This is not an undue or improper limitation on the right to strike. In *SA Clothing and Textile Workers Union and Others v Yarntex (Pty) Ltd t/a Bertrand Group*[22], the Court held:

> 'I do not agree that the prohibition of strikes at subsection or plant level violates the fundamental right to strike. Indeed it is correct that the right to strike is guaranteed to every employee, but like other rights entrenched in the Constitution of the Republic of South Africa, it is not an absolute right and is subject to certain limitations. The LRA gives effect to the right to strike in the context of fair labour practices, and does so by creating a framework in which the right is to be exercised. Thus the statutory collective bargaining mechanisms, as well as other means of regulating strike action, are necessary to ensure that the purpose of orderly collective bargaining, as set out in s 3 of the LRA, is met. …. On the facts it is clear that the applicants are not denied the right to strike - they are entitled to exercise this right provided it occurs at the level of the industry, the subsector or the section in which agreement on the demand submitted could not be reached.'

[55] The Labour Appeal Court in *South African Clothing and Textile Workers Union and Others v Yarntex (Pty) Ltd t/a Bertrand Group*[23] upheld the judgment of the Labour Court referred to above. In addition, the LAC in *Yarntex* dealt with an argument similar to that of Mr Mooki *in casu*, to the effect that either the Constitution or the wage agreement had to specifically prohibit strike action, in order for a strike to be prohibited under Section 65(1)(a) or 65(3)(a)(i). The Court held as follows:[24]

> 'The submissions made by Mr Freund regarding the absence of a specific provision in the constitution prohibiting a strike, such as the one embarked upon by the appellants is correct. However, I do not agree with the further submission he made that the non-existence of such a provision specifically prohibiting the strike in question renders the strike immune from being declared unlawful and therefore unprotected. If it were so, chaos would reign in the industry. …'

[22] (2010) 31 ILJ 2986 (LC) at para 56
[23] (2013) 34 ILJ 1931 (LAC).
[24] Id at para 57.

[56] If what the respondents are seeking to do in this instance is permitted, it is my view that chaos will reign in SAA. It means that no matter what was agreed in the MBF, an individual trade union can simply record its dissatisfaction, extract itself from the structure, and pursue its own demands and that of its members. This would completely subvert and negate the very reason for the establishment of the central bargaining forum in SAA, being structured and orderly collective bargaining on conditions of employment, at a specific time and in terms of an agreed process, and where the will of the majority would ultimately prevail. Any strike action outside these parameters is not permitted.

[57] As I have said above, the wage agreement also contains a provision that it was concluded in settlement of the issue of wages, conditions of employment and benefits, for the period of the agreement. If the respondents are correct that a meal allowance was a condition of employment susceptible to being negotiated in the MBF, then that issue was specifically settled in the wage agreement, on the basis that SAA would determine the allowance as an operational issue. Accordingly, and when SACCA sought to pursue this issue, seek to negotiate on it, and then ultimately refer the dispute to the CCMA on 27 February 2017, there was no longer any live dispute in this respect in existence which could form the subject matter of the intended strike.

[58] In the end, as the Court said in *CSS Tactical (Pty) Ltd v Security Officers Civil Rights and Allied Workers Union and Others*[25]:

> '… 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.'

These provisions, in my view, find application *in casu*.

[25] (2015) 36 ILJ 2764 (LAC) at paras 17 – 18.

[59] I therefore conclude that having regard to the provisions of the Constitution, and the wage agreement, the respondents would be prohibited from striking by virtue of the provisions of either Section 65(1)(a), or Section 65(3)(a)(i), of the LRA. The issue in dispute of demanding an increase in the international meal allowance is clearly regulated by such collective agreements, to which the respondents are bound. This regulation exists in the form of a prescribed process, which the respondents have failed to follow and adhere to, and the fact that the issue in dispute has been specifically resolved on the terms as contained in the wage agreement which was concluded in settlement of all disputes concerning employment conditions. The applicant has thus shown a clear right to the relief sought, in this respect.

The issue of the certificate

[60] All that now remains is the respondents' case relating to the alleged determination already made by commissioner Hilligenn in the CCMA, and the certificate of failure to settle that has been issued. As stated above, Mr Mooki argued that it had been decided by the CCMA that the dispute was one of mutual interest, and when it issued a certificate of failure to settle, the issue of that certificate constituted administrative action that bound the parties, unless set aside. That meant, in terms of this argument that strike action was permitted on this basis alone.

[61] I do not believe that there is merit in this argument. Mr Mooki is seeking to elevate the proceedings in the CCMA and the certificate of failure to settle into something it is not. Further, the certificate simply cannot trump what this Court is expected, if not obliged, to do in terms of Section 68 (as read with Section 65) of the LRA when asked to decide if strikes are permitted. I will now proceed to deal with the substance of this argument.

[62] Firstly, and considering the written ruling of commissioner Hilligenn that accompanied the issuing of the certificate of failure to settle, it does not decide the nature of the dispute at all. I must confess that the ruling is badly written and difficult to follow. But the gist of it was that because the respondents made a demand to negotiate the meal allowance, and the parties remained at an impasse, the respondents were entitled to refer a mutual interest dispute to the

CCMA, and the CCMA thus had jurisdiction. There can of course be no fault with this reasoning. When deciding whether to assume jurisdiction, commissioner Hilligenn had to consider the case as brought and pleaded by the respondents. This consideration does not entail any decision as to whether this pleaded case was true, or whether the dispute brought can ultimately be sustained. Van Der Westhuizen J, in *Gcaba v Minister for Safety and Security and Others*[26] held:

> 'Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*, and not the substantive merits of the case. …. In the event of the court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings - including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits - must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim …'

And in *Mbatha v University of Zululand*[27], Jafta J referred with approval to the above *dicta* of Van der Westhuizen J in *Gcaba*, and said:

> 'Ordinarily the question of jurisdiction is determined with reference to the allegations made in the plaintiff's or applicant's pleadings. …. In assessing whether this procedural requirement has been met, the proper approach is to take the allegations in the particulars of claim (summons) or the founding affidavit at face value. Usually those allegations are taken to be true for purposes of determining jurisdiction. The question whether a court has jurisdiction does not depend on the substantive merits of the case. The allegations which, if established, would prove jurisdiction are sufficient.'

[63] In this instance, there was never any determination by commissioner Hilligenn as to whether the dispute advanced and brought by the respondents had substance. All the commissioner said is that they were entitled to bring the

[26] (2010) 31 ILJ 296 (CC) at para 75.
[27] (2014) 35 ILJ 349 (CC) at paras 159 and 160. See also *Makhanya v University of Zululand* (2009) 30 *ILJ* 1539 (SCA) at para 71; *SA Maritime Safety Authority v McKenzie* (2010) 31 *ILJ* 529 (SCA) at para 8.

dispute, which, as already said, is correct. It is always up to this Court to determine the true or real issue in dispute when asked to deal with a possible unprotected strike.[28] Added to that, and when confronted with an application by an employer to interdict a strike based on any of the provisions of Section 65 of the LRA, it is the duty of this Court to compare this true or real issue in dispute to all of the various components of the subsections in Section 65, as applicable, to ascertain if there is a match that would render the strike unprotected. These duties of this Court cannot be compromised by what happened in the CCMA where it comes to conciliation proceedings, the issuing of a certificate of failure to settle, and compliance with Section 64 of the LRA. In *Vodacom (Pty) Ltd v Communication Workers Union*[29] the Court held as follows:

> '… In short no matter that there has been compliance with s 64, the LRA limits a right to strike, such that if the strike reaches one of the limitations in terms of s 65, it is an unlawful strike, notwithstanding compliance with procedures under s 64. To express it differently, the certificate cannot trump the limitations of s 65. … What is before us is the clear provision of s 65 (1) which provides that no person may take part in a strike or lock-out or in any conduct in contemplation of or furtherance of a strike or lock-out if that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute.'

The Court concluded:[30]

> 'In this particular case, it is common cause that there was a collective agreement which applied. Accordingly whatever certificate may have been produced and may have been shown to the employer, the certificate cannot override the clearly stated limitation upon the right to strike as contained in s 65 (1)*(a)*. In short, a certificate can in no way trump the clear provisions of the limitation. For this reason, the court a quo erred in its approach to the law. It should not have held that the certificate issued in terms of s 64 provided an

[28] See *Coin Security Group (Pty) Ltd v Adams and Others* (2000) 21 ILJ 924 (LAC) at para 15; *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members and Others* (2014) 35 ILJ 983 (LAC) at para 47; *Unitrans Supply Chain Solutions (Pty) Ltd v SA Transport and Allied Workers Union and Others* (2014) 35 ILJ 265 (LC) at para 9.

[29] (2010) 31 ILJ 2060 (LAC) at para 10.

[30] Id at para 11.

> unqualified and unlimited 'passport' to the employees to strike, no matter the provisions of s 65 (1)*(a)*, as I have outlined them.'

In my view, this *ratio* directly applies *in casu*, and is a complete answer to most of the argument of Mr Mooki which was presented in a similar respect.

[64] The proceedings at the CCMA, and before commissioner Hilligenn, were conciliation proceedings under Section 135 of the LRA. The primary purpose of such proceedings is to attempt an amicable resolution of the dispute, and not to decide the dispute. This is evident from Section 135(5), which compels the commissioner to issue a certificate of failure to settle based on one simple reason only, being that the dispute remained unresolved. That is indeed what happened *in casu*. This certificate of failure to settle is of no significance in itself in deciding whether the strike is protected or unprotected. All it proves is that the dispute remains unresolved. It may be added that the respondents would not even need this certificate in order to embark upon a protected strike, as all that is needed is that 30 days must have elapsed since the dispute was referred to the CCMA, and with the dispute still remaining unresolved.[31] In *Gillet Exhaust Technology (Pty) Ltd t/a Tennaco v National Union of Metalworkers of SA on behalf of Members and Another*[32] the Court said:

> '… while the appellant is entitled to an order declaring that the respondent's members are not entitled to embark upon a strike in respect of their demand for 'transport subsidy/allowance', the appellant's prayer for the setting aside of the certificate of non-resolution of the dispute is misconceived. I say this because whether the certificate of non-resolution is valid or not, in this case this did not affect the legality of the strike the employees may have been planning to embark upon. This is so because in terms of s 64(1)*(a)*(i) and (ii) of the Act a strike will be a protected strike even if there is no certificate of non-resolution of the dispute provided that a period of 30 days from the date of the referral of the dispute to conciliation has lapsed and all the other requirements of s 64 of the Act have been complied with.'

[31] See Section 64(1)(a) which reads: '… the issue in dispute has been referred to a council or to the Commission as required by this Act, and (i) a certificate stating that the dispute remains unresolved has been issued; or (ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission …'

[32] (2010) 31 ILJ 2552 (LAC) at para 17.

[65] The certificate of failure to settle in this instance was clearly issued in the form as prescribed by Form 7.12.[33] As such, it does not constitute a ruling. In this respect, the Court in *Strautmann v Silver Meadows Trading 99 (Pty) Ltd t/a Mugg & Bean Suncoast and Others*[34] said:

> 'When a commissioner completes form 7.12 and categorizes the dispute referred to the CCMA by ticking one of the boxes provided, the commissioner does not make a jurisdictional ruling. Nor does the ticking of any of the boxes marked "CCMA arbitration", "Labour Court" "None" or "Strike/Lockout" amount to a ruling on which of those courses of action must be pursued by a referring party.'

[66] In a number of judgments it has been consistently held that a certificate of failure to settle has no legal significance beyond simply recording that a particular dispute was referred to the CCMA, and remained unresolved following conciliation under Section 135 of the LRA. It does not serve as a determination of the dispute or the actual issue in dispute, binding on the parties, going forward. In *Bombardier Transportation (Pty) Ltd v Mtiya NO and Others*[35] it was held:

> '… a certificate of outcome is no more than a document issued by a commissioner stating that, on a particular date, a dispute referred to the CCMA for conciliation remained unresolved. It does not confer jurisdiction on the CCMA to do anything that the CCMA is not empowered to do, nor does it preclude the CCMA from exercising any of its statutory powers. In short, a certificate of outcome has nothing to do with jurisdiction. If a party wishes to challenge the CCMA's jurisdiction to deal with an unfair dismissal dispute, it may do so, whether or not a certificate of outcome has been issued. …'

And as said in *Helderberg International Importers (Pty) Ltd v McGahey NO and Others*[36]:

---

[33] See the Labour Relations Regulations, 2014 published under GN R1016 in GG 38317 of 19 December 2014.
[34] (2009) 30 *ILJ* 2968 (LC) at para 9
[35] (2010) 31 ILJ 2065 (LC) at para 14. See also *Mbele and Others v Chainpack (Pty) Ltd and Others* (2016) 37 ILJ 2107 (LC) at paras 31 – 32; *Cook4life CC v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 2018 (LC) at paras 8 – 9.
[36] (2015) 36 ILJ 1586 (LAC) at para 11.

> 'I align myself with the conclusions reached in the *Bombardier* judgment, as have a number of other decisions in this court, that a certificate of outcome has no legal significance beyond a statement that the dispute referred to conciliation has been conciliated and was resolved or remained unresolved, as the case may be. …'

[67] Even though *Bombardier*, and all the authorities following and applying that judgment, related to dismissal disputes, there is no reason why this same *ratio* cannot apply to mutual interest disputes. After all, the only thing that differs is simply the manner in which the dispute is resolved, being that dismissal disputes are resolved by way of adjudication or arbitration, and 'mutual interest' disputes by way of collective action (strike and/or lock out). In *SA Post Office Ltd v Moloi NO and Others*[37] the Court said:

> 'The status of the certificate of outcome has received attention in a number of cases in the Labour Court and Labour Appeal Court. Although the status of the certificate of outcome was dealt with in the context of unfair dismissal cases, in my view the same principle applies in cases involving disputes of mutual interest. In this respect, I align myself with Van Niekerk J, in *Bombardier Transportation (Pty) Ltd v Mtiya NO & others …'*

[68] Therefore, and in summary, the conciliation proceedings at the CCMA on 17 April 2017, and the certificate of failure to settle issued by commissioner Hilligenn pursuant thereto, does not stand in the way of SAA in obtaining the relief it seeks. It cannot serve as a determination of the nature of the dispute, binding on the parties, thus hamstringing this Court in deciding whether one of the strike prohibitions in Section 65 find application. Accordingly, the certificate of failure to settle, and what is contained therein, has no legal significance to the contradict the application of Section 65(3)(a)(i) (or Section 65(1)(a) for that matter), *in casu*. The strike of the respondents remain unprotected, for the reasons elaborated on above.

<u>Conclusion</u>

[37] (2012) 33 ILJ 715 (LC) at para 37.

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

[70] As to the other considerations of prejudice, balance of convenience and an alternative remedy, I am also convinced that SAA has satisfied these requirements. There can be no doubt that if the strike is allowed to continue, SAA would suffer not only severe financial prejudice, but also reputational prejudice. With the anticipation of the *Rule Nisi*, and the additional process filed as a result thereof, it has been shown that the one day the strike endured, before the intervention of the order of Prinsloo J, cost SAA about R25 million. Prejudice is thus a reality, and manifest. As opposed to this, the respondents are not left stranded if relief is granted. As dealt with above, the respondents have an avenue open to them, fully in line with the Constitution, to pursue their demand for an increased international meal allowance. Finally, SAA has no alternative remedy available to stop the strike. SAA is thus entitled to the declaratory relief and the interdict it sought, as a final order.

[71] This then only leaves the issue of costs. Mr Redding asked for the costs of two counsel. But I do not believe any costs order is appropriate. The parties still have a continued relationship with one another, in the context of the MBF. I believe that the existence of a costs order, with all the collective bargaining still to come in the MBF, can only serve to harm this relationship. I also consider that the respondents immediately responded to the order of Prinsloo J when granted, and stopped the strike, and acted responsibly by rather engaging in the litigation so that the issues can be clarified. In any event, I have a wide discretion, under Section 162, where it comes to the issue of costs, and this is a case where I believe that a proper exercise of this discretion compels me to make no order as to costs.

[72] It is for all the reasons above that I made the order that I did on 3 May 2017, as referred to in paragraph 5 of this judgment.

_____

Sean Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Advocate A Redding SC together Advocate M Van As
Instructed by:	ENS Africa Attorneys
For the Respondents:	Advocate O Mooki
Instructed by:	Mbuysa Neale Attorneys