IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable
Case no: P06/17

In the matter between:

WALLENIUS WILHELMSEN LOGISTICS VEHICLE SERVICES SOUTH AFRICA (PTY) LTD **Applicant**

and

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA **First Respondent**

STATION COMMANDER: SAPS UITENHAGE **Second Respondent**

EMPLOYEES AS PER ANNEXURE "A" **Third to Further Respondents**

Heard: **7 March 2017**

Delivered: **3 April 2017**

Summary: **Return day of urgent application to declare strike action unprotected. Rule *nisi* discharged.**

JUDGMENT

PRINSLOO, J

Introduction

[1] On 25 January 2017 I granted the Applicant an interim interdict declaring the intended strike action by the Third to Further Respondents (the employees) unprotected and they were interdicted and restrained from any conduct in furtherance or contemplation of such strike action.

[2] On 25 January 2017 the matter was unopposed and the return day was set for 7 March 2017, when the matter came again before this Court. The Respondents filed an answering affidavit, to which the Applicant filed a reply.

[3] The Applicant seeks confirmation of the rule *nisi*.

[4] The First and the Third and Further Respondents (the Respondents) filed a counter application to declare the Applicant's conduct of 25 January 2017 when they were refused access to the Applicant's premises to be an unprotected lock-out.

[5] When the urgent application was considered by this Court on 25 January 2017, it was conveyed to the Applicant that the citation of the Second Respondent as a party to the proceedings is inappropriate and is more so since no case is made out in respect of the Uitenhage station commander of the South African Police Service as an interested party and no relief is sought against him or her in the papers before this Court. No relief is granted against the Second Respondent who should never have been a cited party in these proceedings.

Brief history

[6] The Applicant operates a yard management and technical services business in the motor industry. More specifically it performs operations on the premises of Volkswagen South Africa (VWSA) in Uitenhage where it is responsible for driving the new vehicles manufactured

[7] by VWSA from the VWSA plant to the Volkswagen storage facilities on the same premises.

[8] Every minute a vehicle is released from the VWSA production line and those vehicles should be moved continuously to the storage facilities. If that does not happen, the production plant will come to a standstill, rendering the Applicant liable to a damages claim in terms of its contract with VWSA.

[9] The Applicant operates within the registered scope of the Motor Industry Bargaining Council (MIBCO) and is a member of the employer's organisation, Retail Motor Industry Organisation (RMI). RMI and the First Respondent (NUMSA) are parties to and signatories of the MIBCO constitution and they are bound by the provisions of the said constitution.

[10] On 25 January 2017 the Applicant approached this Court to interdict NUMSA and the employees from engaging upon strike action pursuant to the notice of strike action that was delivered on 23 January 2017.

[11] There is some history to the strike notice issued on 23 January 2017, which is relevant in deciding the issues before Court.

[12] NUMSA demands from the Applicant the payment of a transport allowance in the sum of R40 per working day, which, according to NUMSA, is the actual daily cost of transport the employees have to bear. The dispute was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) and after it remained unresolved, NUMSA issued a strike notice on 28 October 2016. The strike was set to commence on 31 October 2016 at 06h00.

[13] The Applicant approached this Court urgently to interdict the strike action and obtained an interim order on 28 October 2016. The strike was declared unprotected as it was not a matter that NUMSA was entitled to

strike on, prior to compliance with clauses 11 and 12 of the MIBCO constitution, alternatively it was not a matter subject to strike action at all.

[14] The return date was 25 November 2016 and the Applicant's argument was that the strike was unprotected by virtue of NUMSA's membership of MIBCO and the fact that the MIBCO constitution was binding on the parties. Sections 11 and 12 of the MIBCO constitution lays down the procedures to be followed by members of trade unions intending to embark on protected strike action and NUMSA failed to follow those procedures. Alternatively, that the strike should be interdicted pending the outcome of arbitration proceedings.

[15] NUMSA opposed the application and submitted that the MIBCO main agreement the Applicant sought to rely on expired on 31 August 2016. This fact is common cause.

[16] On 18 November 2016 the parties signed a new main agreement which has a peace clause and which prohibits plant level bargaining. On the return date the Court found that the existence of the new main agreement does not assist the Applicant as the urgent application was filed before the new agreement was signed and at the time of the filing of the urgent application, there were no valid reasons to prevent NUMSA and its members from embarking on the intended strike as they have fulfilled all the legal requirements for a protected strike. On 7 December 2016 the rule *nisi* issued on 28 October 2016 was discharged in respect of NUMSA and its members.

[17] On 8 December 2016 the Applicant's attorneys addressed a letter to NUMSA, requesting to be advised whether it was still NUMSA's intention to proceed with the strike action. NUMSA did not respond to the letter and the employees continued to work as they did after the interim order was obtained on 28 October 2016.

[18] On 23 January 2017 and at 22h32 NUMSA gave the Applicant notice of strike action to commence on 24 January 2017 at 07h00 and that sparked the second urgent application that was brought on 25 January 2017.

[19] On 24 January 2017 the strike action commenced and ultimatums were issued during the course of the morning. In the afternoon of 24 January 2017 NUMSA informed the Applicant that the employees would return to work on 25 January 2017. The employees tendered their services on 25 January 2017 but were turned away by the Applicant following their failure to sign a document in terms of which they would abandon their demand for the payment of a transport allowance.

[20] On 25 January 2017 the Applicant secured an interim order from this Court.

The urgent application

[21] The Applicant approached this Court on an urgent basis and submitted that the intended strike action is unprotected for a number of reasons.

[22] Firstly, a new main collective agreement was concluded under the auspices of MIBCO on 18 November 2016. The implementation date is the effective date being the date of publication in the Government Gazette, which is yet to take place, but the employers who implemented the main agreement prior to the effective date are immunised from industrial action that may arise from any dispute in any other sector of the industry.

[23] As the Applicant implemented the increase with retrospective effect, it enjoys the aforesaid immunity.

[24] Secondly, as the Applicant implemented the increases retrospectively and as it was accepted by NUMSA, the parties have *inter partes* agreed to the implementation of the main agreement, which includes a peace clause prohibiting plant level bargaining and provisions governing transport allowances.

[25] Thirdly, the previous main agreement, insofar as it governed substantive terms and conditions of employment that expired in August 2016 became part of the employees' individual agreements, despite the termination of the main agreement in August 2016.

[26] The previous main agreement provided for transport and such provision became a substantive term of the individual agreements of employment and persists after termination of the main agreement. The agreed obligation is to provide transport, which the Applicant does, and not to grant an increase in monetary terms which would constitute nothing but a wage increase, which had already been agreed to between the parties and thus compromised by agreement when the collective agreement was concluded in November 2016.

[27] Fourthly the Applicant and NUMSA agreed that if no agreement could be reached on transport, the regional council must assist. Transport is not a wage increase issue but an obligation to provide transport, which the Applicant does. NUMSA cannot strike on this issue but has to refer it to the regional council, which was not done.

[28] Fifthly, the MIBCO constitution is a collective agreement and the parties are bound by it. The MIBCO constitution remains binding and enforceable in the period between its expiry and implementation of the new agreement. The MIBCO constitution expressly governs the process of bargaining and the regulation of strike action. Clauses 11 and 12 prohibit industrial action pursuant to a matter of mutual interest without it first being tabled in accordance with the prescribed procedure. These procedures were not complied with and the strike action is thus premature and unprotected.

[29] Sixthly, the strike action that NUMSA and the employees intended to embark upon in October 2016 is abandoned as the employees returned to work unconditionally and they cannot simply resume the old strike

action without a new referral or alternatively without providing 48 hours' notice.

[30] Furthermore, there is no demand which the Applicant could accept or reject.

[31] Lastly the conclusion of the settlement agreement in November 2016 settled all wage increases, allowances and the provision of transport and therefore the dispute had been unequivocally settled or compromised.

[32] This matter raises a number of pertinent issues, which will be dealt with *infra.*

Waiver of the right to strike

[33] The first question to be considered is whether the Respondents waived their right to strike.

[34] The Applicant's case is that when the employees continued to render their services after 7 December 2016, they did so unconditionally without reserving their right to strike and thereby waived their right to strike. The fact that the employees failed to resort to strike action once the Court discharged the rule *nisi* indicates that the strike action they intended to embark upon in October 2016 was abandoned.

[35] The Respondents on the other hand explained that they returned to work at the end of October 2016 pursuant to the interim order the Court had granted on 28 October 2016. Their compliance with an order of this Court cannot be construed as waiver of their right to strike. The judgment discharging the rule *nisi* was handed down on 7 December 2016, shortly before the annual motor industry shut down and strike action would have served very little purpose at that time. Mr le Roux for the Respondents submitted that the entitlement to strike is not equivalent to an obligation to strike.

[36] The Respondents' case is that the strike action in January 2017 is merely a continuation of the same strike action that was intended to commence in October 2016, but was interdicted by this Court.

[37] In deciding whether the Respondents waived their right to strike, two aspects call for consideration. The first is the right to strike and the second the legal concept of waiver.

The right to strike

[38] Section 23(2)(c) of the Constitution enshrines the fundamental right to strike, which right is given effect to by the provisions of sections 64 to 68 of the Labour Relations Act[1] (the Act).

[39] The Constitutional Court in *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another*[2] held that:

> "It is thus important to recognise that the right to strike protected in the Constitution must be interpreted in the general context that it is a right that is based on the recognition of disparities in the social and economic power held by employers and employees.
>
> But its importance does not only lie in that. It is also an aspect of associational freedom, as recognised in International Labour Organisation (ILO) jurisprudence and by this Court in *Bader Bop*, and may reinforce other social and political rights as well. It is significantly more than merely a means to an end.
>
> Another feature of the right to strike is that it is an integral part of the collective bargaining process. As noted in *Bader Bop*, the committees engaged with the supervision of the ILO Conventions have asserted that the right to strike is essential to collective bargaining. This was also recognised in the *First Certification* case.

[1] Act 66 of 1995 as amended.

[2] (2012) (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC); [2012] 12 BLLR 1193 (CC); (2012) 33 ILJ 2549 (CC). (*Moloto*)

> The regulatory scheme for the exercise of the right to strike under the Act also places it squarely within the context of collective bargaining."

[40] The right to strike is a fundamental right without any express limitation. Sections 64–68 of the Act provide the substantive limitations and procedural pre-conditions for the exercise of the right to strike and the employer's corresponding recourse to lock-out. It is within this context that the question of waiver should be considered.

Waiver

[41] The Applicant's case is that the Respondents waived their right to strike and this contention is supported by the following facts: after judgment was handed down in favour of the Respondents on 7 December 2016, they did not resort to strike action at the time, the employees' return to work was unconditional, without reservation of their right to continue with strike action and the Respondents did not respond to a letter from the Applicant's attorney requesting an indication whether they still intended to proceed with strike action.

[42] The Respondents explained that they returned to work at the end of October 2016 pursuant to the interim order this Court had granted on 28 October 2016 and it would have served very little purpose to continue with strike action after 7 December 2016, shortly before the annual motor industry shut down.

[43] Can the Respondents' non-resuming of strike action in the immediate aftermath of the judgment of 7 December 2016 and the non-responding to a letter from the Applicant's attorneys be construed as an act of waiver or abandonment of their right to strike?

[44] In *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another*[3] the Constitutional Court had occasion to consider whether and to what extent parties, by entering into an arbitration agreement, can be taken to have waived the constitutional right to a fair and impartial hearing under section 34 of the Constitution. In deciding this question, the Court set out the requirements of a waiver as follows:

> "Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person. Our courts take cognisance of the fact that persons do not as a rule lightly abandon their rights. Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting the wavier be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to waive. The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. Waiver is a question of fact and is difficult to establish."[4] (Footnotes omitted.)

[45] In *Schoombee and Another v S*[5] the Constitutional Court remarked as follows about waiver:

> "Was this a waiver? Perhaps. This Court has emphasised that waiver of a constitutional right is difficult. The bar is high. To waive a right, a party must intentionally and knowingly abandon it. The onus to prove waiver is strictly on the party asserting it – here, the State. Even so, this Court has questioned whether waiver is applicable in relation to constitutional rights. And it has noted the distinction between waiver in the contractual sense

[3] [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC). *(Mphaphuli)*

[4] Id at para 81.

[5] [2016] ZACC 50.

> and a mere choice not to exercise a constitutional right."[6] (Footnotes omitted.)

[46] The Applicant bears the onus to prove that the Respondents have abandoned their right to strike and the bar to prove waiver is high. I am not convinced that the mere fact that the Respondents did not resume strike action on 8 December 2016 and failed to respond to a letter from the Applicant's attorneys constituted a clear and unequivocal intention to waive their right to strike. These facts are simply not enough to establish waiver. More so where the right allegedly waived is a constitutional one and the bar to establish waiver even higher.

[47] In *Public Servants Association of South Africa v Minister of Justice and Constitutional Development and Others*[7] it was confirmed that the Act does not provide for a limitation of the right to strike by estoppel, waiver or abandonment and held that even where there was a delay of 19 months before strike action actually commenced, there was no overt act to show that the right to strike was indeed waived.

[48] *In casu* the delay is a few weeks, with a reasonable explanation for that and there is no evidence placed before this Court to satisfy the requirements for waiver.

[49] Having found that the Respondents have not abandoned or waived their right to strike, it remains to be decided whether they were entitled to strike. As already alluded to, the Applicant has raised a number of reasons why the Respondents are not entitled to embark on strike action and why such strike is unprotected. I will deal with those separately.

<u>The Applicant is immunised from industrial action</u>

[50] The previous MIBCO constitution or main agreement was signed in April 2012 and expired on 31 August 2016 (the old agreement). On

[6] Id at para 25.

[7] (2001) 12 BLLR 1385 (LC).

18 November 2016 the parties signed a new main agreement (the new agreement). The implementation date of the new agreement is the effective date as published by the Minister of Labour in the Government Gazette and the duration of the agreement will be from the date of publication and extension thereof until 31 August 2019. It is common cause that publication in the Government Gazette is yet to take place.

[51] It appears from a document the Applicant relies on that the parties agreed to the implementation date as *supra* but where an employer has implemented the terms of the agreement with effect from 1 September 2016, such employer shall be immune to any industrial action. The Applicant's case is that it has implemented the agreement retrospectively and is therefore immunised from industrial action and for this reason the Respondents' strike action is unprotected.

[52] This contention is disputed by the Respondents and they submitted that the immunity agreement only attaches to motor component manufactures, a category that excludes the Applicant. The Applicant insisted that the immunity against strike action is not limited to the motor component manufactures. It is not disputed that the Applicant is not a motor component manufacturer.

[53] The question whether the immunity agreement applies to the Applicant requires an interpretation of the terms of the said agreement. The Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[8] affirmed the principles applicable to the interpretation of legislation and contracts. The Court held that:

> "The present state of the law can be expressed as follows: interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, 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

[8] 2012 (4) SA 593 (SCA).

> 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…. The "inevitable point of departure is the language of the provision itself" read in context and having regard to the purpose of the provision and the background to the preparation and production of the document…".

[54] The document relied upon by the Applicant bears the heading "Sector 1 Chapter III Component Manufacturers" and in the body of the agreement the issues of wages, duration and implementation date are recorded. Under implementation date it is recorded that—

> "Effective date as published by the Minister of Labour in the Government Gazette. The RMI however undertakes to recommend to its members to implement the terms of this agreement with effect from 1 September 2016, provided that where an employer has elected to implement these terms retrospectively, it shall be immune to any industrial action that may arise as a consequence of any dispute in any other sector of the Industry, with the express understanding that such industrial action will be automatically unprotected."

[55] Applying the principles applicable to the interpretation of documents, words should be given their ordinary meaning and the clause dealing with the implementation date cannot and should not be read, construed or considered in isolation. The broader context and operation of the agreement should be considered and it should be read and considered as a whole and not in isolated, fragmented compartments.

[56] It is evident from the heading of the agreement that it is an agreement that will find application in sector 1 with specific reference to component manufacturers. The agreement is not applicable in the entire motor industry. The clause dealing with the implementation date should be read and understood as applicable to motor component manufacturers. The clause provides that once an employer implemented the terms of the agreement retrospectively *"it shall be immune to any industrial action that may arise as a consequence of any dispute in any other sector of the Industry".* This clause not only foresees the possibility of industrial action in other sectors of the industry, but it also indicates that this agreement is not applicable to any other sector of the industry where industrial action may still occur.

[57] The Applicant is not a motor component manufacturer and despite the fact that it implemented the terms of the agreement retrospectively, it is excluded from the immunity in respect of industrial action that was agreed to and is afforded to employers in the component manufacturing industry. The Respondents' industrial action is not unprotected for reasons related to the Applicant's alleged immunity.

The implementation of the main agreement

[58] The Applicant's case is further that the strike action is unprotected because it has already implemented the increases with retrospective effect and paid the increases agreed to as from 1 September 2016. The Respondents have accepted the implementation of the terms of the new agreement and accordingly *inter partes* the parties agreed to the implementation of the agreement, including all its provisions. The provisions included are a peace clause, the prohibition against plant level bargaining and the provisions governing transport allowances.

[59] The Respondents on the other hand stated that the Applicant has unilaterally implemented the retrospective wage increases and denied that this accelerated the effective date of the new agreement.

[60] Mr le Roux for the Respondents submitted that the suggestion that the new agreement is operative *inter partes* ignores the clear terms of the agreement which stipulate that the effective date is postponed until the agreement is published in the Government Gazette. The effective date is not only postponed in relation to non-parties, but also *inter partes.*

[61] Section 31 of the Act provides that a collective agreement concluded in a bargaining council binds the parties to the bargaining council who are parties to the agreement, each party to the collective agreement and members of a trade union or employers' organisation that is a party to the collective agreement. council. The binding nature of such agreement is qualified by the opening words of section 31 namely *"Subject to the provisions of section 32 and the constitution of the bargaining council"* which makes it clear that although a collective agreement is legally binding, such binding effect is contingent on the provisions of section 32 or the bargaining council's constitution. Promulgation by the Minister of Labour is necessary before a collective agreement can be extended to non-parties in terms of section 32.

[62] In *City of Cape Town v Independent Municipal and Allied Workers Union and Others*[9] the Court held that:

> "The use of the words: "subject to section 32" in section 31 of the LRA, is best understood as meaning: "except as curtailed by". In particular, I note that Section 32(2) of LRA thus curtails the period of the binding nature of a collective agreement entered into by the parties to a bargaining council to one "from a specified date and for a specified period".

[63] In my view the same principle applies where the binding nature of the collective agreement is subject to the constitution of the bargaining

[9] [2015] ZALCCT 58; [2015] 12 BLLR 1197 (LC); (2016) 37 ILJ 147 (LC) at para 13.

council and the period of the binding nature of the collective agreement is curtailed from a specified date for a specified period.

[64] *In casu* the new agreement, which is the MIBCO constitution and a collective agreement, provides that the implementation date is *"Effective date as published by the Minister of Labour in the Government Gazette*." Although the agreement will be binding on the parties, it will only be binding and effective once it is promulgated by the Minister of Labour and until that happens, the new agreement has no legal force or effect.

[65] The new agreement signed on 18 November 2016 is not yet operative and there is no merit in the Applicant's submission that the parties have *inter partes* agreed to the implementation of the new agreement with all its provisions, which include a peace clause, prohibition against plant level bargaining and transport allowances. It follows that the new agreement, which is not presently operative, cannot be a reason why the Respondents' strike action should be regarded as unprotected.

The old MIBCO main agreement

[66] The old MIBCO main agreement was signed in April 2012 and expired on 31 August 2016. On 28 October 2016 the Respondents' gave notice of strike action to commence on 31 October 2016, which strike action was interdicted until 7 December 2016. On 18 November 2016 the parties signed a new main agreement, which is awaiting promulgation.

[67] The Applicant alleges that the strike action is unprotected because, despite the fact that the old agreement expired at the end of August 2016, its terms and conditions still apply for two reasons. Firstly, the terms and conditions of the old agreement became part of the employees' individual agreements of employment and secondly it is wrong to argue that the constitution is only binding when and for the periods that the main agreement is in force. I will deal with these submissions *infra.*

[68] In my view the Applicant has taken a shot gun approach in this application and made averments and submissions as to why the Respondents' strike action is unprotected which submissions are to some extent contradictory or mutually exclusive. This application reminds one of an unedited brainstorming process.

[69] On the one hand the Applicant relies on an agreement that provides immunity against strike action, which renders the status of the old agreement or the promulgation of the new agreement irrelevant. Without any qualification or in the alternative to the claim that the Applicant enjoys immunity, the Applicant alleges that the new agreement has been accepted and implemented *inter partes* and as a result of that, all the terms of the new agreement have been implemented, including the peace clause. In the same breath and once again without any qualification or in the alternative, the Applicant alleges that the terms of the old agreement became part of the employees contracts of employment and that the old agreement is still applicable.

[70] The Applicant's position is thus that the strike is unprotected because it enjoys immunity and because the new agreement has been implemented and because the old agreement is still valid and binding. I find it difficult to see how all these could at the same time render the strike unprotected.

[71] Be that as it may, I will deal with the Applicant's allegations in this regard. Firstly, the Applicant stated that the strike action is unprotected because the old agreement governed substantive terms and conditions of employment, which became part of the employees' employment agreements and remained so, despite the expiry of the old agreement. The old agreement provided for transport and the Applicant's obligation to provide transport to employees whose shifts end after 20h00 and where the employer and employees cannot reach mutual agreement, the regional council may be requested to assist in arriving at such an agreement.

[72] The agreed obligation is thus to provide transport, which the Applicant does and not to pay a transport allowance which would constitute no more than a wage increase. A wage increase had already been agreed to between the parties and such claim was thus compromised by agreement between the parties when they concluded the new agreement on 18 November 2016.

[73] Furthermore, the parties agreed that if no agreement regarding transport could be reached, the council must assist. The Applicant's case is that the transport issue is not a wage increase but an obligation to provide transport and this is not an issue on which the Respondent can strike, but has to be referred to the council and the Respondents have failed to do that.

[74] In answer to these allegations, the Respondents submitted that even if the terms and conditions of employment governed by the old agreement became part of the employees' contracts of employment, it is distinct from the operation of a collective agreement for purposes of the substantive limitations on strike action contained in section 65 of the Act.

[75] The Respondents further distinguished their demand for the payment of a transport allowance from the issue of transport as set out by the Applicant. The Respondents' demand does not concern the availability of transport at the end of an evening shift or the provision of transport by the employer, but it concerns the payment of an allowance for the actual cost of transport, regardless of the time of day. The Respondents deny that the demand for transport allowance was compromised as it is an issue in its own right and was pursued outside the ambit of centralised MIBCO negotiations. The demand could not have been compromised in the central forum when it was not pursued in that forum in the first place.

[76] As to the allegation that the regional council should have been involved, the Respondents submitted that the old agreement expired and its terms

are no longer binding and the role of the regional council is no more than one of facilitation and its involvement cannot oust the right to strike where the statutory requirements for strike action have been fulfilled.

[77] The first issue to be considered is what is the status of the old agreement that expired on 31 August 2016.

[78] In *SAMWU v City of Tshwane and Another*[10] the status of an expired collective agreement regulating a shift system was considered and the Court held that:

> "It is trite that the terms of a collective agreement are not only binding on the individual employees but as a matter of law are incorporated into the employees' contract of employment. It is therefore my view that even though the 2006 collective agreement lapsed, its provisions having been incorporated into the employment contracts of the individual members of the applicant continued beyond the life span of the collective agreement. The shift system remained as was before the lapse of the collective agreement because its provisions became part of the individual employees' employment contracts. In other words those terms and conditions set out in the collective agreement remained in force even after the lapse of the collective agreement and would remain as such until another collective agreement was concluded changing those provisions that had been incorporated into individuals' contracts."

[79] It has to be decided whether the provisions of the old agreement became part of the employees' contracts of employment and whether it created a vested right that preserved the transport provisions as part of the employees' working conditions. If so, the conditions may remain in force even after the lapse of the old agreement and would remain in force until the new agreement becomes effective.

[10] [2013] ZALCJHB 104; (2014) 35 ILJ 241 (LC) at para 18.

[80] The Applicant's case is that clause 4.1B(3)(h) of Division A of the old agreement provided for transport for employees whose shifts end after 20h00 that may be arranged by mutual agreement between an employer and its employees and where the employer and employees cannot reach mutual agreement, the regional council may be requested to assist in arriving at such an agreement. The agreed obligation is to provide transport, which the Applicant does and not to pay a transport allowance.

[81] The Respondents' case on the other hand is that even if the terms and conditions of employment governed by the old agreement became part of the employees' contracts of employment, their demand for the payment of a transport allowance is different from transport as set out in clause 4.1B(3)(h) of Division A of the old agreement. The Respondents' demand does not concern the provision of transport by the employer, but it concerns the payment of an allowance for the actual cost of transport.

[82] The Respondents' argued that the payment of a transport allowance is not an issue regulated by the old agreement.

[83] In my view there is a distinction to be drawn between terms and conditions of employment governed by a collective agreement which are substantive issues and the portion of the agreement that provides for procedural issues.

[84] Terms and conditions of employment are regulated in the substantive part of a collective agreement and those may be incorporated in an employee's contract of employment and may stay alive after the expiry of the collective agreement. The procedural portion of the agreement sets out the process to be followed for tabling and negotiating the substantive issues. These procedural aspects cannot be regarded as terms and conditions of employment, but set out procedures the parties must follow in dealing with each other and the substantive part of the agreement.

[85] Even if I were to accept that the provisions of the old agreement became part of the employees' contracts of employment and remain in force after the expiry of the old agreement, it does not assist the Applicant for a number of reasons.

[86] Firstly, it is evident from the provisions of the old agreement that the Applicant relies on in support for the argument that transport is provided for in the old agreement, that the payment of a transport allowance is not an issue regulated by the old agreement. It can therefore not be part of the terms and conditions of the employees' contracts. It is indeed a separate issue that was not catered for in the old agreement or the new agreement and could therefore not have been compromised.

[87] Secondly, the Labour Appeal Court in *SA National Security Employers Association v TGWU and others*[11] (*SANSEA*) confirmed that a strike is not prohibited during the currency of a collective agreement when the issue in dispute relates to terms and conditions applicable after its expiry. In the *SANSEA* case the unions and the employers' organization had negotiated wages and other conditions of employment with unions annually since 1993. The LAC made it clear that the legislature had intended to provide that the parties were bound by a collective agreement for the period that it was operative and that they were precluded from resorting to industrial action to change its terms. The parties were, however, not prohibited from striking about an issue not provided for in the collective agreement. The LAC in *SANSEA* held that:

> "What the legislature intended with s 65(3)*(b)*(i), in my view, was to provide that the parties are bound to the terms of the collective agreement for the period that it is operative and that they are precluded from resorting to industrial action to change its terms. So, for example, having agreed on wages in the security industry for the period 7 April 1997 to 6 April 1998, the unions are not entitled to strike to increase the wages *for that period*.

[11] [1998] 4 BLLR 364 (LAC).

> What the 1995 Act does not expressly prohibit is a resort to industrial action by one of the parties to a collective agreement to resolve a dispute about an issue which is *not* regulated by the collective agreement.
>
> On the facts of this case the dispute between SANSEA and the unions which forms the subject-matter of the strike is the wage dispute for the 1998/1999 year. The 1997/1998 agreement does not regulate that issue. Accordingly, in terms of s 65(3)*(b)*(i) the unions are not prohibited from embarking on a strike to compel compliance with its demand."

[88] This was followed in *SA Federation of Civil Engineering Contractors on behalf of its members v NUM and Another*[12] where the Court held that:

> "What is thus clear from the foregoing is that a collective agreement remains binding in respect of the issues identified and regulated in the current collective agreement. A fundamental consequence of this principle is therefore that the parties may not strike about any issue which is regulated by the current agreement. Nothing, however, prevents parties from bargaining in respect of an issue to be regulated in a following (or new) agreement."

[89] As there is currently no binding agreement that is operative and the issue of transport allowance is not catered for in the old or new agreement, the reasons advanced by the Applicant cannot render the strike action unprotected.

[90] The last reason advanced by the Applicant as to why the strike action is not protected, is that clauses 11 and 12 of the MIBCO constitution provide for negotiations, collective agreements, strikes and lock-outs. Clause 11 provides for negotiations in respect of the amendment of any existing collective agreement, the introduction of a new agreement or any

[12] (2010) 31 ILJ 426 (LC) at para 26.

matter of mutual interest and the procedure to be followed and the timeframes within which it has to take place. Clause 12 provides that no strikes or lock-outs shall take place until the matter giving rise thereto has been dealt with in accordance with the aforesaid clause 11 and section 64 and 65 of the Act and shall not take place during the currency of an agreement arrived at by the parties.

[91] The question is whether clauses 11 and 12 that prohibit industrial action in respect of a matter of mutual interest without it first being tabled in accordance with the procedure set out in clause 11, before strike action could be the recourse, apply *in casu.*

[92] Clause 12 specifically prohibits strikes or lock-outs until the matter has been dealt with in accordance with clause 11 and provides that strikes and lock-outs shall not take place during the currency of an agreement.

[93] Ms Nel for the Applicant argued that the MIBCO agreement contains a peace clause that prohibits any form of industrial action as a result of any dispute on wage and or salary adjustments and other conditions of employment relating to any sector in the agreement. It further provides that there shall be no two-tier bargaining on any matter of mutual interest and Ms Nel argued that the demand for a transport allowance is nothing but a demand for a wage increase at plant level, which is clearly prohibited by the terms of the agreement.

[94] One of the most important consequences of a peace clause in a binding collective agreement is that the parties may not strike over any issue regulated in terms of the collective agreement (see s 65(1)*(a)* and *(b)* of the Act).

[95] In my view the provisions of clauses 11 and 12 of the MIBCO constitution do not assist the Applicant as there is currently no applicable agreement which prohibits strike action or which prescribes a procedure to be followed before strike action could follow, as set out in clauses 11 and 12

of the old agreement. In *SANSEA* the Labour Appeal Court confirmed that the legislature had intended to provide that the parties were bound by a collective agreement for the period that it was operative and that they were precluded from resorting to industrial action to change its terms for that period.

[96] The Act provides the legal framework for the exercise of the right to strike. Section 64(1) of the Act subjects the right to strike to a number of limitations. The first limitation relates to the procedural requirements that must be followed for a strike to be protected. In essence it is required that the issue in dispute must be referred to conciliation. Once conciliation fails and a certificate of non-resolution is issued, employees may embark on strike action provided that the required strike notice is given to their employer. Of particular relevance to the present application is the limitation on strike action in terms of a peace clause (see s 65(1)*(a)* of the A) and the limitation on strike action where the subject of the strike is regulated by a collective agreement (s 65(3)*(a)* of the Act).

[97] *In casu* there is no operative agreement and once there is compliance with the provisions of sections 64 and 65 of the Act, the strike action should be protected. Even if I am wrong on this and there is indeed an operative agreement, the strike action is still protected as the subject of the strike is not regulated by the agreement and non-compliance with procedures set out in an agreement, cannot render the strike unprotected. In *Country Fair Foods (Pty) Ltd v FAWU and Others*[13] the Labour Appeal Court confirmed that the Act sets out specific requirements which must be met in order for an employee to acquire the right to strike and once those requirements have been complied with, the Act confers the protection and status of a protected strike as defined in section 67(1) of the Act. The only requirement for a strike to be protected is that it must comply with the provisions of the Act. The Court held that:

[13] (2001) 5 BLLR 494 (LAC), (2001) 22 ILJ 1103 (LAC).

> "What the legislature has sought to achieve is to give parties a choice of either following a pre-strike dispute procedure contained in a collective agreement or following the statutory procedure in s 64(1). Compliance with either procedure suffices to confer on employees the right to strike and the resultant strike acquires the status of a protected strike with all the benefits and consequences which flow from such status. I have considered the question whether there could be any basis on which, applying purposive interpretation, it could be said that a strike which has been resorted to without prior compliance with a procedure in a collective agreement but has complied with the procedure of s 64(1) of the Act can nevertheless be said not to be a protected strike. I do not think that that can be said without the court unjustifiably usurping the legislature's legislative function".

[98] When the Respondent issued a strike notice on 28 October 2016 there was compliance with the provisions of the Act and it follows that the strike was protected, notwithstanding the fact that procedural issues as set out in the old or new agreement had not been complied with.

[99] The strike that was intended to commence on 31 October 2016 was merely suspended until 24 January 2017. The strike action in January 2017 was a continuation of the strike action that was intended in October 2016. It is not a separate or different strike, but a mere resumption of the strike of which a section 64(1)(b) notice had already been given. Once an adequate notice as required by the Act had been given, there is no obligation to give another notice on resumption of a temporarily suspended strike[14] and there is no need for the Respondents to refer a new dispute or to issue another 48 hours' strike notice.

[100] The Respondents' strike action is not unprotected and the Applicant is not entitled to have the rule *nisi* confirmed insofar as it declared the strike action unprotected.

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[14] *Transportation Motor Spares v NUMSA and others* (1999) 20 ILJ 690 (LC).

[101] The Applicant submitted that it is entitled to confirmation of the rule *nisi* in respect of the unlawful conduct displayed during the strike action. The Applicant sought an order interdicting and restraining the Respondents' from intimidating, harassing or interfering with the Applicant's employees, customers, suppliers, service providers or any other person involved in or connected with the business of the Applicant and from unlawfully interfering with or damaging the property or assets of the Applicant, its clients, employees, service providers or any other person involved in the Applicant's business.

[102] In support of the relief so sought the Applicant stated that the Respondents are conducting themselves unlawfully and video footage depicting the unlawful conduct will be made available at the hearing of the matter. No video footage was made available to this Court.

[103] The Applicant alleges that the video footage depicted the employees as blocking the roads and preventing undisturbed entry and egress to the premises of VWSA, setting tyres alight and stoning the Applicant's vehicles. In support of these allegations the Applicant appended affidavits deposed to by three individuals, describing the aforesaid events.

[104] In opposition the Respondents submitted that the affidavits deposed to by P Mzwazi, J D Deysel and M A Seekoei do not implicate the employees and it is denied that they were responsible for the conduct as described in the affidavits referred to. In the replying affidavit the Applicant did no more than to state that a typed affidavit deposed to by P Mrwebi was submitted and accepted as evidence in the employees' disciplinary hearings.

[105] Whether the Applicant is able to place sufficient or convincing evidence before the chairperson of an internal disciplinary hearing to show that the employees conducted themselves unlawfully, is an entirely different

question and irrelevant for purposes of deciding the issue before this Court.

[106] *In casu* the affidavits placed before Court do not identify the employees, in fact they state specifically that it is not known who threw stones and state that 'people' were blocking the roads. I am not satisfied that on the facts and evidence placed before this Court that the Applicant has made out a case that entitles it to the confirmation of the second part of the rule *nisi*.

[107] This is not to say that this Court condones unlawful conduct during strike action or that this Court turns a blind eye to conduct that should be interdicted and restrained. There is simply not sufficient evidence placed before this Court to conclude that the employees have acted unlawfully and that the Applicant has a clear right to the relief it seeks.

[108] The rule *nisi* issued by this Court on 25 January 2017 is discharged.

Counter application

[109] The Respondents have filed a counter application seeking a declaratory order that the Applicant's conduct on 25 January 2017 is an unprotected lock out and that the Applicant be interdicted and restrained from the continued imposition of the lock-out and that it be ordered to uplift the lock-out and permit the employees to resume their duties.

[110] Alternatively, and in the event that the lock-out is found to be protected, interdicting and restraining the Applicant from making use of replacement labour during the duration of the lock-out.

[111] The Respondents' case is that on 24 January 2017 their attorney informed the Applicant that the strike was suspended and that the employees were tendering their services in accordance with their contracts of employment. When the employees returned to work on 25 January 2017, they were not allowed access to the Applicant's premises

and they were required to sign a document in terms of which they had to abandon their right to pursue the demand for the payment of a transport allowance as a precondition for being permitted to resume work. When the employees refused to sign the document, they were not permitted to work. The Respondents' attorneys alerted the Applicant that its conduct amounted to the imposition of an unprotected lock-out.

[112] The Applicant's case is that it is entitled to reject the conditional tender of services in circumstances where such tender would allow the employees to proceed with their discontinuous strike action which is unprotected. Until the employees give an unequivocal relinquishment of the unprotected strike action, the Applicant is entitled to refuse the conditional tender of services.

[113] The Applicant further submitted that the employees were not locked out but that they were suspended to face charges arising from their unlawful conduct during the course of the strike. Even if the suspension was capable of being construed as a lock-out, it was protected given that it was in response to the Respondents' unprotected strike action.

[114] The Respondents insisted that they were locked-out and such lock-out was not in compliance with the requirements of the Act in that they were not given notice of the lock-out as required by the Act and it was not imposed in response to an unprotected strike, but was in fact an offensive lock-out wherefore the Applicant is not entitled to make use of replacement labour.

[115] When the matter was argued I enquired from the parties what the current state of affairs was and they informed me that the employees are currently back at work and that the Applicant is in the process of finalising the internal disciplinary processes. It appears from the affidavits filed in this matter that the disciplinary hearings ran their course and that the parties are awaiting the chairperson's determination in relation to the issue of guilt.

[116] In my view the relief sought by the Respondents in their counter application has been overtaken by events subsequent to the filing of papers and the relief became moot to a great extent. The Respondents seek an order declaring the Applicant's conduct on 25 January 2017 an unprotected lock-out, interdicting the continued imposition of the lock-out and ordering the Applicant to uplift the lock-out and permit the employees to resume their duties.

[117] The employees are no longer locked-out and they were subsequently permitted back at work, wherefore relief in that regard and an order as sought by the Respondents is unnecessary.

[118] The Respondents' strike action is not unprotected and the normal consequences in respect of lock-out should follow from that. There is no need to decide the issues raised in the counter application in view of my findings on the protected status of the strike action and as the issues became academic in light of subsequent events.

Costs

[119] In awarding costs this Court has a very wide discretion. In my view the interest of justice will be best served by making no order as to costs, having regard to the ongoing collective bargaining relationship between the parties and the prospect of prejudice to that relationship and the successful resolution of outstanding issues should an order for costs be made.

Order

[120] In the premises I make the following order:

1. The rule *nisi* issued on 25 January 2017 is discharged;
2. The Respondents' counter application is dismissed;
3. There is no order as to costs.

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Connie Prinsloo

Judge of the Labour Court

Appearances

For the Applicant:	Advocate C A Nel
Instructed by:	Macgregor Erasmus Attorneys

For the First. Third and Further Respondents:	Advocate F le Roux
Instructed by:	Gray Moodliar Attorneys