REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA12/13

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY **Appellant**

and

SOUTH AFRICAN MUNICIPAL WORKERS UNION

obo THREE OF ITS MEMBERS **Respondent**

Heard: **25 March 2014**

Delivered: **23 October 2014**

Summary: Collective agreement providing for shop-stewards to carry out union functions on full time basis but paid by employer and defining the respective duties and obligations of employee shop-stewards and their employers. Employer deducting shop-stewards salaries during strike based on "no work no pay" principle– employer disputing that shop-stewards were working during protected strike action-Jurisdiction- employer contending dispute about interpretation of collective agreement- Appeal - the dispute was about the interpretation of clauses of the collective agreement relating to duties and obligations of shop-stewards and employers. Majority held- Labour Court having no jurisdiction since main issue concerns the interpretation and application of clauses in the collective agreement. Interpretation of collective agreement was not merely peripheral to issues. Appeal upheld.

Minority finding that shop-stewards not performing duties when all union members on strike. Employer correct in applying the no work no pay principle. Appeal upheld with costs.

CORAM: WAGLAY JP, TLALETSI DJP AND COPPIN AJA

JUDGMENT

COPPIN AJA

[1] This is an appeal against the judgment of the Labour Court (A C Basson J) ordering the appellant to pay three of its employees, full-time shop-stewards and members of the South African Municipal Workers Union ("*the respondent*") remuneration for the period of a strike and also interdicting the appellant from making deductions from their salary for their 'participation' in the strike. The Labour Court granted the appellant leave to appeal to this Court.

[2] Two issues were raised concerning the court *a quo*'s judgment, namely, whether the Labour Court had jurisdiction to decide the dispute between the parties and if so, whether full-time shop-stewards are entitled to be paid for the duration of a protected strike, particularly in circumstances where they participate in the strike.

[3] The appellant's argument in respect of the two issues, in essence, was the following. The Labour Court had no jurisdiction to decide the dispute because it was about the interpretation of a collective agreement ("the main agreement") and section 24 of the Labour Relations Act 66 of 1995 ("*the LRA*") was applicable. In terms of that section, the dispute either had to be resolved in accordance with the procedure provided in the collective agreement, which procedure must first require the parties to attempt to resolve the dispute through conciliation, and if that fails, to resolve it through arbitration. Where there is no dispute resolution procedure in the collective agreement, or if that procedure is not operative, section 24 provides that the dispute has to be referred to the Commission for Conciliation Mediation and Arbitration ("*the CCMA*") for its resolution, by means of conciliation and if that fails, by means of arbitration. It was further submitted that if the Labour Court had jurisdiction to determine the dispute then its interpretation of the main agreement was nevertheless wrong for the following reasons: It was

'unbusiness' like, unfair and at variance with certain clauses of the main agreement in particular clauses 2.5.6.4.1 to 2.5.6.4.2, and did not "accord with the well-established principle of no work for no pay which finds expression, in the context of a strike, in the provisions of section 67(3) of the LRA". It was further submitted that the court *a quo* placed the full-time stewards in a better and more privileged position than other employees and in so doing was "creating a recipe for union trouble apropos the relationship between shop-stewards and members in the structure of the union".

[4] The respondent, on the other hand, asserted the correctness of the court *a quo's* judgment, denied that the Labour Court did not have the necessary jurisdiction to decide the dispute and was generally dismissive of the appellant's arguments, describing them as lacking in cogency and merit. It was submitted that the main agreement varied the individual contracts of employment of the employees concerned and that the Labour Court has jurisdiction in terms of section 77(3) of the Basic Conditions of Employment Act, No. 75 of 1997 ("the BCEA") to deal with the claims of the employees to be paid their salaries. I will deal with the full detail of the opposing argument in the course of assessing the appellant's submissions.

The background facts

[5] The common cause facts, or those not seriously disputed, are the following: The respondent, on behalf of three of its members, approached the Labour Court in application proceedings for an order that the appellant be interdicted from deducting amounts from the salaries of those members and for an order directing the respondent to repay those members the monies so deducted. It was averred, *inter alia*, that the deductions were a contravention of section 34 of the BCEA and in breach of the main agreement and that the non-payment of salaries constituted a contravention of section 33 of the BCEA and a breach of the main agreement. The order sought was also that the appellant pay salaries that had not been paid to those members over a certain period. The members, who are employed by the appellant, are Mrs Elsie Pos ("*Pos*"), employed as a Clinic Head, Mr Nhlanhla Mazibuko ("*Mazibuko*"), employed as a Senior Property Officer and Mr Philip Moepye ("*Moepye*"), employed as a

cashier. These persons were full-time shop-stewards. The deductions were in respect of salaries (or part salaries) that had been paid to them for a period when the respondent's members had embarked on a strike. The appellant treated the three employees in the same manner as the other employees who participated in the strike, contending that they also participated in the strike and applied the principle of "no work no pay" to them. The respondent opposed the application and filed opposing affidavits.

[6] When the matter first came before the Labour Court, it was referred for the hearing of oral evidence on the basis that there was a dispute of fact that could not be resolved on the papers. The dispute of fact was about whether the three employees attended work during the strike. Subsequently, and after hearing oral evidence on the issue in dispute, the Labour Court gave the order which is being appealed against. Two witnesses testified on behalf of the respondent, namely Pos and Mr Kekana. The appellant called no witnesses.

[7] On the affidavits it was common cause that the main agreement had been entered into between the South African Local Government Association ("*SALGA*"), which represented the interests, *inter alios*, of the appellant, the Independent Municipal and Allied Trade Union ("*IMATU*") and the respondent and related, *inter alia*, to the election, appointment, obligations and remuneration of full-time shop-stewards.

[8] It was common cause that Pos, Mazibuko and Moepye were duly elected and appointed in terms of the policies and Constitution of the respondent as full-time shop-stewards representing the members of the respondent. The main agreement in clause 2.5.5 provided that each trade union has the right to elect full-time shop-stewards in accordance with its Constitution and policy. The main agreement also deals, *inter alia*, with the disciplining, withdrawal of the status of a full-time shop-steward and the replacement of a shop-steward that has ceased to hold such office.

[9] More importantly, in clause 2.5.6, the main agreement deals with the "duties and obligations" of full-time shop-stewards and provides:

> '2.5.6 Duties and obligations

2.5.6.1 Full-time shop-stewards shall represent the interests of their trade union and their members. This may entail improving employers/employee relations by building trust between employees and management.

2.5.6.2 A full-time shop-steward shall be subject to the applicable conditions of service, rules and regulations of the employer where he or she is employed.

2.5.6.3 The execution of the duties linked to the position of the full-time shop-steward will be performed in accordance with the existing procedures and practices of the employer.

2.5.6.4 The trade unions accept that a full-time shop-steward shall –

2.5.6.4.1 be considered the same as any other employee in respect of the application of conditions of service;

2.5.6.4.2 be bound by his or her terms and conditions of service and by the policies, rules and regulations prevailing from time to time in his/her employment and constituency; and

2.5.6.4.3 carry out his or her duties, as laid down in this agreement and any other agreements entered into between the parties without unreasonably and unnecessarily interfering with or disrupting the employer's functioning and interfering with the performance of the employees' duties.'

[10] Clause 2.5.7 deals with the conditions of service and employment security of full-time shop-stewards. For the purposes of this judgment it is only necessary to quote clause 2.5.7.1 which provides:

'2.5.7.1 Full-time shop-stewards shall be remunerated on the basis of the post they held at the time of election and will receive all salary notches, general increases, and service condition improvements applicable to such posts.

2.5.7.2 Full-time shop-stewards shall not be prejudiced in their employment or promotion of prospects and shall be deemed to retain the job that they held for their terms of office, or any further term of office.'

[11] Clause 2.5.9 of the main agreement deals with the reporting and accountability of full-time shop-stewards. The clause provides:

> '2.5.9 Reporting and accountability
>
> 2.5.9.1 Full-time shop-stewards must report to a designated member of the employer for administrative purposes.
>
> 2.5.9.2 The full-time shop-steward shall report and be accountable to the trade union structures or members in accordance with the respective constitutions and policies of the trade unions.
>
> 2.5.9.3 Each trade union shall be accountable for the satisfactory performance of each full-time shop-steward and shall ensure that they carry out their duties efficiently and effectively.
>
> 2.5.9.4 Each full-time shop-steward shall accept the conditions of this agreement by signing the attached declaration (Annexure 'B3').
>
> 2.5.9.5 The full-time shop-steward may form part of the consultation and negotiation structures of local labour forum, including serving on the council and its divisions and their committees and working groups.'

[12] It was not in issue that Pos, Mazibuko and Moepye worked from the offices of the respondent in execution of their duties as full-time shop-stewards and were remunerated by the appellant, as its employees, pursuant to the provisions of the main agreement. It was further common cause and not disputed that on 10 February 2011, Pos, in her capacity as Acting Branch Secretary of the respondent union, gave the appellant notice that its members intended to embark on a protected strike from 22 February 2011 at 07h00 with the intention of settling a dispute relating to a certain case and specifically, concerning the suspension, by the appellant, of certain officials referred to in the notice, for the investigation into non-compliance with the relevant collective agreement and legislation regarding the awarding of tenders and concerning the disciplining of those who may be found to have misled the appellant in the tender process.

[13] It was further common cause that the work force, specifically members of the respondent, embarked on the strike as notified, by withholding their labour from the appellant. The said strike action persisted until about April or May 2011. The appellant did not pay the employees who were on strike and who did not render services to it during the strike. This was alleged to be on the basis of the principle of "no work no pay", which also finds expression in the provisions of section 67(3) of the LRA. It was common cause that the appellant also made deductions from the salaries of Pos, Mazibuko and Moepye and did not pay them salaries for the period of the duration of the strike in 2011, as detailed in the notice of application and in the founding papers of the application which had been brought by the respondent, on their behalf, in the court *a quo*.

[14] The appellant contended that, as with the other striking employees, it was entitled to withhold payment of the salaries of Pos, Mazibuko and Moepye for the period of the duration of the strike on the basis of the principle of "no work no pay". The respondent and the said employees denied that they were on strike and contended that they were on duty for the period of the duration of the strike pursuant to and in fulfilment of their obligations to represent the interests of the trade union and its members, as contemplated, according to them, in the main agreement. On behalf of the appellant, it was, in essence, contended that it was unconscionable that Pos, Mazibuko and Moepye could be paid for participating in the strike while other employees, co-participants in the strike, were not paid.

[15] The issue that was before the court *a quo* was thus whether Pos, Mazibuko and Moepye had participated in the strike in the same sense as the other employees and whether the non-payment of their salaries and the deductions made in connection with the strike, were therefore justified. The court *a quo* considered the terms of the main agreement as well as the evidence of Pos and Kekana, that had been presented by the respondent, and concluded as follows:

> '[20] In the present case, I am of the view that the employees did not participate in the strike and therefore they are entitled to their remuneration

for the months in question. In arriving at this decision, I have taken note of the following: Firstly, on the facts, the employees did not withhold or withdraw their labour from the employer; they signed in everyday and reported for work (as full-time shop-stewards). Secondly, during the course of the strike they attended to their duties as full-time shop-stewards: they monitored the strike and attended disciplinary hearings and meetings. Thirdly, although I do take the point that the full-time shop-steward never loses his/her status of being an employee; the three employees participated in the strike in the capacity of serving the interests of the union and its members. Fourthly, the employer's obligation to remunerate an employee is suspended in terms of section 67(3) of the LRA which states that an employer is not obliged to remunerate an employee for services that the employee does not render during a protected strike. There is no evidence before this Court that the individual employees did not render their services. They continued as normal and their involvement in the strike was in their capacity as full-time shop-stewards who had to manage the strike on behalf of the union. They did not refuse to render services to the employer as this obligation was suspended by virtue of their appointment as full-time shop-steward.

[21] In the event, it is concluded that the three employees were at work and hence entitled to their salaries. In respect of costs I can find no reason why the applicant should not be entitled to its costs which costs include the employment of senior counsel.'

The issue of jurisdiction

[16] The issue of jurisdiction was not raised or raised crisply by the parties in the affidavits (i.e. the pleadings) that served before the court *a quo* and, generally, in the cases that they made in the papers before the court *a quo*. The only time the issue of jurisdiction is crisply referred to by the court *a quo* is in its judgment granting leave to appeal to this Court.

[17] In its notice of application for leave to appeal, dated 6 December 2011, the appellant, *inter alia,* raises as grounds that there is a reasonable prospect that another court "will find" that clause 2.5.6.2 of the main agreement contemplates that in the event of an employee, including a full-time shop-steward, being on strike or withholding the tendering of services to the

employer, the employer is not obliged to pay such an employee including a full-time shop-steward, a salary. Another ground raised is that there are reasonable prospects that another court would find that clause 2.5.6, if read holistically, cannot be interpreted to mean that a shop-steward qualifies to be paid his, or her, salary, if the shop-steward only represents the interests of the trade union and its members during a strike. It is argued, in the alternative, that an interpretation to the effect that a full-time shop-steward qualifies to be paid his, or her, salary for only serving the interests of the trade union and its members during a strike, is repugnant to the spirit, purpose and objects of the LRA.

[18] In its notice of application for leave to appeal, dated 8 June 2012, the grounds of appeal raised by the appellant appear, in essence, to be the same as those raised in the earlier notice, including the ground that, in terms of clause 2.5.6 of the main agreement, a full-time shop-steward not only has a duty to serve the interests of the union and its members, but also that of the employer. It is stated in the notice that a full-time shop-steward has the overall responsibility to ensure orderly collective bargaining in the workplace which, in turn, supports the employer's interest to avoid strife and conflict in the workplace. It was also submitted in the notice that "strike action" implies a breakdown in the employment relationship and that, therefore, a full-time shop-steward's participation in the strike is not in the employer's interests; and that the employer's obligation to pay such a full-time shop-steward's salary for the period of his, or her, participation in the strike, could be suspended.

[19] It is clearly in the light of those grounds raised by the appellant, that the court *a quo* held in its judgment, granting the appellant leave to appeal to this Court, that two questions need to be addressed by this Court, namely, whether the Labour Court had jurisdiction to decide the dispute between the parties? And, if so, whether the full-time shop-stewards were entitled to be paid during a protected strike? If the first question is answered in the negative, it would be the end of the enquiry and this Court will not have to consider the second question.

[20] It is apparent from an analysis of the papers filed in the court *a quo* that the main issue is about, and is governed by, the main agreement. The main agreement governs the payment of the salaries of the shop-stewards envisaged in that agreement, as well as their rights and duties. The respondent, on behalf of Pos, Mazibuko and Moepye is claiming deductions made from their salaries and payment of salaries that had not been paid to them for the period of the strike. The respondent averred in its founding papers that the deductions and non-payments of salaries was in breach of the main agreement and in violation of sections 33 and 24, respectively, of the BCEA. Reliance was placed by the respondent, *inter alia*, on the main agreement, in particular on clauses 2.5.6 and 2.5.7. In its answering affidavit, the appellant, *inter alia,* denied that Pos, Mazibuko and Moepye were performing their "normal duties" and contended that they were involved in the strike. It was also contended that the deductions were to "off-set what had been unduly paid to the shop-stewards as result of their absence from work during the strike". In its second answering affidavit, presumably a supplementary affidavit,[1] which was made by a different deponent, the appellant, essentially, makes averments to the same effect as in its earlier answering affidavit.

[21] It is trite that the jurisdiction of the Labour Court (and the CCMA or a council) to entertain a matter is determined from the pleadings in the matter.[2] It is also an established principle that in application proceedings, the affidavits constitute the pleadings and the evidence. While the issues between parties generally emerge from the pleadings, it may not be readily possible to determine what the true nature of those issues are, or what the true nature of the dispute is, because of the manner in which the pleadings are drafted. Therefore, the true nature of the dispute is to be determined from an analysis of the facts and not from the parties' characterisation of the dispute.[3]

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[1] It is titled 'Amended Answering Affidavit".

[2] See *inter alia*, *Public Servants' Association obo Liebenberg v Department of Defence* [2013] 8 BLLR 804 (LC) para 29 and the cases cited there, including*, PSA obo De Bruyn v Minister of Safety and Security* [2012] 9 BLLR 888 (LAC)*; Chirwa v Transnet Ltd* [2008] 2 BLLR 97 (CC) and *South African Maritime Safety Authority v Mckenzie* [2010] 5 BLLR 488 (SCA*).*

[3] See *Wardlaw v Supreme Mouldings (Pty) Ltd* [2007] 6 BLLR 487 (LAC), referred to in *NUMSA obo Sinuko v Powertech Transformers (Pty) Ltd* [2014] 2 BLLR 133 (LAC) at 138 paras [16] and [17];

[22] In the papers that were filed in the court *a quo*, it is expressly averred by the respondent that the appellant's action in withholding the salaries and in making deductions from the salaries of the relevant shopstewards, was in breach of the main agreement. The court thus had to determine whether the main agreement had been breached. This, of necessity, required an interpretation of the main agreement. From an analysis of the facts, it becomes apparent that the nub of the real dispute between the parties was about the duties and obligations of a full-time shop-steward, in particular, during a strike. The respondent clearly contended that such a shop-steward had to represent the interests of his or her trade union and its members and if that entailed being part of organising the strike it did not mean that the shop-steward was on strike. Participating in the sense of organising and managing the strike was part and parcel of a full-time shop-steward's duties and obligations for which the shop-steward was to be paid. The appellant, on the other hand, contended that the full-time shop-steward's duties was much broader than that and included looking after the interests of the employer as well. Participation by full-time shop-stewards in a strike, even if it was to manage or organise the strike in the interests of their trade union and its members was anathema to the employer's interests. In such circumstances, according to the appellant, the full-time shop-stewards were not serving the interests of the employer and the employer has no duty to pay the full-time shop-steward for the duration of their participation in the strike action.

[23] If the main issue in the "pleadings" is about the interpretation and application of the clauses in the main agreement, including clause 2.5.6 and/or 2.5.7 of the main agreement, then it must, in terms of section 24 of the LRA, be resolved, firstly, by conciliation, failing that, by arbitration, in accordance with the provisions of the main agreement, alternatively, by the CCMA by means of conciliation, failing that, by means of arbitration, as mentioned earlier in this judgment.[4]

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compare *Cusa v Tau Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) paras [65]-]66] (also reported in [2009] 1 BLLR 1 (CC)).

[4] This was not a case where the interpretation of the collective agreement was merely ancillary to the main issue, see in that regard *Johannesburg City Parks v Mphahlani NO and others* [2010] 6 BLLR 594 (LAC).

[24] In argument on this point of jurisdiction, counsel for the respondent did not contend that the real dispute between the parties was not about the interpretation of the main agreement or the clauses of that agreement that have been referred to, but argued that those provisions had become a part of the employment contract of each of the full-time shop-stewards (in this case that of Pos, Mazibuko and Moepye) and that the court *a quo* was interpreting, not the main agreement *per se*, but the individual contracts of employment of those employees insofar as those contracts "*incorporated*" the relevant clauses of the main agreement and that it had the power to do so in terms of section 77(3) of the BCEA.

[25] This argument, in my view, which is made to overcome the difficulty which the jurisdictional point presents to the respondent, ignores the primacy of collective agreements under the LRA. One could equally argue that the court *a quo* was interpreting the main agreement and that the dispute was about the main agreement which was the source of the relevant clauses. For this argument, respondent's counsel purportedly relied on section 23(3) of the LRA which provides: "Where applicable, a collective agreement varies any contract of employment between an employee and an employer who are both bound by the collective agreement." That provision is likely to apply to all collective agreements where reciprocal rights and obligations of employers and employees are dealt with. But it is not correct that if clauses in the collective agreement, by which the employment contract is varied, are interpreted, that it is in fact an interpretation of the employment contract and not of the collective agreement. The interpretation is certainly of the relevant clause(s) in the collective agreement and by implication, also of the relevant clauses in the employment contract.

[26] Collective agreements are to be accorded primacy. In *National Bargaining Council for the Road Freight Industry and Another v Carlbaik Mining Contracts (Pty) Ltd and Another,*[5] this Court held that section 199 of the LRA, read together with section 23(3) of the LRA, purpose "to advance the primary object of the LRA, namely the promotion of collective bargaining at sectoral

[5] (2012) 33 ILJ 1808 (LAC) paras 16-18.

level and giving primacy to the collective agreements above individual contracts of employment." Section 199 provides, *inter alia*, in essence, that "contracts of employment may not disregard or waive collective agreements."

[27] The fact that it was agreed that the rights, duties and obligations pertaining to full-time shop-stewards were to be reduced to a collective agreement at bargaining council, or sectoral level, is indicative of the intention to create and maintain uniformity in the sector in respect of those matters. The meaning to be given to each clause in the collective agreement was therefore also clearly intended to be uniform throughout the sector and at both bargaining council and plant levels. To distinguish between the collective agreement and the individual contracts of employment in respect of those aspects when interpreting the relevant clauses, could be subversive, firstly, of the very intention of maintaining uniformity, because there is a possibility that different meanings could be given to the very same clause(s) by the different parties to the agreement if they were allowed to definitively interpret the clauses at plant level. Such an approach would also weaken the collective agreement to the point of rendering it ineffective. Further, such an approach would be inconsistent with one of the other main objectives of the LRA, namely to ensure orderly and effective collective bargaining. The said objectives of the LRA and the collective agreement can only be maintained if the collective agreement, i.e the main agreement, itself, is interpreted.

[28] In any event, the respondent did not rely specifically on the individual contracts of employment of Pos, Mazibuko and Moepye in the application it brought, but there was specific reliance on the clauses in the main agreement and it was averred by the respondent that the deductions and non-payment of salaries were in breach of the main agreement (and sections 33 and 34, respectively, of the BCEA). Moreover, it is apparent from its judgment that in this case the court *a quo* never considered that it was interpreting individual contracts of employment, but was interpreting the clauses in the main agreement. In any event, it could not interpret the relevant clause(s) in the employment contracts, and give meaning to it without, simultaneously, giving

the same meaning, or interpretation, to the relevant clause(s) in the main agreement.

[29] The real dispute between the parties was indeed about the interpretation and application of the main agreement, in particular clause 2.5.6 thereof. In terms of section 24 of the LRA it was not within the power of the court *a quo* to hear and determine such a dispute between the parties. That power resided in the body contemplated in the main agreement, if there was indeed a procedure provided as contemplated in section 24(1) of the LRA, or in the CCMA.[6]

[30] Section 77(3) of the BCEA provides that "the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract". But the section does not purport to give to the Labour Court jurisdiction, or power that it does not have in terms of the LRA. On the contrary, in terms of section 77A of the BCEA, the Labour Court is not given such powers in relation to the interpretation and application of collective agreements. Section 77A(e) gives the Labour Court the power to make "a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77(3), which determination may include an order for specific performance, an award of damages or an award of compensation". The deductions and non-payment of salaries can only be a contravention of the BCEA if they are in breach of the main agreement. The Labour Court is not empowered, under either the LRA, or the BCEA, to interpret and apply the main agreement, particularly in circumstances where the interpretation is pivotal and fundamental, and not merely incidental, to the resolution of the dispute between the parties, including the determination of the claims of the employees.[7] In terms of the basic tenets of our law on the interpretation of statutes, the BCEA cannot be interpreted in a manner which conflicts with the LRA. They must be interpreted as being in harmony with each other.

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[6] See *South African Motor Industry and Employers' Association and Another v NUMSA and Others* [1997] 9 BLLR 1157 (LAC).

[7] See, *inter alia*, *Metro Bus (Pty) Ltd v SAMWU* [2009] 9 BLLR 905 (LC).

[31] Having determined the true nature of the dispute between the parties, the court *a quo* should not have gone on to adjudicate the merits of the dispute, but ought to have allowed the matter to be referred to the body or the CCMA with jurisdiction as contemplated in section 24 of the LRA. By adjudicating the merits of the dispute, which, squarely, involved the interpretation and application of the relevant clauses in the main agreement, the court *a quo* erred and the appeal should therefore succeed.

[32] Since the question of jurisdiction is decisive of the appeal, this Court need not and should not consider the correctness of the court ***a quo's*** decision on the merits of the dispute. It is for the statutory body with jurisdiction to decide on the meaning to be given to those clauses in the main agreement. The jurisdiction of that body will extend to and include all ancillary matters arising from the interpretation dispute.[8]

[33] In my view, no order for costs should be made; not in respect of the application that served before the Labour Court, nor in respect of this appeal. Once it became clear that the Labour Court did not have jurisdiction to resolve the interpretation dispute, the court *a quo* should not have entertained the matter any further.[9]

[34] In the result, the following order is made:

1. The appeal is upheld on the basis that the Labour Court had no jurisdiction to resolve the dispute between the parties which requires the interpretation and application of the collective agreement.

2. The order of the court *a quo* is set aside and is replaced with the following order:

> "The application is dismissed with no order as to costs."

3. No order is made in respect of the costs of the appeal.

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[8] *United Association of South Africa v BHP Billiton Energy Coal SA Ltd* [2013] 6 BLLR 602 (LC).
[9] Compare*: South African Motor Industry Employers' Association and another v NUMSA and Others* [1997] 9 BLLR 1157 (LAC) at 1161G.

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P Coppin

Acting Judge of the Labour Appeal Court

Tlaletsi DJP concurs in the judgment of Coppin AJA.

Waglay JP

[35] I had the pleasure of reading the judgment prepared by my brother Coppin JA. I agree that the appeal should be upheld, but for different reasons. In my view, the Labour Court had the necessary jurisdiction to entertain the claim for the payment of remuneration before it, but ought properly to have dismissed that claim, with costs.

[36] The facts, circumstances and background to this dispute are not in dispute. They are set out in the accompanying judgment and it is not necessary for me to restate them.

[37] The respondent in this appeal (the applicants in the Labour Court) are the trade union (SAMWU), acting on behalf of three of its full-time shop stewards. The respondents sought for the Labour Court, exercising its concurrent jurisdiction with the civil courts in terms of section 77 (3) of the Basic Conditions of Employment Act,[10] to compel the appellant to pay the three full-time shop stewards their salaries for the period that SAMWU members, employees of the appellant, were on strike at the appellant's premises. The respondent averred that the salaries of the three full-time shop stewards were wrongfully withheld, deducted or not paid, as the three shop-stewards had during the course of the strike continued to discharge their duties and responsibilities in terms of the collective agreement which provided for their

[10] 75 of 1997.

appointment. The respondent's claim was met with the appellant's reply that by withholding, deducting or not paying the three shop stewards it did not act unlawfully; that it was and is entitled not to remunerate them because the members of SAMWU were out on strike and, by extension, so were they.

[38] I deal first with the issue of jurisdiction. It should be recalled that the respondent's claim in the court *a quo* was brought in contract, or, to use the language of s 77 (3) of the BCEA, it was a matter that concerned a contract of employment. In essence, the respondent claimed that the appellant's refusal to pay the shop stewards constituted a breach of their contracts of employment. The court *a quo* dealt with the matter (correctly) on this basis. Section 77 (3) requires the court to hear and determine the matter before it. It is not for a court in these circumstances to discern what it considers to be the true nature of the dispute between the parties and to elect, on that basis, whether it has jurisdiction. Provided that the nature of the dispute as it appears from the pleadings is one that falls within the scope of the court's jurisdiction, the court must adjudicate the claim on that basis and the case must stand or fall on that basis. The respondent came to court having elected to frame the shop stewards claim in contract – the parties were entitled (and the court was obliged) to determine the dispute on that basis. While I appreciate that the suite of statutes that make up our principal labour laws must as far as possible be read harmoniously, it is not open to a court to substitute one cause of action for another simply because it believes that a particular formulation is more appropriate. In the present instance, by seeking to enforce the terms of the respective contracts of employment, the respondent disavowed any claim based on their interpretation of the collective agreement to which the appellant (through SALGA) and the respondent were party. SAMWU chose instead to enforce the contracts of employment of the full-time shop stewards under a statutory provision that required the court to determine the matter without regard to the limits placed on the court's jurisdiction under the LRA (in this instance, the compulsory arbitration of certain kinds of disputes) and to adjudicate the claim as a civil court would. This is what the court *a quo* did, and its judgment cannot be faulted in that regard.

[39] However, as I indicated above and for the following reasons, I disagree with the court *a quo*'s assessment of the merits and the conclusion to which it came. The collective agreement concluded between SALGA, which represents local government employers in South Africa on the one hand, and the two trade unions, IMATU and SAMWU, which represent the majority of local government employees on the other, provides, as is recorded earlier, for certain elected shop stewards to be appointed on a full-time basis and to be excused from performing their day to day duties for the employer without being prejudiced in any way with respect to their salaries, increments, promotional prospects, etc. In essence, the full-time shop stewards perform work for their trade union in the employers' time. They perform a very important function and contribute to labour peace in that the employer has ready access to a trade union representative without interrupting the normal flow of work in the workplace, and the trade union has a representative available on the shop floor to deal with any issues that may arise or need immediately to be addressed.

[40] In terms of the collective agreement, the full-time shop-stewards retain their substantive positions and receive the benefits attached to those positions. In other words, there is no post in the employer's establishment for full-time shop stewards – a person appointed in that capacity remains employed in his or her substantive position on the terms and conditions applicable to that position. The appointment of full-time shop stewards is based on the fiction that they in fact perform the tasks they are employed to perform. The reality is that they do not perform those tasks; they carry out duties for and on behalf of their trade union.

[41] The respondent claims that the three full-time shop stewards did not participate in the strike because they continued during the strike to carry out their duties as full time shop-stewards. Therefore, they contend, the appellant was not entitled to apply the 'no work, no pay' principle to them, and they are entitled to their full remuneration for the period of the strike.

[42] In my view, this contention is misconceived. The appellant, as I have mentioned, does not pay a full-time shop steward to work for a trade union.

What it does is to pay those of its employees who are full-time shop stewards their normal salaries for rendering of services in terms of their substantive positions. However, it excuses the full-time shop stewards from performing the required services. This carries with it an important corollary, i.e. the full-time shop steward is entitled to be remunerated for as long as the duties that he or she is excused from performing are capable of being performed.

[43] Once the full time shop-stewards gave notice to the appellant (as they did) that all SAMWU members would be embarking on a strike from a particular date and time unless certain of their demands were met and once the strike commenced with all SAMWU members participating therein, it cannot be said that the three full time shop stewards, even fictionally so, could carry out their duties as employees. Once members of SAMWU represented by the full-time shop stewards went out on strike, and for so long as the strike continued, the appellant was entitled to apply the 'no work no pay', principle to the full-time shop stewards. This is so because their duties were no longer capable of being performed by reason of the strike. Furthermore, by issuing the strike notice, the full time shop-stewards were acting on behalf of themselves and on behalf of SAMWU members. They thus, in my view, signalled an intention not to carry out their fictional duties. It would be manifestly unfair and irrational to treat them differently than the other striking employees.

[44] In any event, the duties carried out by the full time shop-stewards at the time of the strike were functions which would generally be carried out by ordinary (i.e. non-full-time shop stewards) in a strike situation. The non-full-time shop-stewards could not expect to be paid if, while on strike, they assisted fellow colleagues in a disciplinary hearing or negotiated with their employer in respect of the demands relating to the strike or report back to fellow members of the union on offers made or rejected by the employer. In other words, the exercise of their functions as full-time shop stewards was conditional on a normal working environment.

[45] For these reasons, in my view, the appellant was correct in applying the 'no work, no pay' principle to the shop-stewards and the judgment of the Labour Court stands to be corrected in this regard.

[46] With regard to costs, the Labour Court exercised its jurisdiction concurrently with the civil courts and in effect, sat as a civil court. The court therefore did not have the discretion conferred by the LRA to decide whether it was equitable to grant costs. That discretion is confined to matters that arise under the LRA. Costs in a purely contractual dispute such as the present, unless there are exceptional circumstances, ought ordinarily to follow the result. In any event, even if there was a discretion to allow or disallow costs based on considerations of equity, I would award costs against the respondent. However, while it may be understandable that full-time shop stewards might seek to obtain payment of salary on the basis that they continued to carry out their duties in terms of the collective agreement while all other members of the trade union which they represent were out on strike, for SAMWU to support such a claim, as I said earlier, offends one's sense of propriety. For this reason, I believe that SAMWU alone should be burdened with the paying of all of the appellant's party and party costs in this matter both on appeal and in the Labour Court. I do not however, consider the costs of two counsel to be justified.

[47] In the result, I would make the following order:

(i) The appeal succeeds with costs, such costs to be paid by the first respondent alone;

(ii) The order of the Labour Court is set aside and substituted with the following order:

"The application is dismissed and the first applicant is ordered to pay the costs of the application".

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Waglay JP

APPEARANCES:

FOR THE APPELLANT:	N A Cassim SC with Z Nxumalo (heads of argument having been drawn by N A Cassim SC, F A Boda, and Z Nxumalo) Instructed by Maria Phefadu Attorneys
FOR THE RESPONDENT:	H Van Der Riet SC Instructed by A C Schmidt INC