REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D 448/2014

In the matter between:

NEWCASTLE LOCAL MUNICIPALITY **Applicant**

and

SAMWU **First Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL **Second Respondent**

IAN BULOSE N.O. **Third Respondent**

Heard: **1 August 2014**

Delivered: **12 August 2014**

Summary: Strike – whether protected or unprotected – requirements relating to the issue in dispute – what must be considered to determine issue in dispute

Strike – issue in dispute – whether issue concerns a matter relating to wages and salaries

Strike – Section 65(3)(a) – whether collective agreement regulating issue in dispute – wages and salaries to be negotiated at central level

Issue in dispute – issue forming subject matter of strike in essence one of wages – regulated by collective agreement

Interdict – clear right shown – rule nisi declaring strike unprotected confirmed

Certificate of failure to settle – consequences of – certificate not determination of issues – application to review certificate dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] In this matter, Gush J had granted a *rule nisi* on 21 May 2014 in terms of which, *inter alia*, the members of the first respondent were interdicted and restrained from embarking upon proposed strike action at the applicant. This matter then came before me as a return date on this *rule nisi* on 30 July 2014, and stood down to 1 August 2014 for argument. On 1 August 2014, I extended the *rule nisi* to 12 August 2014 when this judgment was to be handed down. This judgment is now handed down pursuant to the order I have made on 1 August 2014.

Background facts

[2] Fortunately, much of the factual matrix in this matter was common case. The applicant is a municipality established in terms of the Municipal Systems Act.[1] The first respondent is one of the representative trade unions in the applicant, counting much of the applicant's employees as its members.

[3] Being in the public service, the applicant and its employees, as well as the first respondent trade union, resorts and conduct their affairs under the scope and jurisdiction of the South African Local Government Bargaining Council. I will refer in this judgment to this bargaining council as 'the Council'.

[4] It was common cause that by virtue of a collective agreement concluded in the Council between the South African Local Government Association ('SALGA') and the first respondent and the other representative trade union in the public sector, being the Independent Municipal and Allied trade Union ('IMATU'), the collective bargaining process in respect of certain issues in the sector have been regulated. The applicant is a member of SALGA and the individual employees to which this application relates are all members of the first respondent.

[5] In terms of Part C, Section 1 of the collective agreement, it is recorded in clause 1.1 that:

> 'Collective bargaining may be conducted at either the national or divisional level and the appropriate forum shall be determined by having regard to the matter that is the subject of collective bargaining.'

It is then recorded in clause 1.2 that the issue of 'wages and salaries' shall be the subject of collective bargaining at national level only.

[1] Act 32 of 2000.

[6] The applicant has set out in its founding affidavit several background facts that are simply of no relevance to the determination of the application *in casu*. I shall accordingly, and for this reason, not refer to any of these background facts in this judgment. I shall only set out those facts that are relevant to or have a direct bearing on the case at hand.

[7] What appears from the evidence is that there are, from time to time, meetings between the applicant and organised labour, concerning a variety of issues in the workplace, as and when they arise. These meetings appear to be attended by a number of trade union and employer representatives and are formally minuted. The first inkling of the dispute ultimately giving rise to the current proceedings now before me can be found in the minutes of a meeting that took place on 14 March 2014.

[8] The minute of the 14 March 2014 meeting reflects that the first respondent had raised one particular issue for discussion. This issue was described, broadly speaking, as 'Driver's issues'. In particular, this issue had three legs, the first being a contention that there were discrepancies in post levels 9 and 10 affecting the drivers, meaning that in order to get better pay, one had to be a driver. Secondly, the difference in salary between drivers and general workers was R2 900.00. Thirdly, the drivers earn more than traffic officers. Mr Radebe, one of the spokespersons for the first respondent in the meeting, recorded that there was a need to close the gap between high earning employees and low earning employees and there needed to be an increment to salaries of the lower paid employees. This issue of 'closing the wage gap' seemed to the general theme of the contention raised by the first respondent throughout this meeting, and the meetings to follow.

[9] In this meeting of 14 March 2014, Mr Nkosi, reflected in the minutes as the executive manager: legal services of the applicant, stated that the issue of the increment sought by the first respondent was a central bargaining issue, because salaries are negotiated at national level. Mr Nkosi stated that the applicant was

willing to enter into discussions with the first respondent about these issues but this was without prejudice to the actual agreed negotiating structure. Mr Nkosi recorded that the applicant could not negotiate salary increments outside the bargaining council.

[10] The true nature of the issue in dispute raised by the first respondent then revealed itself in an example provided by Mr Sefiso Khumalo (another representative of the first respondent present in the meeting of 14 March 2014). He stated that drivers were on post level 9 and they were then moved to post level 6. This means their salary moved from R106 104 to R176 738. The demand was that other employees must receive a similar increment. The applicant stated that such an increment was not permitted by the current budget. The meeting ended with no real resolution being arrived at but the applicant undertook to investigate the matter further and compile a report.

[11] A further meeting then took place on 24 March 2014. This meeting was attended by representatives of the applicant and the first respondent but was also attended by Mr Graveling, who was the IR/LR manager from SALGA. Mr Graveling explained that all issues on salaries and wages could be a subject for discussion at national level only. Mr Graveling specifically referred to the collective agreement in this regard. He explained that the current issue raised was indeed such an issue.

[12] Despite what had been explained by Mr Graveling, the parties to the meeting of 24 March 2014 then proceeded to still canvass the issue raised by the first respondent. Again, Mr Sefiso Khumalo of the first respondent stated that there were adjustments to post levels of employees, and in particular drivers, resulting in the difference in salary between a driver and general worker being R10 000.00. According to Mr Khumalo, this same increment should apply across the board to all employees.

[13] The parties then proceeded to discuss how the post level adjustment of the drivers actually had come about. Mr Khumalo stated that a case for seven drivers had been

referred to arbitration at the bargaining council and the drivers received an arbitration award in their favour adjusting their post levels. Mr Khumalo, however, complained that this arbitration award was then simply 'extended' by the applicant to 15 drivers without similar bargaining council proceedings for these drivers. Mr Mswane, the COO of the applicant, then explained that the outcome of the arbitration proceedings referred to, resulted in a disparity between the salaries of drivers and based on the principle of equal pay for equal work, the dispute was then resolved by settlement agreement by applying the post adjustment to all drivers. It therefore appears that the post level adjustment to drivers was done as a result of a rights dispute that had been determined by arbitration and not due to some or other arbitrary increase simply given by the applicant. I may also mention that Mr Graveling from SALGA stated that this post adjustment was in any event wrong and should have happened and this should be appreciated going forward.

[14] Despite the above discussions, the spokespersons for the first respondent in the meeting maintained the stance that the key issue was the reduction of the salary gap between post levels. It was contended that the gap between salary levels of post 13 to post 9 should be reduced by increasing pay to all employees.

[15] Mr Graveling then explained that the issue was really one of job evaluation and that there was actually a job grading process going forward. In terms of this process, all municipalities would submit their job evaluations to the Job Evaluation Committee ('JEC'). The JEC would then submit a benchmark report to the National Moderation Committee ('NMC'). The NMC would then moderate all the job levels. This job evaluation was still with the bargaining council and could only be released once all parties at national level agreed to it. The first respondent's representatives acknowledged this job evaluation process but demanded that pending this process all the employees must receive an increment for the simple reason that 'it was done to some employees'. The applicant's answer was that meeting such a demand was not sustainable. Again, this meeting adjourned without parties arriving at a

resolution.

[16] The next meeting was on 14 April 2014. In this meeting, Mr Sefiso Khumalo from the first respondent tabled a proposal. This proposal was that all employees in post levels 10 to 20 be paid an increment of R5 200.00 and that all employees in post levels 9 to 5 be paid an increment of R2 600.00. The applicant's answer to this was once again, principally, that this was nothing more than a salary negotiation and that this cannot be done at the current bargaining level. The applicant also stated that the formal job evaluation process should be followed. Mr Khumalo answered that the increments was the problem caused by the employer (the applicant) who moved certain employees and not others. As recorded in the minute itself, the parties then 'agreed to disagree'.

[17] On 22 April 2014, the first respondent then referred a dispute to the bargaining council. In this referral, the first respondent ticked the block marked 'mutual interest', under the section relating to the nature of the dispute in the referral and recorded that the dispute arose on 14 April 2014. The brief description in the referral of the dispute was 'inconsistancy the employer give others a salary adjustment but refuse to give others.' (sic) As an outcome, the first respondent prayed for a 'legal strike' against the applicant. On 9 May 2014, and following unsuccessful conciliation, the third respondent then issued a certificate of failure to settle, recording therein that the issue in dispute concerned a matter of mutual interest, the dispute remained unresolved and that strike action by the first respondent and its members was competent.

[18] In correspondence on 16 May 2014 by the applicant's attorneys to the first respondent, it was recorded by the applicant that the dispute concerned a salary dispute which could only be considered at national level. The applicant stated that as a result, the proposed strike would be unprotected. The applicant complained that the certificate of failure to settle had been improperly issued and that it intended to apply to review and set aside this certificate. The applicant sought an

undertaking from the first respondent not to embark upon strike action pending this proposed review of the certificate. When this undertaking was not forthcoming from the first respondent, this application then ensued and the *rule nisi* referred to above was obtained.

The issue for determination

[19] The applicant seeks a final interdict in the form of the confirmation of the interim order referred to above. This means that the relief now sought is final relief and therefore the applicant must satisfy three essential requirements which must all be shown to exist in order to get such relief, being: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[2]

[20] The central question in the current matter is whether the proposed strike by the first respondent and its members would be protected or unprotected. If the strike is found to be unprotected, then it would follow that the applicant would have no alternative remedy other than the granting of an interdict. In addition, to allow an unprotected strike to occur would certainly cause the applicant harm. The consequence therefore is that once the strike is found to be unprotected *in casu*, the requirements for the granting of a final order will be satisfied. However, and if the proposed strike is found to be protected, then the applicant will fail to show the existence of a clear right and the interim order would have to be discharged.

[21] As I have said above, most of the facts in this matter are fortunately common cause. Insofar as there are disputed facts, I have applied the normal principles to resolve such factual disputes in motion proceedings where final relief is sought as enunciated in the judgment of *Plascon--Evans Paints Ltd v Van Riebeeck Paints*

[2] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V and A Waterfront Properties (Pty) Ltd and Another v Helicopter and Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) at para 20; *Royalserve Cleaning (Pty) Ltd v Democratic Union of Security Workers and Others* (2012) 33 ILJ 448 (LC) at para 2.

(Pty) Ltd[3] and have accepted the facts as contained in the first respondent's answering affidavit. The factual background as set out above has been arrived at on this basis.

[22] A proposed strike can be held to be unprotected for a number of different reasons, as set out in section 65 of the LRA.[4] Ms Allen, who represented the first respondent, submitted that the applicant bore the onus to make out a case as to which grounds it relied upon to declare the proposed strike to be unprotected in its founding affidavit. Ms Allen is undoubtedly correct in making this submission. I had the opportunity to recently deal with this in the same context of deciding to make an interim order a final order in *Jonsson Workwear (Pty) Ltd v Williamson and Another*[5] and said:

> 'In *Betlane v Shelly Court CC* the court said: "It is trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit. A case cannot be made out in the replying affidavit for the first time." This approach applies equally in the Labour Court, and I refer to *De Beer v Minister of Safety and Security and Another* where it was held that: 'It is trite law that an applicant must stand or fall by his or her founding affidavit.'

[23] The above then being the situation, the applicant squarely based its case on one ground only. The applicant contended that the issue in dispute relates to an increase or increment for the members of the first respondent and that this is a salary dispute. According to the applicant, and because it was a salary dispute, collective bargaining could only take place at national level in the bargaining

[3] 1984 (3) SA 623 (A) at 634E-635C; See also *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paras 26 – 27; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 *ILJ* 2031 (LAC) at para 38; *Geyser v MEC for Transport, Kwazulu-Natal* (2001) 22 *ILJ* 440 (LC) at para 32; *Denel Informatics Staff Association and Another v Denel Informatics (Pty) Ltd* (1999) 20 *ILJ* 137 (LC) at para 26.

[4] These reasons are that a collective agreement prohibits strike action, there is an agreement that dispute be referred to arbitration, the dispute is susceptible to being resolved through adjudication or arbitration, the employees are engaged in a maintenance or essential service, or the parties are bound by a collective agreement, arbitration award or wage determination that regulates the issue in dispute – See Section 65(1) and (3).

[5] (2014) 35 *ILJ* 712 (LC) at para 20.

council. As a result, and according to the applicant, the first respondent and its members were not permitted to bargain with the applicant at workplace level on this, which is what it was doing and any strike action pursuant to this would be unprotected. All of this means that the applicable statutory provision relied on by the applicant would be section 65(3)(a) of the LRA. I therefore agree with the submission by Ms Allen that I simply need not concern myself with any other issues such as whether the issue in dispute concerned an unfair labour practice or any other form of rights dispute. As I said in *United Transport and Allied Trade Union/SA Railways and Harbours Union and Others v Autopax Passenger Services (SOC) Ltd and Another*[6]:

> '…. there are two reasons why the applicants' case in respect of the application of s 65(3)*(a)* of the LRA as put forward by Mr *Redding* cannot be sustained. The first and most immediate reason is that no such case was made out in the founding affidavit. It has never been contended as part of the applicants' case that the lock-out was unlawful because there existed a collective agreement that regulated the issues in dispute. The applicants' case was quite specific, being that the lock-out was unlawful simply because applicants were not party to the dispute between SATAWU and the first respondent forming the subject-matter of the lock-out, that there existed no dispute between the applicants and the first respondent and that the individual applicants, at all times tendered their services and never joined any strike...'

[24] Therefore, the only issue I will consider in these proceedings, in deciding whether the proposed strike by the first respondent and its members would be protected or unprotected, is whether the provisions of 65(3)(a) of the LRA find application. There is, however, also the peripheral issue of the applicant's prayer that the certificate of failure to settle issued by the third respondent should be reviewed and set aside, which I shall deal with first.

The certificate of failure to settle

[25] As stated, the applicant contended in its notice of motion and founding affidavit that

[6] (2014) 35 ILJ 1425 (LC) at para 30.

the certificate of failure to settle issued by the third respondent should be reviewed and set aside, on the basis that the third respondent had no jurisdiction to entertain the matter and had thus irregularly issued the certificate. This issue can immediately be disposed on the simple basis that for the purposes of this application and deciding whether the proposed strike is protected or unprotected, the certificate of failure to settle actually has no significance. The Court in *Swissport (SA) (Pty) Ltd v SA Transport and Allied Workers Union and Others*[7] said:

> 'The requirements for protected strike action under the Labour Relations Act are well-known…. The trade union must refer the issue in dispute to the CCMA or relevant bargaining council; the CCMA must issue a certificate that the matter could not be resolved at conciliation, or a period of 30 days (or a longer period agreed between the parties) must elapse….' (emphasis added)

This simply means that the right to strike accrues (provided of course that notice of strike action is also given as contemplated by Section 64(1)) upon the expiry of a period of 30 days from when the dispute was referred to the CCMA or bargaining council and such dispute still remains unresolved. It simply does not matter whether a certificate of failure to settle has been issued or not.

[26] In any event, regard must be had to what exactly the nature of a certificate of failure to settle is. It is certainly not a jurisdictional ruling or any determination of the jurisdiction of the CCMA. In *Strautmann v Silver Meadows Trading 99 (Pty) Ltd t/a Mugg & Bean Suncoast,*[8] the Court held as follows:

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

[7] (2011) 32 *ILJ* 1256 (LC) at para 13.
[8] (2009) 30 *ILJ* 2968 (LC) at para 9.

[27] The point is that the certificate of failure to settle does not form the basis of, nor does it determine in any way, whether a strike would be protected or unprotected. All it does is to record that a dispute was referred to the CCMA or bargaining council, as the case may be, and this dispute remains unresolved. There is simply no need to challenge the validity of this certificate by way of review as a prerequisite to being able to challenge the protected nature of a strike. In point is the judgment in *Bombardier Transportation (Pty) Ltd v Mtiya NO and Others*[9] where the Court said:

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

[28] Similarly and in *Air Chefs (Pty) Ltd v SA Transport and Allied Workers Union and Others,*[10] the Court said:

> 'It is now trite law that the significance of a certificate of outcome being issued is that it essentially marks the end of the conciliation phase of a dispute and the description of the dispute on the certificate is nothing more than indicative of what the dispute might concern. It is not a finding by the author of the certificate. Consequently, it cannot be said that the employer ought to have set aside the certificate before it could raise its argument that the dispute concerns a dispute of rights rather than one of interest.'

[9] (2010) 31 *ILJ* 2065 (LC) at para 14.
[10] (2013) 34 *ILJ* 119 (LC) at para 15; See also *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 *ILJ* 371 (LC) at para 12.

[29] Specifically in the context of a review of a certificate of failure to settle relating to an interest dispute (which would ultimately proceed to strike action), the Court *SA Post Office Ltd v Moloi NO and Others*[11] held:

> 'The status of the certificate of outcome has received attention in a number of cases in the Labour Court and Labour Appeal Court. Although the status of the certificate of outcome was dealt with in the context of unfair dismissal cases, in my view the same principle applies in cases involving disputes of mutual interest. In this respect, I align myself with Van Niekerk J, in *Bombardier Transportation*….'

[30] And in *Gillet Exhaust Technology (Pty) Ltd t/a Tennaco v National Union of Metalworkers of SA on behalf of Members and Another*,[12] it was said:

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

Respectfully, it cannot be clearer than that, which confirms what I have said above.

[31] Therefore, and in my view, for the reasons recorded above, there is simply need to consider or determine any issue concerning the applicant's application to review and set aside the certificate of failure to settle issued by the third respondent. Such an application would in any event not be competent, as the certificate is not any determination of jurisdiction which would be susceptible to review. The application

[11] (2012) 33 *ILJ* 715 (LC) at para 37.
[12] (2010) 31 *ILJ* 2552 (LAC) at para 17.

by the applicant to review and set aside the certificate of failure to settle is ill conceived, unnecessary and falls to be dismissed. That, however, does not mean that the applicant cannot challenge the protected nature of the proposed strike. This the applicant can still do without any reference to the certificate of failure to settle, based on the ground as I have set out above and which ground I shall now proceed to consider.

The nature of the issue in dispute

[32] The first issue to consider in determining whether the proposed strike by the first respondent and its members would be protected or unprotected is whether the issue in dispute is a matter concerning wages and salaries of the employees. The Court in *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members and Others*[13] said: '…. It is our duty to look at the true nature of the dispute and not the manner in which it has been packaged by the employees….' Similarly and in *Coin Security Group (Pty) Ltd v Adams and Others,*[14] the Court held:

> 'It is the court's duty to ascertain the true or real issue in dispute; (*Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building Workers Union and others (2)* (1997) 18 *ILJ* 671 (LAC); *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union and Others (1)* (1998) 19 *ILJ* 260 (LAC)). In conducting that enquiry a court looks at the substance of the dispute and not the form in which it is presented (*Fidelity* at 269G-H; *Ceramic* at 678C). The characterization of a dispute by a party is not necessarily conclusive (*Ceramic* at 677H-I; 678A-C). There is in my view no difference in the approach of these decisions. In each case the court was concerned to establish the substance of the dispute.'

[33] In deciding what must be considered when establishing the true or real issue in dispute, the Court in *City of Johannesburg Metropolitan Municipality v SA Municipal*

[13] (2014) 35 *ILJ* 983 (LAC) at para 47; see also *Unitrans Supply Chain Solutions (Pty) Ltd v SA Transport and Allied Workers Union and Others* (2014) 35 ILJ 265 (LC) at para 9.
[14] (2000) 21 *ILJ* 924 (LAC) at para 16.

Workers Union and Others[15] held:

> 'The issue in dispute in relation to a strike (in these proceedings, the demands made by the union) is to be ascertained from the relevant facts. These include the referral form, any relevant correspondence, the negotiations between the parties and the affidavits filed in this court'.

Similarly and in *SATAWU v Coin Reaction*[16], the Court held that the real or true dispute should be determined with reference to all the relevant facts 'including the referral form to conciliation, the correspondence immediately before and after conciliation, the negotiations and discussions which took place at the conciliation and the content of the advisory award and affidavits filed with this court'. In my view, this exercise would, *in casu*, and because there is yet no strike notice, entail a proper consideration of the meeting minutes referred to above, the founding and answering affidavit and the dispute referral by the first respondent to the Council.

[34] Applying the above principles, the picture that then emerges is that the real or true issue in dispute is clearly a matter concerning wages and salaries of the employees. I say this for the following reasons:

34.1 The dispute arose when the grades of some drivers were changed. They were moved from one grade to another. The latter grade had a higher salary scale, resulting in an increase in the drivers' salaries. Importantly, this grade change was brought about as a result of arbitration proceedings in the bargaining council in respect of seven individual drivers, which was then applied to all drivers by way of settlement agreement to ensure equal pay for equal work. Another important factor was that it appeared the grade change of the drivers was in fact, and in the end, erroneously done and this is something which the applicant must now live with;

[15] (2009) 30 *ILJ* 2064 (LC) 2069G-H.
[16] (2005) 26 *ILJ* 1507 (LC) at 1512D.

34.2 The simple point is that the applicant did not arbitrarily and unilaterally afford some employee an increase in salary, and not others, as suggested by the first respondent. The increase in salary was brought about by a grade change following litigation, which was any event done in error;

34.3 The SALGA representative explained in the final meeting as to how job evaluations are in fact done and confirmed that even this issue related to salaries and wages and was done at a central (national) level. The first respondent's representatives in this meeting did not dispute this but still demanded an increase;

34.4 It was clear that at all times, the nub of the complaint by the first respondent's representatives in the meetings was the salary gap between lower and higher paid employees, which they demanded should be narrowed. In order to achieve this, and at the heart of the demand, was that a salary increases be given to all employees between grades 20 and 5;

34.5 there was never any demand or issue raised about employees being moved to a different post level or grade. What was demanded was the narrowing of the salary gap between post levels/grades by way of an increase to all employees in their current grades across the board;

34.6 In fact, and despite acknowledging that the issue was a job evaluation issue which was actually being dealt with at central level in the bargaining council, the first respondent's representatives remained adamant that all employees must receive an increase because the drivers received an increase. This same sentiment is reflected in the Council referral document;

34.7 In the final meeting of 14 April 2014, where the parties agreed to disagree, the first respondent even went so far as to attach an actual quantum to increases proposed. These proposed increases were not even based on any

move of post level or job grade. It was an arbitrary amount arrived at by the first respondent. This was actually an increase demand 'across the board', so to speak, to narrow salary gaps between higher paid and lower paid employees.

[35] The first respondent, in its answering affidavit, in effect tried to camouflage what was really a salary and increase dispute, as being something else. The first respondent says that the dispute is not about salaries but about the adjustment of post levels. The first respondent contends that the applicant unilaterally adjusted the post levels of some employees and what it and its members are seeking is that all the employees' post levels be adjusted accordingly. But, as stated, this contention of the first respondent is entirely at odds with what is the true issue in dispute. In particular, it must be emphasised that nowhere in any of the meetings was it even demanded the post level of employees be changed. It was never asked that the post levels of employees be upgraded. What was, in a nutshell, demanded by the first respondent was an increase for all employees across the board to narrow the gap between salaries in the different post levels, whilst employees still remain in their existing post levels. If this is not a salary or wage matter or dispute, it is difficult to comprehend what would be.

[36] In any event, it is clear from the minutes of the last two meetings that the post level adjustment of the drivers irregularly came about. It happened following adjudication which went against the applicant. As the SALGA representative said, it is something that never should have happened but did, and the applicant must live with this insofar as the drivers are concerned. This, however, cannot mean that it establishes some or other form of precedent or basis of workplace level bargaining going forward. I am in any event satisfied that a proper conspectus of the meeting minutes show that the issue of job evaluation and with it possible changes of grades of employees as a result of such evaluation, was always a salary and wage issue dealt with at a central (national) level in the bargaining council in terms of an

agreed process. In my view, it is entirely inappropriate for the first respondent and its members to in essence seize on what was erroneous conduct of the applicant following a situation that it was confronted as a result of legal action by some drivers, as a basis to secure a salary increase for all employees.

[37] In any event, and as stated above, the core issue raised by the first respondent's representatives in the meetings always was and remained the salary gap between posts, which they wanted narrowed by way of a general increase. This is clearly, in my view, a 'salaries and wages matter', no matter how one may choose to disguise or describe it.

[38] Having found that the issue in dispute actually concerns the salaries of the first respondent's members and a demand for an increase of such salaries, the collective agreement must then be considered. The collective agreement is clear. It specifically prescribes that all issues of salaries and wages can only be the subject matter of collective bargaining at national level. What the first respondent and its members are doing in this matter now before me is workplace level collective bargaining. This is not permitted by the collective agreement, which specifically prescribes national level bargaining.

[39] One of the primary purposes of the LRA is to provide a proper framework within which orderly collective bargaining can take place, with preference being given to collective bargaining at a sectoral level.[17] In this context, the provisions of section 65(3)(a) of the LRA must be considered, which provide:

> '(3) Subject to a collective agreement, no person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or lock-out -

[17] See Section 1 of the LRA, the relevant of which reads: 'The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are-…. (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can- (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest… (d) to promote- (i) orderly collective bargaining; (ii) collective bargaining at sectoral level….' (emphasis added).

> (a) if that person is bound by - (i) any arbitration award or collective agreement that regulates the issue in dispute…. '

If section 65(3)(a) finds application, this would be a justified statutory limitation on the right to strike, and the proposed strike action of the first respondent and its members in this instance would clearly be unlawful and unprotected, being prohibited by statute.

[40] In dealing with the concept of 'regulate the issue in dispute' as recorded in section 65(3)(a), the Court in *Fidelity Guards v PTWU and Others*[18] said:

> 'I am of the opinion that the phrase "regulates the issue in dispute" refers to a substantive regulation of the issue or a process leading to the resolution of the issue. Must this regulation be comprehensive? Or is it sufficient that the issue be regulated generally by providing for instance, that the issue is settled, at least for the present year of bargaining, or is assigned to a specific process or that an issue is assigned to a particular level of bargaining or to a particular forum? I think that the wider sense is meant here.'

[41] The judgment in *Fidelity Guards* was approved of in *Air Chefs*[19] where the Court said:

> 'In summary, the learned judge concluded that an issue is regulated if it is contained in a substantive rule, or if the process for dealing with the issue is set out in the regulating agreement. In this case, the parties did agree on a process regulated by a procedure.'

A further reference is made to the judgment in *ADT Security (Pty) Ltd v SA Transport and Allied Workers Union and Another*[20] where it was held also with specific reference to Section 65(3)(a) that 'the prohibition against a strike action

[18] [1997] 11 BLLR 1425 (LC) at 1433F-H.
[19] *Air Chefs* (supra) at para 27.
[20] (2012) 33 *ILJ* 2061 (LC) at para 18.

where there is a binding collective agreement is not limited to substantive issue/s in dispute but includes the procedure laid out in the collective agreement'.[21]

[42] It is clear from what is set out above that the collective agreement specifically prescribes that any collective bargaining with regard to wages and salaries can only take place at national level. In my view, the clear purpose of these prescriptions in the collective agreement, as referred to above, is to prohibit any collective bargaining in respect of salaries and wages of employees in the public sector from workplace to workplace. This kind of approach is fully in line with what the Court said in *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another*[22]:

> '… the Act seeks to provide a framework whereby both employers and employees and their organizations can participate in collective bargaining and the formulation of industrial policy. Finally, the Act seeks to promote orderly collective bargaining with an emphasis on bargaining at sectoral level, employee participation in decisions in the workplace, and the effective resolution of labour disputes.'

[43] Based on the above principles, the first prize in an organised sector such as the public service in which wages and conditions of employment are determined by collective bargaining on a centralised basis and at sectoral level, has to be that individual workplace collective bargaining on conditions of employment must be excluded. Otherwise, the very objectives of the sectoral level collective bargaining structure voluntarily arrived at and defined by all the influential stakeholders in the sector is undermined and there will be no successful achievement of orderly collective bargaining at sectoral level as one of the fundamental objectives of the LRA. To put it simply, the parties in the sector at a sectoral level should know what the employees want and need, and what the employers can afford to give, and this must be allowed to prevail. This is in effect what the applicant and the SALGA

[21] See also *Transnet Ltd v SA Transport and Allied Workers Union and Others* (2011) 32 *ILJ* 2269 (LC) at para 21 – 24; *Unitrans Fuel and Chemical (Pty) Ltd v Transport and Allied Workers Union of SA and Another* (2010) 31 *ILJ* 2854 (LAC) at para 18.

representative tried to convey to the first respondent's representatives throughout the meetings referred to above but, unfortunately, without it finding any fertile ground.

[44] The Courts have on occasion dealt with the very issue of whether strike action is protected in instances where centralised collective bargaining at sectoral level is in place but nonetheless plant level collective bargaining in an individual employer is pursued by a trade union. The judgment in *Unitrans Fuel and Chemical (Pty) Ltd v Transport and Allied Workers Union of SA and Another*[23] is directly applicable *in casu*, where the Court dealt with a collective agreement prescribing centralised bargaining on wages and conditions of employment, and said:

> 'According to the appellant the first three demands of the first respondent, described as 'wage discrepancies'; 'wage reduction' and 'coupling R500 pw' are all related to and connected with wages and are substantive issues and as such the first respondent is prohibited in terms of clause 50(1) and (3) read with s 65(1)(a) and (3)(a) (i) from calling upon its members to strike in order to secure these demands. I accept that where a demand is made for an increase in remuneration or for remuneration to be paid in relation to a particular aspect of employment such demands relate to wages and are substantive issues. If the demands as we have them here are about wages and substantive issues then, as appellant has properly argued, the first respondent is prohibited from calling on its members to embark on a strike in respect of those issues.'

The judgment in *Unitrans* makes it clear that in the context of prescribed centralised bargaining at sectoral level, a demand at workplace level that would have the result of enhancing remuneration (with the phrase applied in its most general sense) in an individual employer would not be permitted and any strike action at such an individual employer pursuant to such a demand would be prohibited. I respectfully agree with this reasoning.

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[22] (2003) 24 *ILJ* 305 (CC) at para 26
[23] (2010) 31 *ILJ* 2854 (LAC) at para 18.

[45] As referred to above, part of the first respondent's case, crystalised to its simplest form, is that because the applicant unilaterally gave post adjustments and consequently increases, to some employees, the other employees who did not receive these increases or adjustments may now collectively bargain and consequently strike, so that they can also all get these increases and adjustments. In dealing with such very issue in the context of the metal and engineering industry which equally has a collective agreement prescribed collective bargaining on wages and conditions of employment at central level only, the Court in *Cape Gate (Pty) Ltd v National Union of Metalworkers of SA and Others*[24] concluded as follows:

> 'The objective underlying the clause is to ensure that negotiation of such matters takes place only at the level of the bargaining council and in no other forum, such as at plant level. It is also to preclude any strike action over such matters while they continue to be regulated by the main agreement. The clause would make little sense if it had the effect now contended for on behalf of NUMSA, namely that where wage increases are determined in the main agreement, employees and their unions are free to agitate for further increases by way of plant level negotiation and ultimately strike action. This would be subversive of the objective of promoting collective bargaining at the level of bargaining councils and the effectiveness of their agreements. This would not accord with the clear and worthy objectives of the LRA. Accordingly the interpretation which is advanced on behalf of NUMSA cannot be sustained.
>
> … if an employer such as the applicant decides unilaterally to grant an increase over and above the increase laid down in the main agreement to a particular category of employees, it must consult with the union representing that category. But this does not have the effect of entitling any other category, such as the non-artisans in this matter, to engage in collective bargaining at plant level with a view to obtaining a similar increase for themselves, and when that fails, to embark on strike action. This in my view is a clear violation of clause 37 of the main agreement.

[24] (2007) 28 *ILJ* 871 (LC) at paras 38 – 40.

> The issue in dispute relevant to the present strike is what wage increase, if any, non-artisans should receive. That seeks to reopen a matter already regulated by the main agreement, for that determined, for the currency of the agreement, the matter of wage increases, in what was agreed to be the exclusive forum, namely the bargaining council.'

In my view, the demand by the first respondent in the current matter for would squarely resort within the parameters of the ratio in the *Cape Gate* judgment and this ratio finds proper application in this instance. I agree with this ratio, and thus conclude that the proposed strike by the first respondent and its members must be rendered unprotected and thus prohibited.

[46] Insofar as the applicant may have engaged the first respondent in meetings on this issue and undertook to investigate the complaints and consider proposals in this regard from the first respondent, this cannot detract from the applicability of the collective agreement and its consequences. In any event, it was recorded from the outset by the applicant, as set out above, that the applicant entered into these discussions without prejudice to the issue that it considered this to be a national bargaining issue in terms of the collective agreement. In *SA Clothing and Textile Workers Union and Others v Yarntex (Pty) Ltd t/a Bertrand Group,*[25] it was held as follows, which can equally be applied in this instance:

> '…. It would appear from the evidence that even where there may at times have been plant-level meetings, or even in fact interim agreements or informal exemptions, this does not render legitimate plant-level collective bargaining or strike action in respect of a wage demand. The constitution expressly prohibits plant-level and subsection-level bargaining and therefore strikes or lock-outs at these levels. This would mean that even if plant-level negotiations did not lead to consensus, wages in the entire section could not be said to have been agreed. The effect of this would be, in accordance with the constitution, that either SACTWU (at all four plants) or all four employers (as part of the employers' association) would be at liberty to embark upon industrial action. The only proviso would be that the requisite number of meetings

> and other procedural requirements of the constitution had been met. The simple fact of the matter is that, in terms of the constitution, consensus could not be compelled at the individual employers through the parties having recourse to industrial action, whether in the form of a protected strike or a lock-out. In my view this is indeed what the applicants sought to do.'

Again, I fully agree with the above reasoning. If the first respondent and its members seek those kind of enhancements to, or improvement of the salaries of employees, be it in the form of job evaluation, post level changes or the closing of the salary gap between high and low paid employees, this must be done at a national level and in the bargaining council in terms of the collective agreement.

[47] The Labour Appeal Court in *South African Clothing and Textile Workers Union and Others v Yarntex (Pty) Ltd t/a Bertrand Group*[26] upheld the judgment of the Labour Court referred to above. Several extracts from the Labour Appeal Court judgment in *Yarntex* is pertinent to the current matter and, especially, serves to address the approach propagated by the first respondent in its answering affidavit. The first respondent in effect says it is only asking for employees to be moved to higher post levels and not for an increase in salary *per se*, and this issue is not referred to in the collective agreement as a national bargaining issue. The Labour Appeal Court in *Yarntex* firstly held as follows:[27]

> 'The submissions made by Mr Freund regarding the absence of a specific provision in the constitution prohibiting a strike, such as the one embarked upon by the appellants is correct. However, I do not agree with the further submission he made that the non-existence of such a provision specifically prohibiting the strike in question renders the strike immune from being declared unlawful and therefore unprotected. If it were so, chaos would reign in the industry. The resultant effect of which would be the selective crippling of those plants which did not conduct their affairs with SACTWU in the fashion adopted by Derlon in this case, i.e. entering into

[25] (2010) 31 *ILJ* 2986 (LC) at paras 45 – 46
[26] (2013) 34 *ILJ* 2199 (LAC).
[27] Id at para 57.

> negotiations and concluding private agreements with SACTWU on the determination of wage levels to the exclusion of other role players, such as Bertrand.'

In my view, this is precisely the mischief that the approach propagated by the first respondent would cause. The fact is that if this kind of conduct is permitted, chaos will reign in the sector, as the first respondent would be entitled to move from municipality to municipality, depending on its influence, and demand that employees simply be moved to higher post levels and so procure further increases for them whilst they are still doing exactly the same work, against the treat of protected strike action if the respective municipalities do not comply. All of this will take place whilst the first respondent still enjoys the overall protection and guarantees provided by the sector (national) collective agreement. This surely would be entirely incompatible with orderly and prescribed centralised bargaining at a sectoral level, as applicable *in casu.*

[48] The Labour Appeal Court in *Yarntex* went further and said:[28]

> 'The constitution is premised on centralised bargaining between NAWTM and SACTWU, the main purpose of which is to create and maintain uniformity in the determination of wage levels so as to ensure that all employers in a given sub-sector or section level in this industry are treated in an equitable fashion. Employers and employees in these sub-sectors should enjoy the same treatment to ensure that employers compete with their counterparts in a fair manner in order to sustain the industry and to prevent job losses.
>
> Any contrary interpretation of the relevant provisions of the Act and the constitution would result in catastrophic circumstances which would be inimical to the operation of the industry in question. Clearly the overarching purpose of the constitution was to avoid fragmentation of the bargaining process. This interpretation of the constitution is in accord with the intentions of the drafters thereof to outlaw plant level bargaining.

[28] Id at paras 58 – 60.

> My interpretation of the constitution therefore is that the strike in question is not protected by the provisions of constitution. Neither is it protected by the LRA.'

The above clearly illustrates the very point I have sought to make. By determining wages and salaries by collective bargaining at a national level only, the situation of different municipalities paying different salaries for the same work is eliminated. Parity is ensured. The situation of public service employees moving from municipality to municipality simply in pursuit of better wages for the same work is mitigated. In fact, the events *in casu* illustrate the difficulty caused by allowing workplace bargaining, which the SALGA representative sought to explain in the meeting. To illustrate – if the first respondent is allowed to collectively bargain at workplace level in the applicant for a change in post level of employees in general, a general worker in the applicant could for example be at post level 9 whilst all other general workers in all other municipalities are at post level 12. This is precisely what is sought to be avoided by the dispensation agreed to by all the parties in the public sector and completely undermines consistency and parity in the sector.

[49] In the end, and for the reasons set out above, I conclude that the issue in dispute raised by the first respondent on behalf of its members and which would form the subject matter of any intended strike action at the applicant is nothing more than a salary dispute. That being the case, and in terms of the collective agreement, collective bargaining is only permitted at national level in the bargaining council. The first respondent and its members are clearly bound by this collective agreement. Accordingly, there exists a collective agreement *in casu* that regulates the issue in dispute and as result, any intended strike action will be unprotected by virtue of the application of the substantive limitation in section 65(3)(a) of the LRA.

[50] I am therefore satisfied that the applicant has demonstrated the existence of the necessary clear right to the relief sought. The applicant was thus entitled to the interdict it sought and the *rule nisi* declaring the strike to be unprotected was

properly granted. This part of the *rule nisi* now clearly stands to be made a final order, as I will do hereunder.

[51] This then only leaves the issue of costs. The parties still have an ongoing relationship with one another. Neither party in any event really pressed the issue of costs before me. The authorities also indicate that matters such as these are such that parties should not be burdened with costs orders. This Court in any event has a wide discretion where it comes to the issue of costs and, in my view, fairness in all the circumstances of this matter together with the continuing relationship dictates that no order as to costs be made.

Order

[52] Accordingly, I make the following order:

52.1 The *rule nisi* issued on 21 May 2014 is confirmed only to the extent as specified in this order hereunder.

52.2 Any strike action to be embarked upon or contemplated by the first respondent and its members in terms of the dispute referred to the second respondent on 22 April 2014 under case number KPD041413, is declared to constitute unprotected strike action as contemplated by section 68(1) of the Labour Relations Act.

52.3 The first respondent and its members are interdicted and restrained from embarking upon or commencing any strike action or conduct in contemplation of strike action in respect of the strike action declared to be unprotected in terms of this order.

52.4 The applicant's application to review and set aside the certificate of failure to settle issued by the third respondent on 9 May 2014 is dismissed.

52.5 There is no order as to costs.

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Snyman, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate R B G Choudree SC and Adv M Sewpal

Instructed by K M Chetty Attorneys

For the First Respondent: Advocate K Allen

Instructed by: Tomlinson Mnguni James Attorneys