IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held at Johannesburg

Case No JA28/08

In the matter between

PLATINUM MILE INVESTMENTS (PTY) LTD Appellant

t/a TRANSITON TRANSPORT

and

SOUTH AFRICAN TRANSPORT AND First Respondent

ALLIED WORKERS UNION (SATAWU)

MEMBERS OF SATAWU Second Respondent

J U D G M E N T

Introduction

[1] On the 19th September 2005, the appellant, Platinum Mile Investments (Pty) Ltd t/a Transition Transport dismissed 35 of its employees for participating in a strike. The court *a quo* found these dismissals to be automatically unfair and reinstated these employees without loss of earnings or benefits. This is an appeal,

with the leave of the court *a quo*, against the judgment and order of the Labour Court. These employees are members of the first respondent, South African Transport and Allied Workers Union ("SATAWU"). These dismissed employees have been collectively cited as the second respondent. I shall refer to them as either the second respondent or as 'these employees'.

[2] It is common cause that at the time these employees went on strike SATAWU had declared two disputes with the appellant, namely 'a recognition dispute' and a 'labour broker dispute'. The crisp issue to be determined in this appeal is whether the strike which commenced on 8 September 2005 was a protected or an unprotected strike. It became common cause that if the second respondent had gone on a strike as a result of the failure by the appellant to sign a recognition agreement with the first respondent then such a strike was unprotected and as such the appellant was entitled to dismiss the striking employees. However if the strike was in respect of the appellant wanting to employ labour brokers then the strike being a matter which concerned a mutual interest, would be protected. The appellant was therefore not entitled to dismiss these employees.

[3] The court *a quo* held that the strike was about the labour broker dispute, from which it followed that the strike was protected and the ensuing dismissals automatically unfair. It is the appellant's contention that on the conspectus of evidence and the analysis thereof, the court *a quo* erred in finding that the strike was protected and the ensuing dismissals automatically unfair. It ought to have found that the strike was about the recognition dispute, with the result that the strike was unprotected and the ensuing dismissals not automatically (or otherwise) unfair.

Factual background

[4] The appellant's main business is transporting carpeting and wooden flooring for the industry. At all times material to the dispute between the parties, there was no recognition agreement existing whereby the appellant recognised the first respondent as representing its employees in general or these employees in particular. In order to obtain recognition and enter into an agreement there was ongoing correspondence between the appellant and the first respondent. On the 9 June 2005 and when no progress was forthcoming the first respondent referred a refusal to bargain/organisational rights dispute to the Commission for

Conciliation, Mediation and Arbitration ('CCMA') for conciliation ('the recognition dispute'). On the 25th July 2005, the CCMA notified the parties of the set down of the conciliation of the recognition dispute for the 17th August 2005.

[5] In tandem but on the 27th July 2005, the first respondent referred a mutual interest dispute involving the appellant's (alleged) use of a labour broker to the National Bargaining Council for the Road Freight Industry ('the NBCRFI') for conciliation ('the labour broker dispute'). In the interim and on the 17th August 2005, the CCMA sought to conciliate the recognition dispute, with the Commissioner having undertaken to issue an advisory award in terms of s 64(2) read with s 135(3)(c) of the Labour Relations Act 66 of 1995 ("LRA").

[6] On the 2nd September 2005, without waiting for the aforesaid award to be handed down, and in terms of s 64(1) (b), SATAWU gave the appellant 48 hours notice of the commencement of a strike over the recognition dispute. The strike was due to commence at 14h00 on 4 September 2005. On the 2nd of September the appellant responded to SATAWU warning it that the strike was unprotected and their members participating in the strike stood to be dismissed.

[7] On Saturday, 3 September 2005, and while attending to other unrelated business at the CCMA, Mr Thulani Nkosi ('Nkosi'), SATAWU's official who was involved in all the antecedent negotiations with the appellant, managed to secure a copy of the aforesaid advisory award ('advisory award'). The award concluded with the following advice:

> '1. The parties to meet within 30 days of the receipt of this award to write a collective agreement.
> 2. Should they fail to do so, the union to exercise its rights in terms of s64 of the Act."

It is not in dispute that the advisory award was only sent to the parties by the CCMA on 7 September 2005 and did not come to the appellant's prior attention. In preparation for the proposed strike which was to take place, Nkosi had a meeting with Mr Esmon Vilakazi ('Vilakazi'), the shop steward in the employ of the appellant on Saturday, 3 September 2005, being the very day he received a copy of the award.

[8] In any event on the 3rd September 2005, SATAWU sent the appellant a letter advising as follows:

> 'RE: 48 HRS NOTICE, (SECTION 64 OF LRA)

Our letter regarding the above and subsequently your letter dated 2 September 2005 refers.

The union do hereby withdraw (sic) the notice; the company will be advised in due course of the new date and time for commencement of the industrial action.

NB: The door is (sic) still open to resolve the dispute.'

On Monday 5 September 2005, despite this notice having been sent, there was a work stoppage and an interaction between the appellant's management and the strikers. It was alleged by the appellant that Nkosi was present but this was denied by Nkosi.

[9] On the 5th September 2005, SATAWU sent the appellant a second s 64(1) (b) strike notice. The notice read:

'RE: 48 HRS NOTICE IN TERMS OF SECTION 64(1)(B)

The above-said subject refers.

This letter serves as an official notice to embark on a protected industrial action, in terms of section 64(1) (b) of LRA Act No 66 of 1995, as amended from time to time.

The proposed industrial action will commence on Thursday the 08th September 2005.

The union doors are open for negotiations in an attempt to resolve the dispute.'

[10] On 6 September 2005, in response to the above, the appellant sent to SATAWU and marked for the attention of Nkosi, a letter advising that the threatened strike would be unprotected and any employee participating in the proposed strike risked dismissal. A further letter was attached to the above letter for attention of Nkosi setting out various antecedents in the matter including the various occasions on which unprotected strikes had taken place in the past. Of significance however was the indication that any participation in the strike by appellant's workforce would leave the appellant with 'no option but to terminate their employment with immediate effect'. It was further brought to Nkosi's attention that members of SATAWU employed by the appellant had already 'received final warnings for their participation in previous unprotected strike action'.

[11] On 7 September 2005, SATAWU through Nkosi sent a letter to the appellant by fax which read:

'RE: 48 HRS/ PROTECTED INDUSTRIAL ACTION

Your letter dated 06/Sep/2005 refers.

The above said letter is misleading as it misrepresents facts misinterprets the LRA.

The notice served on 05 September has to do with mutual interest dispute in terms of section 64(1) and 134 of the LRA…..

Be as it (sic), the union will avail itself for negotiation.'

The appellant denied having received this letter. Before us counsel submitted that in light of the fax transmission report, the appellant was constrained to accept that the letter was sent even if it did not come to the attention of management.

[12] At 07h00 on the 8th September 2005, the strike commenced at the appellants premises. On the same day the appellant sent a letter to SATAWU in which it advised that the strike was unprotected and that disciplinary action would be taken against the participating employees. The appellant also issued the employees with notification of a disciplinary enquiry which was scheduled for the 16th September 2005. Consistent with the position adopted by

SATAWU that the strike was protected none of the striking employees took part in the disciplinary enquiry.

[13] While the second and further respondents were still on strike they were dismissed by the appellant on 19 September 2005 for participating in an unprotected and unprocedural strike action. As pointed out earlier the employees refused to participate in the disciplinary enquiry. SATAWU actively encouraged the employees not to participate in the disciplinary enquiry as is evident from a missive received by the appellant from SATAWU. The strike lasted from 8 September 2005 to 19 September 2005.

[14] A dispute arose between the appellant, on the one hand, and first and second respondents, on the other, about fairness of these employees dismissal. The first respondent contended that the reason for these employees dismissal was their participation in a protected strike and that, therefore, the dismissal was automatically unfair whereas the appellant contended that these employees' participation in a strike was not protected and that, therefore, it was not automatically unfair. The dispute concerning these employees' dismissal was referred to the NBCRFI for conciliation. When conciliation failed to produce a resolution of the dispute, first

respondent referred the dispute to the Labour Court for adjudication.

Proceedings in the Labour Court

[15] In the Labour Court the parties agreed that the primary issue was whether or not the second and further respondents' dismissal was automatically unfair. The matter came before Rampai AJ. The court *a quo* was asked to determine whether or not the second and further respondents participated in a protected strike.

[16] The Labour Court found that the strike action was lawful since the employees were participating in a protected strike which related to the employment of labour brokers by the appellant. The Labour Court hence concluded that the dismissals of second and further respondents were procedurally and substantively unfair. In coming to this conclusion the court was required to evaluate the evidence led by both parties. The judgment of the court *a quo* did not elaborate on the evidence led on behalf of the parties. I therefore propose to engage in this exercise under this rubric.

[17] The appellant opened its case with the evidence of Mr. Sven Viljoen ('Viljoen'), the Operations Manager of the appellant. On 5 September 2005 he arrived at the premises of the company and noticed that some employees were just standing and not doing their work. When he asked them about their conduct they said they would not work until he saw Nkosi and had the recognition agreement signed. Viljoen explained to them that he had attempted to facilitate two meetings to reach consensus on the recognition agreement. Nkosi did not attend the first meeting. He arrived an hour and a half late for the second meeting and at a time when it was not possible to accommodate him. On the 5th September 2005 the employees insisted that he see Nkosi. Nkosi eventually arrived but security refused him entry into the premises because he had no appointment. Security telephoned him and he met Nkosi at the gate and told him to make an appointment for a meeting. Nkosi caused chaos on the premises. Nkosi told him if he did not sign the recognition agreement he would organise a strike. On 5 September 2005 the company received a 48-hour strike notice that the strike would commence on 8 September 2005.

[18] On 8 September 2005 the employees refused to work until the company signed the recognition agreement. He called Ms Bosch, the Industrial Relations Manager of the company, who corroborated what he had already told the employees. She told them that the strike was unprotected. They enlisted the assistance of the South African Police Services because the employees refused to heed the ultimatum to return to work or leave the premises and were further intimidating other drivers who were not participating in the strike. The employees instead danced and insisted that management sign the recognition agreement.

[19] He testified further that employees who were on strike were given notifications of disciplinary hearings scheduled for 16 September 2005. The hearings had to be postponed to 19 September 2005 because the striking employees refused to participate in the hearings. SATAWU despite being aware of the hearings encouraged the striking employees not to participate in the hearings. On the 19 September 2005 when the striking employees did not attend they were dismissed *in absentia* and given dismissal letters. These letters were faxed to SATAWU.

[20] Under cross-examination he conceded that a dispute of interest relating to the appellant allegedly wanting to use labour brokers was referred to the NBCRFI on 27 July 2005, however this matter was handled by their labour consultant and he did not know the details. He agreed that a notice dated 5 September 2005 was given after 30 days had lapsed but reiterated that the strike, as explained to him by the striking employees, was for signing of the recognition agreement and it was unprotected. He did not agree that the strike was about the use of a labour broker. He only became aware of this contention much later, and in any event after the strike was over. He confirmed that the fax transmission report dated 7 September 2005, and the fax number used was the appellant's. It was not in dispute that they used casual employees but he was not aware of any labour broker employed by them. Although counsel for the respondent meandered in his cross-examination of the alleged use by the appellant of labour brokers, at no time was it specifically put to Viljoen that the company used the services of a labour broker, namely DHF Labour Hire. He agreed that Vilakazi was carrying a placard which read "Transiton down with casuals and drivers hire".

[21] A video recording was made of the first day of the strike. The transcription thereof was received as Exhibit C. This recording provides, in part at least, the objective evidence as to what transpired on the morning of 8 September 2005 when the strike began. I shall advert to this a little later. He was emphatic that at no time during the strike did anybody raise the issue of the alleged use by the company of a labour broker. With regards to SATAWU's letter dated 5 September 2005, he had no reason to believe that the reason for the strike had changed to anything other than the failure by the company to sign a recognition agreement. On 8 September 2005, one of the striking employees, Vilakazi, had asked him to sign the recognition agreement. He testified that due to the ongoing strike the company employed temporary workers.

[22] The next person to testify for the appellant was Ms Ilse Bosch ('Bosch'). She is employed as the Human Resources Manager by the appellant. She corroborated the testimony of Viljoen that Nkosi apologised for not being able to make it to the first meeting when the question of the content of the recognition agreement was to be discussed. When a second meeting was arranged Nkosi arrived very late and because of other commitments the meeting could not continue. She had no doubt in her mind that the strike of 8

September 2005 was for signing of the recognition agreement. On the morning of 8 September 2005 she addressed the striking employees and implored them to return to work or to leave the premises and not to intimidate the workers who were not striking. According to her testimony Vilakazi once again raised the failure by the appellant to sign the recognition agreement as a reason for the strike. This conversation was recorded on video. As far as the disciplinary hearing of 16 September 2005 was concerned, she was the complainant on behalf of the company and Helena Roux was the chairperson. The dismissed employees did not attend the hearing and it was postponed to 19 September 2005. The message was communicated to the union. The union responded by saying that the industrial action was procedural and protected and no employee was to attend that hearing.

[23] On 19 September 2005 these employees were found guilty. There was an internal appeal which was unsuccessful. She further testified that subject to certain restrictions the Main Agreement governing the Road Freight Industry permitted them to employ casuals. Since the Main Agreement regulated the industry as a whole and since the agreement permitted the employment of casuals this could not have been the subject matter of a strike. She

testified that on 8 September 2005 the demonstrations were peaceful the whole day and one of the employees came to her with the SATAWU standard recognition agreement and asked her to sign it in order to end the strike. She denied that the company ever employed the services of a labour broker prior to the strike. Under cross-examination and in face of this evidence it was not put to this witness that the company employed the services of a labour broker.

[24] Under further cross-examination she denied having seen the union letter dated 7 September 2005 before 15 March 2007. She steadfastly denied that she had so structured the address to the employees on the 8 September 2005 so as to steer the employees' response to the recognition agreement. On the first day of the strike there was some intimidation and victimization which did not last for long. The employees wanted the company to sign the recognition agreement. She had no doubt in her mind that the reason the employees went on strike was the recognition agreement and not a matter of mutual interest.

[25] The next person to testify on behalf of the appellant was Ms Helena Roux, a Labour Relations Consultant. On the 16th

September 2005 she was supposed to have chaired the disciplinary enquiry which was scheduled for that day. I do not propose to consider her evidence in any detail since her evidence related in the main to the disciplinary enquiry which did not proceed. It is further not in dispute that SATAWU had advised the striking workers not to participate in the enquiry as they considered the strike to be a protected one. In any event, on the evidence given by the company she came to the conclusion that the strike that commenced on 8 September 2005 was unprotected and the appropriate sanction was summary dismissal. Her reasoning was that the dispute was about the recognition agreement and the CCMA had sent an advisory award on the evening of 7 September 2005. The strike started on the following day and that was contrary to provisions of section 64(2) of LRA. Her evidence concluded the evidence for the appellant.

[26] The first person to testify on behalf of the respondent was Vilakazi, a shop steward. Vilakazi was of the view that the strike was lawful and protected because the appellant had employed casuals without consulting with the employees of the first respondent. He emphasised this aspect in his entire evidence both in chief and cross-examination. He denied that the strike was about a

recognition agreement and nor had anybody mentioned anything about a recognition agreement to the appellant's representative when the strike started. This is not borne out by the video recording made by the company.

[27] Despite being a shop steward he knew nothing about a collective bargaining agreement which governed the industry and permitted an employer to use casual workers. According to Vilakazi the company had employed casual workers since he saw new faces from time to time. From his evidence it became apparent that Vilakazi did not know the difference between a labour broker and a casual worker. He erroneously assumed that the mere fact that the company employed casual workers from time to time meant that they were necessarily employing labour brokers. Nor could he give any testimony that the appellant had employed any casual workers in contravention of the collective bargaining agreement. All he said was and I quote: "*...Today we see new faces, tomorrow it is other faces, those are gone and we did not know their names actually.*"

[28] In any event counsel for the respondents did not at any time put to the appellant's witnesses that they had employed casual workers

contrary to the collective bargaining agreement. Under cross-examination Vilakazi was constrained to admit that as far as he was aware Nkosi had on the 3rd September 2005 received a letter from the CCMA which allowed them to strike. He admitted under further cross-examination apropos the letter of the 3rd September 2005, I quote :

> "*I cannot say precisely if this is the letter, M'Lord but what I know is that the letter which Mr Nkosi had in his possession was saying that I must go and tell the other employees that we were allowed to go on strike on Monday.*"

[29] The evidence of Vilakazi provides corroboration, irrespective of Nkosi's evidence, that the strike which commenced was about the recognition agreement. If anything, Vilakazi's evidence corroborates the evidence of the appellant's witnesses, despite Vilakazi insisting that they were striking about casual workers, that the strike in fact was about the recognition agreement since it was common cause that the only missive emanating from the CCMA on the 3rd September 2005 was the CCMA award which only permitted the appellant's employees to strike if no recognition agreement could be reached from the handing down of the award on the 3rd September 2005.

[30] On Monday, 5 September 2005, Vilakazi and the other workers came in late and found Viljoen already on the company premises. They did not clock in that morning and the work stoppage commenced. Vilakazi became evasive when counsel for the appellant tried to elicit answers about the stoppage and responded by stating that Nkosi would respond on those aspects when he testified. He further denied that they were given any notice to attend a disciplinary hearing. He testified that even if a notice had been given they would not have participated in any disciplinary hearing.

[31] The next person to testify was Nkosi, a trade union organiser employed by SATAWU. In his evidence in chief he testified that he had encountered problems with the appellant's representative in agreeing upon a recognition agreement and discussion about the use of a labour broker by the appellant. I shall not deal with his further evidence on what is common cause since the same is on record relating to the two disputes in which appellant and the respondents were engaged in.

[32] He had received the advisory award on 3 September 2005 which led him to issue a letter on the same day countermanding the strike which was due to commence on the 5th September 2005.

On 5 September 2005, he caused to be issued a further notice in terms of s 64 (1) (b) of the LRA and this was supposed to be in respect of the labour broker issue, despite the absence of such mention in the notice itself. He further testified that the letter he wrote on 7 September 2005 in response to appellant's letter dated 6 September 2005 was to inform the appellant that the strike which was due to commence on 8 September 2005 was a strike relating to a mutual interest dispute. In his view the strike was protected because 30 days had elapsed since referral to the bargaining council of the dispute between the parties of the alleged use of labour brokers by the appellant.

[33] In his evidence in chief he testified that when he wrote a letter dated 17 September 2005 in response to the appellant's letter dated 16 September 2005 with regards to the disciplinary hearing, he thought that the appellant had engaged in a lockout and it would only be uplifted once the strike was over and then he would have advised the workers to attend a disciplinary hearing. This

reasoning is both illogical and inconsistent with the provisions of the LRA. As far as the letter of 19 September 2005 in which the appellant informed him that the striking workers employment had been terminated since they failed to attend a disciplinary hearing, he testified that the disciplinary hearing of 19 September 2005 was unfair because there was a lockout and a strike going on. In any event an urgent application brought by him on behalf of the dismissed employees, was in itself dismissed by the Labour Court for lack of urgency.

[34] I do not propose to deal in any detail with his evidence in cross-examination save to refer to certain aspects. He testified that the letter of 7 September 2005 to which I have adverted earlier and which the appellant said it did not receive could not be attached to the urgent application because they were running against time. He further testified that the original letter was missing. I do not propose saying anything further on this aspect since the appeal before us was argued on the basis that the transmission slip indicates that a letter was sent although not received by the appellant.

[35] What is however of significance is his testimony that the appellant was already using a labour broker namely, DHF Labour Hire, prior to the strike. This aspect was not canvassed with any of the appellant's witnesses when they testified. Nor is it mentioned in the referral made to NBCRFI by the first respondent as evidenced by annexure TCN1. One would have expected the first respondent to particularize the name of the broker in its referral. I accept that language is not an instrument of mathematical precision, however since the court *a quo* was constrained for probabilities in the language used by the parties whilst not attaching sufficient weight to the *viva voce* evidence led before it, one would have expected the first respondent to use the name of the labour broker. Instead in annexure TCN1 which forms part of Exhibit A the nature of the dispute set out is as follows:

> "*The dispute is about mutual interest in that the employer wants to use labour broker, while the employees working the employer to employ employees permanent where there is vacancies.*"

[36] We are left with the impression that this is an after thought since Mr Baloyi who acted for the respondent in the court *a quo* would not have failed to canvass this salient aspect and put it to the

appellant's witness since it forms the gravamen of the respondents' complaint against the appellant. He conceded that the letter dated 5 September 2005 did not say what the dispute was all about. He further conceded that there was no letter in the bundles which pointed to the use by the appellant of labour brokers.

ON APPEAL

[37] The critical question before us, as it was before the court *a quo*, was the nature of the dispute giving rise to the strike and whether the finding by the court *a quo* of an automatically unfair dismissal can stand in light of the evidence tendered in the court *a quo*. It is not in dispute that as early as 29 June 2005, following the CCMA referral on 9 June 2005, the first respondent had threatened a strike over the recognition dispute. On 2 September 2005, the union notified that its members would commence with a strike over the recognition dispute at 14h00 on Sunday, 4 September 2005. On 3 September 2005 and at midday, Nkosi met the employees at the first respondent's offices to discuss plans. He however, had fortuitously and on the same day had come into possession of the advisory arbitration award which recommended that the parties enter into a recognition agreement within the next 30 days before

striking. Nkosi appeared to have come to the conclusion that the union was bound by the advice given by the commissioner and that the strike the following day would be unprotected. Nkosi in his evidence informed the court that he had informed Vilakazi that they should not strike on Monday, 5 September 2005.

[38] Work stoppage did occur on Monday, 5 September 2005 despite the advisory award. Vilakazi testified that Nkosi had told him on Saturday, 3rd September 2005, to tell the other employees that they were allowed to go on strike on Monday, in light of the "letter" which Nkosi had received from the CCMA. The "letter" clearly is a reference to the award given by the CCMA. This evidence of Vilakazi corroborates the evidence of Viljoen that some employees embarked on a work stoppage in the morning and that they would not return to work until such time as Viljoen signed a recognition agreement. We viewed the video tape and although a worker was carrying a placard about casual workers, Vilakazi demanded that the recognition agreement be signed. If one takes into account Vilakazi's evidence in the court *a quo* together with what appears on the video footage, the probabilities are overwhelming that the stoppage related to the signing of the recognition agreement.

Bosch also corroborated the version of Viljoen that the strike demand was for the conclusion of a recognition agreement and not about any labour brokers since although the appellant was employing casuals from time to time no labour broker was being used by the company. She also corroborated Viljoen's evidence that one of the employees presented her with a copy of the standard union recognition agreement for signature.

[39] The appellant's version of the events of 5 September 2005 has to be accepted since it was substantially unchallenged and in fact in part corroborated by Vilakazi and the video tape. I am left with the impression that Nkosi used the dormant labour broker dispute as a disguise for a strike over the recognition agreement which had already commenced. I am thus satisfied that the strike which commenced on 5 September 2005 related to the failure by the appellant to sign the recognition agreement.

[40] The respondents withdrew their first notice of intention to strike over the recognition dispute and did not give the appellants another notice of intention to strike over that issue. On the respondents own version the second strike notice did not relate to a recognition dispute. In the result, the strike which commenced on 5th

September 2005 contravened s 64 (1) (b) (read with s 64 (2) of the LRA), and therefore once it is accepted that the strike was about the recognition dispute it follows that the strike was unprotected.

[41] I shall in passing advert to what in our view constituted a misdirection by the court *a quo* in not allowing the admission of the Main Collective Agreement and the Dispute Resolution Collective Agreement of the NBCRFI which was duly promulgated and which was binding on the parties at the time of the strike. I am in agreement with the court *a quo* that the agreement was not specifically pleaded by the appellant in the court *a quo* but that cannot provide a cogent basis for its non- admission. It is trite law that the legal status of a published national collective bargaining agreement is that of a subordinate legislation. Such an agreement fits into the juristic pigeon hole of a statute rather than contract.

[42] In terms of s 23 of the LRA the legal effect of a collective agreement extends beyond the parties to the collective agreement. The relevant provisions appear below:

> **'23. Legal effect of collective agreement –**
>
> (1) …

(2) A *collective agreement* binds for the whole period of the *collective agreement* every person bound in terms of subsection (1) (c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered *trade union* or registered *employers' organisation* for the duration of the *collective agreement*.

(3) Where applicable, a *collective agreement* varies any contract of employment between an *employee* and employer who are both bound by the *collective agreement*.

(4) Unless the *collective agreement* provides otherwise, any party to a *collective agreement* that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties.'

The extensive binding nature of the provisions of a collective agreement provides support for the view that such agreements are a form of subordinate legislation.

[43] The LRA further provides for the enforcement of the collective agreement reached by the bargaining council. Section 33 provides:

> **'33. Appointment and powers of designated agents of bargaining councils –**
>
> (1) The *Minister* may at the request of a *bargaining council* appoint any person as the designated agent of that *bargaining council* to promote, monitor and enforce compliance with any *collective agreement* concluded in that *bargaining council*.
>
> (1A) A designated agent may –
>
> (a) secure compliance with the council's *collective agreements* by –
>
> (i) publicising the contents of the agreements.
>
> …'

[44] Parliament has authorized the relevant Minister, who is a member of the Executive, to make an appointment of a designated agent at his or her discretion. The agent's powers are specifically provided for in the rest of the section. These powers are necessary for the

effective implementation of the LRA. Parliament intended a national collective bargaining agreement to be subordinate legislation.

[45] The requirement for publicising the contents of the collective agreement is further support for the contention that national collective bargaining agreements constitute subordinate legislation. This requirement enjoys constitutional recognition in terms of s 101 (3) of the Constitution of the Republic of South Africa, 1996 which reads:

> **'101 Executive decisions –**
>
> (1) …
>
> (2) …
>
> (3) Proclamation, regulations and other instruments of subordinate legislation must be accessible to the public.'

[46] There can be no dispute that a collective bargaining agreement or an industrial agreement is not a contract but rather a piece of subordinate legislation. In ***S v Prefabricated Housing Corporation (Pty) Ltd and Another*** 1974 (1) SA 535 (A) the court

considered the validity of an industrial agreement made by the Pietermaritzburg Industrial Council and promulgated by the Minister in the Government Gazette. The court asked the question whether the correct 'juristic pigeon-hole' for industrial agreements was contract or statute. Trollip JA, on behalf of a unanimous court, held at 539G-540A that the type of document, although referred to as an "agreement" in industrial parlance, was not a contract in the legal sense. The parties to the industrial council to the employers' organizations and the trade unions do not contract *inter se* to produce the measure. They 'negotiate' the 'agreement' but ultimately the industrial council decides whether to adopt and transmit the measure to the Minister. The learned Judge also referred to the requirement of publication in the Gazette as a further indication that the industrial agreement was a piece of subordinate legislation. The court also referred to the fact that the Minister could provide that the agreement was binding on employers and employees in the industry other than those who entered into the agreement. Accordingly, the court held that an industrial agreement is not a contract but a piece of subordinate legislation.

[47] That being so the court *a quo* was not only bound to admit the main agreement but also allow cross-examination on it. The agreement clearly provides for the employment of casual workers. No evidence was presented in the court *a quo* that casuals were employed contrary to the agreement and as far as labour brokers are concerned it was never put to any of the appellant's witnesses that a labour broker was employed. Be that as it may in light of the conclusion to which we have come, I am satisfied that the strike pertained to the recognition agreement.

[48] In the premises the appeal is upheld and the order made by the court *a quo* is set aside in its entirety. As far as costs are concerned, one is left with the clear impression that the first respondent failed to properly direct the cause of events which led to the strike and did not provide proper advice to the striking workers. Accordingly, fairness dictates that the first respondent is ordered to pay the costs of the proceedings in the court *a quo* and the costs occasioned by the appeal.

PATEL JA

I agree

_____

WAGLAY ADJP

I agree

_____

SANGONI AJA

Appearances:

For the Appellant/s: Mr F. BODA
Instructed by: YUSUF NAGDEE ATTORNEYS

For the Respondent/s: Mr. J S MPHAHLANI
Instructed by : M M BALOYI ATTORNEYS

Date of Judgment: 14 MAY 2010