IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG.

Case No. JA 28/06

In the matter between

SECURITY SERVICES
EMPLOYERS' ORGANISATION ("SSEO") **First Appellant**

SOUTH AFRICAN NATIONAL SECURITY
EMPLOYERS' ASSOCIATION ("SANSEA") **Second Appellant**

SOUTH AFRICAN INTRUDER DETECTION
SERVICES ASSOCIATION ("SAIDSA") **Third Appellant**

WESTERN CAPE SECURITY ASSOCIATION
("WESCA") **Fourth Appellant**

SECURITY INDUSTRY ASSOCIATION **Fifth Respondent**
OF SOUTH AFRICA ("SIASA)

And

SOUTH AFRICAN TRANSPORT
AND ALLIED WORKERS' UNION ("SATAWU") **First Respondent**

THOSE PERSONS WHOSE NAMES
ARE LISTED IN ANNEXURE "A"
TO THE NOTICE OF MOTION **Second to further respondents**

JUDGMENT

ZONDO JP

Introduction

[1] This is an appeal against a judgment and order given by Cele AJ sitting in the Labour Court in terms of which he discharged with costs a *rule nisi* which he had granted a few days earlier. The appellants in this appeal were the applicants in those proceedings

whereas the respondents were respondents in those proceedings. The Labour Court subsequently granted the appellants leave to appeal to this Court against its judgment and order. Before we can consider the appeal, it is necessary to refer to the facts of this matter.

The facts.

[2] The first to the fifth appellants are employers' organisations within the meaning of that term as found in sec 213 of the Labour Relations Act 66 of 1995 ("**the Act**"). Each one of them has as its members some employers who operate in various parts of the country within the security industry. The first respondent is the Transport and Allied Workers Union (hereinafter referred to as "**SATAWU**"). It is a registered trade union whose members include a very large number of employees employed in the security industry. The second and further respondents are some of the members of SATAWU who are employed within the security industry.

[3] Currently there is an industry-wide strike by SATAWU's members in the security industry. When the strike notice was given prior to the commencement of this strike, it was not intended that SATAWU members in the security industry would be the only ones who would participate in the strike. The strike notice was given around 15 March 2006. The strike commenced either late in March or early April 2006. The other employees who, it was planned, would also participate in the strike, are employed in the security industry and they are members of other trade unions. It is not necessary to identify those other unions. It suffices for present purposes to simply state that the unions in question are trade unions that had a co-operation arrangement with SATAWU to negotiate jointly with the appellants on wages and other terms and conditions

of employment.

[4] The reason why employees who are members of the other unions are not on strike when it had earlier been contemplated that they would also take part in the strike is that their unions – about 14 of them - concluded an agreement with the appellants on the 1st April 2006 and, thereby, resolved the wage dispute that had been going on between them and the appellants.

[5] It would seem that the appellants were under the impression that SATAWU was also going to sign the April 1 agreement because a perusal of that agreement reveals that provision was made at the end of the agreement for the signature of a representative of SATAWU. SATAWU was opposed to the agreement and would not sign it. The appellants thereafter brought an urgent application before the Labour Court for a *rule nisi* with an interim interdict. Effectively the appellants sought an order declaring that SATAWU was bound by the April 1 agreement despite the fact that SATAWU had not signed that agreement.

[6] There is only one basis upon which the appellants mounted their case in the founding affidavit that SATAWU was bound by the April 1agreement and that, therefore, it was not entitled to pursue the current strike. Before I identify that basis, it is necessary to first refer to a document within the record marked "**Constitution for the National Bargaining Council for the Private Security Services Industry."** ("**the constitution**"). That document was

prepared in 1998 by a number of trade unions including SATAWU's predecessor, the Transport and General Workers Union and two employers' organisations, including the second appellant, in the private security industry with a view to the registration of a bargaining council for the transport industry.

[7] The efforts to get a bargaining council registered failed to secure sufficient support. Accordingly, no bargaining council was registered for the private security industry. Clause 6 of the constitution governed the manner in which the different trade unions, on the one hand, and, employers' organisations, on the other, would be represented in the proposed bargaining council. The clause envisaged proportional representation based on the number of members a trade union had. However, the minimum threshold was 5000 members. Clause 15 governed the procedure applicable to negotiations for the conclusion of a collective agreement in the bargaining council.

[8] After this short detour, I now return to the basis upon which the appellants sought to make out a case in support of its contention that SATAWU was bound by the April 1 agreement. That basis is to be found in paragraph 17 of the founding affidavit. There the deponent to the founding affidavit said that on the 25th November 2005 "**the parties to the Constitution, including [SATAWU**]", signed an addendum to the Constitution in terms of which these parties again confirmed their intention to be bound by the constitution and further agreed that "**clause 6 [dealt with below]**

of the attached document (i.e. the constitution) does not apply and further agree that section 69 together with the Code of Good Practice on Picketing as contained in the LRA (Act 69 of 1995, as amended) will apply." In paragraph 18 of the founding affidavit the deponent then stated in effect that, as clause 6 of the constitution dealt with proportional representation of trade unions and employers' organisations on the council, the agreement among the parties to the addendum that clause 6 would not apply meant that each trade union and each employers' organisation would be allocated one vote.

[9] Paragraphs 28, 29 and 30 of the founding affidavit fell under the heading: "**Legal submissions**". In par 28 the deponent submitted that "**upon a proper interpretation of clause 15(3)(e) of the constitution as read with clause 2 of the [April 1] wage agreement and the addendum to the constitution, [SATAWU] is bound by the wage agreement and is therefore not entitled to strike in pursuance of the demands which formed the issue in dispute and therefore the subject matter of the strike. Legal argument in this regard will be addressed to the above Honourable Court at the hearing of this matter."** In par 29 the deponent stated that **"(i)n any event, it is apparent from clauses 2.3 and 2.4 of the wage agreement that [SATAWU] is precluded from continuing with the strike unit such time as the Minister of Labour has considered the promulgation of the wage agreement as a Sectoral determination as contemplated**

in section 52 of the LRA. Legal argument in this regard will be addressed to the above Honourable Court at the hearing of this matter." In par 30 the deponent concluded by saying he was "**therefore**" submitting that the continued strike was unprotected.

[10] It is clear from a consideration of the founding affidavit that the only basis upon which the appellants contended that SATAWU was bound by the April 1 agreement was that it had agreed that clause 6 of the constitution would not apply. It is also clear that the only basis upon which the appellants relied in the founding affidavit to say that SATAWU had agreed that clause 6 would not apply was a handwritten amendment to the addendum to the constitution. The material parts of that handwritten amendment to that addendum are quoted in paragraph 17 of the founding affidavit. No other case was sought to be made out in the founding affidavit. To the extent that it can be said that in paragraph 18 of the founding affidavit the deponent sought to make out another case which was not based on the handwritten amendment to the addendum, such case would have been one to the effect that, in the light of clause 2 of the April 1 agreement, SATAWU was bound by that agreement even though SATAWU had not signed it. It was not a case based on any conduct of SATAWU. Of course, such a contention was devoid of any substance and deserves no further consideration.

[11] In its answering affidavit SATAWU admitted that it had signed the addendum of the 25th November 2005 to the constitution but that,

when it signed the addendum, the contents of the addendum were only the typed contents and not the handwritten amendment. SATAWU explained in the answering affidavit that the handwritten amendment to the effect that clause 6 of the constitution would not apply was added later and the parties to the typed addendum were asked to initial the amendment to signify their agreement to it. SATAWU said that it refused to initial the handwritten amendment. For that reason, contended SATAWU in the answering affidavit, it was not bound by the April 1 agreement.

[12] In his replying affidavit the deponent to the founding affidavit conceded the veracity of SATAWU's version about the handwritten amendment to the addendum. However, he stated that, that notwithstanding, upon a proper interpretation of clause 15(3)(e) of the constitution as read with clause 2 of the wage agreement and the amended addendum to the constitution, SATAWU was still bound by the wage agreement. This contention is rather puzzling in the light of the concession made on behalf of the appellants earlier in the affidavit to the effect that SATAWU did not initial the handwritten amendment. That contention was advanced in paragraph 7 of the replying affidavit which is a reply to para 14 of SATAWU's answering affidavit. In paragraph 8, which is a reply to par 15 of SATAWU's answering affidavit, the deponent to the appellants' replying affidavit purports to give an explanation for his statement in the founding affidavit that what SATAWU had agreed to included the handwritten amendment to the addendum to the constitution and yet in the replying affidavit he was conceding

the veracity of SATAWU's version.

[13] It is necessary to say how Mr Myburg, the deponent to the founding and replying affidavits of the appellants, attempted to explain the conflicting positions that he took in the founding and replying affidavits with regard to SATAWU's attitude to the handwritten amendment. Under par 8 of the replying affidavit he said that Mr Ravuku, who was the facilitator at the meetings of the 25th November 2005 and the 5th December 2005, informed everybody at the meeting that all parties had initialled the handwritten amendment. He said this against the background of a statement he had made earlier in the replying affidavit that, before the commencement of the meeting of the 25th November, the appellants had said that they were not prepared to negotiate with the trade unions, including SATAWU, unless the trade unions reached an agreement amongst themselves as to their threshold of representivity. He said that, according to his source, the unions had thereafter asked for a caucus and when they returned to the meeting, Mr Ravuku had confirmed that all the parties to the dispute, including SATAWU, had signed the addendum and had initialled the handwritten amendment to the addendum.

[14] The replying affidavit stated that Simon, who represented SATAWU at the meeting, did not then say that what Ravuku had said was not true and that SATAWU had not initialled the handwritten amendment or that SATAWU did not consider itself bound by the handwritten amendment to the addendum. Mr

Myburg said this in paragraphs 8.1.1 to 8.1.4 of his replying affidavit. Then in paragraph 8.1.5 he said: "…**accordingly, the applicants thereafter commenced with the wage negotiations on the understanding that the unions had reached an agreement inter partes as to their thresholds for representivity (i.e that clause 6 of the Constitution would not be applicable."** Mr Myburg went on to say in par 8.1.8 of the replying affidavit that at the commencement of the next meeting, which was on the 5th December 2005, Simon asked that certain corrections be effected to the minutes of the meeting of the 25th November to say that "**SATAWU now states that they had not initialled against the amendment to the addendum**." Mr Myburgh says in the affidavits that his source told him that these amendments to the minutes were adopted as a true reflection of the proceedings of the 25th November 2006.

[15] In par 8.1.9 of the replying affidavit Mr Myburg said that his source informed him that, after the adoption of the amendments to the minutes proposed by Simon, the parties continued with their meeting on the 5th December. He says that this was "**in an attempt to resolve the dispute.**" He said that "**Simon participated in the negotiations at this meeting and again did not advise Ravuku or any other person that [SATAWU] was no longer prepared to be involved in these negotiations because it had not agreed to the thresholds of representivity as**

contemplated in the amendment to the addendum." In par 8.2. Mr Myburg said that "**under such circumstances**" he was submitting that **"[SATAWU] [had] acquiesced to the amendment to the addendum and is therefore estopped from denying that it agreed to the amendment to the addendum**." He further said that legal argument in this regard would be addressed to the court at the hearing of the matter.

[16] In par 8.3 of the replying affidavit Mr Myburg confesses that at the time when he deposed to the founding affidavit, he was under the bona fide but mistaken impression that Simon had initialled the amendment to the addendum. He then says in the next sentence: "**I nevertheless am still of the view that [SATAWU] had agreed to the amendment to the addendum."** In par 9.1 he states that, **"(a)s stated hereinabove, the amendment to the addendum excised clause 6 from the constitution and therefore this clause was not applicable to the negotiations which culminated in the wage agreement."**

[17] If one has regard to the replying affidavit, one can see that, on the one hand the appellants admit that SATAWU did not initial the handwritten amendment to the addendum and yet, on the other, they do not go on to admit that SATAWU is therefore not bound by the wage agreement. Their case is that SATAWU is, nevertheless, bound by the April 1 agreement. It is clear from the earlier subparagraphs of paragraph 8 that the circumstances that the

appellants relied upon to say that SATAWU had acquiesced to the handwritten amendment related to the conduct of SATAWU's representative at the meetings of the 25th November 2005 and 5 December 2005 as described earlier.

[18] In par 9.2 of the replying affidavit the appellants sought to make out some point based on clause 15(3)(e) but the case it sought to make out therein is difficult to follow and, when this was pointed out to Council, he did not attempt to base the appellant's case thereon.

[19] It follows from the above that the case that the appellants sought to make out in the founding affidavit was based on the allegation that SATAWU had agreed to the handwritten amendment to the addendum but that case was answered fully an successfully in the respondents' answering affidavit. Realising that the case that they had sought to make out in the founding affidavit had become unsustainable in the light of the respondents' answer, the appellants purported to introduce another case in their replying affidavit. That was that SATAWU was bound by the wage agreement of 1 April because at the meetings held on the 25th November 2005 and 5 December 2005 its representative did not announce that SATAWU had not initialled the handwritten agreement nor did he say at the meeting of the 5th December that SATAWU "**was on longer prepared to be involved in these negotiations because it had not agreed to the thresholds of representativity as contemplated in**

the amendment to the addendum."

[20] At this stage it is important to point out that on appeal the case that Counsel for the appellants argued was not the one foreshadowed in the founding affidavit as outlined above. It was based on the conduct of SATAWU's representative at the meeting referred to above. Whether or not it was open to the appellants to argue that case is an issue that I shall deal with shortly. In the meantime it is necessary to point out that, after the appellants had delivered their replying affidavit, SATAWU delivered a further affidavit which it called a supplementary affidavit. In the additional affidavit SATAWU sought the leave of the Court to file the affidavit. We were informed that the Court a quo granted leave and the matter was argued on the basis of all the affidavits including SATAWU's supplementary affidavit. No further affidavits were delivered thereafter by any party.

[21] In the supplementary affidavit SATAWU said that it was agreed, it seems in October 2005, between SATAWU and the appellants that the constitution would form the basis of the wage negotiations. The deponent says that SATAWU and the appellants then signed the addendum to the Constitution without the handwritten amendment and this was done in order to give effect to the agreement that the constitution would form the basis of the negotiations. The deponent says that the other trade unions refused to sign the addendum without the handwritten amendment. Those unions then effected the handwritten amendment and initialled it but SATAWU refused

to initial it. The deponent says that, as far as SATAWU was concerned, clause 6 of the constitution remained in force.

[22] The deponent to the supplementary affidavit explained in paragraph 8 thereof exactly what followed at the meeting of the 25th November after SATAWU had refused to initial the handwritten amendment. He says that **"(t)he employers expressed concern at having to negotiate with 15 union and, at some meetings, in the region of 50 representatives**." He goes on thus:

> "The unions therefore caucused and elected four representatives. The other unions recognised SATAWU as the majority union and agreed that it would therefore be entitled to its own representative. The other unions requested that the kind of arrangement referred to in subclause 6(4) of the constitution he applied to the unions. Because precise membership figures were not available, and because SATAWU did not wish to scupper negotiations or endanger the eventual promulgation **of a Sectoral determination, SATAWU agreed with this proposal. All the other unions were therefore to be represented by three joint representatives. The unions' negotiating team would henceforth be composed of these four representatives."**

Clause 6(4) relates to efforts that had been made to ensure that, if there was one or more of the employers' organisations which represented small and medium enterprises, at least one of them had to be given a seat on the delegation representing the employer party. Within the context of trade unions this would mean, it seems to us, that one of the three representatives representing the unions

had to be from a small trade union.

[23] In the additional affidavit the deponent refers to a meeting of the 30th November 2005 between the Department of Labour, on the one hand, and, on the other, SATAWU and other unions, in which the Department of Labour submitted a draft constitution for the bargaining council for the private security industry which removed the threshold system contained in clause 6 of the 1998 constitution. The deponent says that SATAWU rejected this attempt and the draft amendment was not adopted.

[24] The deponent to SATAWU's supplementary affidavit states in paragraph 18 thereof that at a meeting of the unions involved in the dispute with the appellants early in March 2006 the unions "**agreed that they would not sign a wage agreement without a collective mandate of all members."** He says that the agreement among the unions relating to the need for a collective mandate was reiterated at a meeting of the unions that was held on the 23rd to the 24th March 2006 **"and it was decided that the collective mandate would be sought on 3 April 2006."** He says in par 20 that the other unions "**reneged on this agreement**" and signed the April 1 wage agreement.

The appeal

[25] I have already outlined above the case that the appellants sought to make out in the founding affidavit, the replying affidavit and on appeal before us. It is not necessary to repeat that exercise. The first question

that arises is whether the appellants were entitled to argue the case that they sought to argue on appeal. Counsel for the respondents submitted that they were not so entitled. Relying on **Administrator, Transvaal and others v Theletsane & others 1991(2) SA 192 (A)** Counsel for the respondents argued that the manner of approaching the affidavits adopted by the appellants on appeal was the same as the one that the respondents in **Theletsane** adopted which was rejected by the Appellate Division in that case.

[26] In this regard it is important to point out that in effect Counsel for the appellant's case on appeal was that from the fact that SATAWU had agreed that the unions' delegation to the negotiations with the appellants be a group of four representatives that was not composed on the basis of the level of membership of the different unions in the industry and the fact that SATAWU's representative continued to participate in the negotiations on the 25th November and 5 December 2005 without announcing that SATAWU had not initialled the handwritten amendment to the addendum we must draw the inference that SATAWU was agreeing that the decision of the council would be based on a simple majority as provided for in clause 15(3)(e) and not on clause 6 of the constitution.

[27] Counsel for the respondents contended that, as was decided in Theletsane's case, it would be unfair to the respondents to draw the inference that the appellants urged us to draw from the respondents' supplementary affidavit. He pointed out that the case that the appellants sought to make out in their founding affidavit was that SATAWU had agreed to the handwritten amendment to the addendum and that, for that reason, it was bound by the April 1

agreement and that is the case which SATAWU sought to meet in its answering affidavit and supplementary affidavit. He submitted that it would be unfair and prejudicial to the respondents for the matter to be decided on a basis that ignores that context of the answering and supplementary affidavits.

[28] In Theletsane the workers employed by the Administrator, Transvaal, brought an application to the then Supreme Court for an order inter alia declaring that their dismissal by the Administrator was unlawful in that they had not been given a hearing before they were dismissed and that this omission on the employer's part vitiated their dismissal. In answering this case the Administrator went beyond denying the allegation that the workers had not been given a hearing before they were dismissed but gave details relating to the hearing that they had been given. The Adminstrator, Transvaal and others were the appellants in the Appellate Division and the workers were the respondents. The Witwatersrand Local Division had granted the workers' application on the basis that the hearing that the Adminstrator had given the workers was not a fair hearing and not on the basis that the Adminstrator had not given the workers a hearing at all as had been alleged by the workers in their founding affidavit.

[29] On appeal Smallberger JA, who gave a minority judgment, also adopted the same approach as had been adopted by the Witwatersrand Local Division and found in favour of the workers on the basis that the Administrator had failed to give the workers a

proper or fair hearing. Botha JA, in whose judgment the majority concurred, disagreed with this approach of dealing with affidavits. He held that it was not permissible to decide the matter on the basis that, although the case sought to be made out by the workers in the founding affidavit was that the workers had not been given any hearing was without substance, the dismissal was, nevertheless, unlawful on the basis that the hearing that the appellants had given the workers was not proper or fair. He said that that amounted to reversing the onus. He emphasised that the context in which the appellants in that case had given details about the adequacy or fairness of the hearing that the respondents had been given was that they were answering a case to the effect that no hearing whatsoever had been afforded the workers and not one to the effect that an inadequate or improper hearing had been afforded them.

[30] In our judgement the submission by Counsel for the respondents that the approach to affidavits on the basis of which Counsel for the appellants sought to argue the appellants' case is impermissible and in conflict with the decision of the Appellate Division in Theletsane's case is correct. In our view the respondents were called upon to answer the case as set out in the founding affidavit and not any other case. The fact that they may have gone further than that in the answering affidavit does not mean that they would not be prejudiced if the matter were now to be decided on the basis of such additional information as they may have included in the answering and supplementary affidavit. They were answering the case that they had agreed to the handwritten amendment to the

addendum.

[31] The submission by Counsel for the appellants was that we should draw an inference from the respondents' own version of events that SATAWU acquiesced to the handwritten amendment to the addendum or to an arrangement in terms of which it was bound by the decision of a simple majority of the council. He submitted that, when regard is had to the fact that the majority of the trade unions and the appellants signed the April 1 agreement, that decision enjoyed the majority of the unions or the council. Counsel submitted that we should draw this inference from the fact that SATAWU, on its own version, had agreed to the unions being represented by a delegation of four irrespective of the different levels of membership of the different unions in the industry meant that SATAWU was agreeing to the provisions of clause 15(3)(e) of the constitution being applicable as opposed to clause 6. He pointed out that otherwise it was difficult to see how else the delegation of four could operate. We think that the answer to this is that the appellants did not anywhere say that by merely agreeing that the unions' delegation be composed of four representatives SATAWU was agreeing to the application of clause 15(3)(e) with regard to decision making.

[32] Accordingly, the submission lacks an evidential basis in the affidavits and stands to be rejected. At any rate the submission flies in the face of the uncontradicted evidence contained in the respondents' supplementary affidavit that an agreement had been

concluded among the trade unions to the effect that a collective mandate of the workers would be sought before any agreement could be signed with the appellants. The deponent to the supplementary affidavit makes it clear that the signing of the April 1 agreement by the trade unions which signed that agreement was contrary to agreement among the trade unions that "**a collective mandate"** would be sought on the 3rd April 2006. This uncontradicted evidence shows that it was never agreed that the delegation of four had the power to bind everyone to an agreement simply because they constituted the negotiating team of the unions.

[33] Furthermore, the deponent to the supplementary affidavit also made it clear that the reason why SATAWU had agreed to a delegation of four with no regard to the level of membership of the different unions was to avoid scuppering the wage negotiations by insisting on a delegation that was based on the level of membership of the different trade unions when there were no figures immediately available to verify membership. In our view SATAWU's conduct in regard to agreeing to the delegation of four and in regard to its representative at the meetings of the 25th November and 5 December 2006 provided no basis for the drawing of the inference that the appellants urged us to draw. In law that inference can only be drawn if it is the more natural of the inferences that arise. (see **Govan v Skidmore 1952 (1) SA 732 (N)** as explained by Holmes JA in **Ocean Accident and Guarantee Corporation Ltd v Koch 1963(4) SA 147(A) at 159 B-D** and

followed in **Hulse-Renter & others v Godde 2001(4) SA 1336 (SCA) at 1344 C-F**. Such inference can simply not be drawn when it is quite clear not only that SATAWU was adamant that it would not initial the handwritten amendment to the addendum but also that it sought to ensure that the arrangement contemplated in clause 6 was not done away with. Furthermore, we are of the view that there can be no logical explanation why SATAWU would have seen it as advantageous to itself to agree that, notwithstanding the fact that it was the biggest of all the other unions added together, it should, nevertheless, be bound by a decision taken by the minority unions.

[34] In all of the circumstances we have no hesitation in coming to the conclusion that SATAWU did not acquiesce to the April 1 agreement nor did it at any stage agree to be bound by any decision of the minority unions. Accordingly, the appeal stands to be dismissed. There is no reason why costs should not follow the result.

[35] In the premises the appeal is dismissed with costs.

Zondo JP

I agree.

Jappie AJA

I agree.

Musi AJA

Appearance:

For the appellant	:	P Kennedy SC with adv Van As
Instructed by	:	Moodie & Robertson
For the respondent	:	JG Van der Riet SC
Instructed by	:	Cheadle Thompson & Haysom Inc
Date of judgment	:	11 May 2006