IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 69/14

In the matter between:–

CSS TACTICAL (PTY) LTD **Appellant**

and

SECURITY OFFICERS CIVIL RIGHTS AND ALLIED

WORKERS UNION (SOCRAWU) **First Respondents**

ZWABESHO MBATHA and 302 others **Second and further Respondents**

Heard: 19 May 2015

Delivered: 24 June 2015

Summary: Employer seeking to interdicting strike in support of certain demands – parties concluding agreement at national level on certain issues – agreement specifying issues negotiating at national level and at company level- employer contending that issues raised by union at company level ought to be negotiated at national level – employer conceding only at the appeal stage that some issues

negotiating at company level – evidence proving national agreement silent on remaining issues – striking on remaining issues not limited by national agreement and union having constitutional right to strike on these issues - Appeal dismissed with costs.

Coram: Tlaletsi DJP, Ndlovu *et* Landman JJA

JUDGMENT

LANDMAN JA

Introduction

[1] The appellant, CSS Tactical (PTY) Ltd, unsuccessfully sought to interdict the Security Officers Civil Rights and Allied Workers Union (SOCRAWU) and 302 members (henceforth the respondents) from striking in support of certain demands on the basis of section 65(3)(a) of the Labour Relations Act 66 of 1995 (the LRA). The appeal is with the leave of the Labour Court (AC Basson J).

The dispute

[2] On 23 August 2013, the respondents submitted a list of demands to the appellant. The appellant then recorded its willingness to enter into negotiations on one of the demands namely the demand for limited organisational rights. But the parties deadlocked on the appropriate forum. The appellant referred a dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA) in terms of section 24 of the LRA pertaining to the interpretation of the Framework Agreement. The union referred a dispute to the CCMA concerning matters of mutual interest. The referrals were consolidated and considered by the CCMA.

[3] The dispute with which this appeal is concerned arose when the respondents gave notice to the appellant that they intended striking on 17 December 2013. The issues set out in this notice were fewer than those listed in the letter of 23 August. The following issues were listed in the strike notice:

1. travelling allowance;
2. two structures of tactical unit;
3. two full-time shop stewards;
4. quality SABS approved bullet vests;
5. one roster system; and
6. payment for attending criminal cases as witnesses arising out of arrests made while on duty.

[4] The appellant applied for and was granted a rule *nisi* by the Labour Court calling on the respondents to show cause why they should not be interdicted from striking. The interdict was discharged on the return day.

The context

[5] It is necessary to sketch the background and collective bargaining regime in which the demands were made. I do so, at this stage, without analysing or applying it to the problem.

The national forum

[6] The appellant, the union and others engaged in the security sector do not have a bargaining council for this industry. Instead, they have concluded a collective agreement entitled "The Negotiating Framework Agreement for the National Bargaining Forum for the Private Security Sector" ('the Framework Agreement') providing, as the title indicates, for a National Bargaining Forum for the Private Security Sector ("the Forum"). The appellant through its employers' organisation

The South African National Security Employers' Association (SANSEA) is a member of the forum. It is common cause that the union is by association bound by this agreement. The forum operates by negotiating, periodically, at national level, terms and conditions which are applicable to the private security sector. The bargain is then recorded in a collective agreement entitled "The Memorandum of Agreement" ('the Memorandum') for submission to the Minister of Labour, in order that she may, in her discretion, incorporate it or parts of it in a sectoral determination for the private security sector in accordance with the Basic Conditions of Employment Act 75 of 1997. Potentially (and in practice) portions of the Memorandum reached at the Forum are extended to all participants in the sector, including non-parties to the Forum and the resultant Memorandum. On promulgation of a sectoral determination containing all or some of the terms of the Memorandum, the Memorandum comes into operation as a collective agreement binding its signatories and members of those signatories. See clause 9.3 of the Framework Agreement.

[7] Clause 8.5 of the Framework Agreement provides that:

> `Unless otherwise agreed no party or member of the party to this agreement shall raise for negotiation with any other party or member of such a party to this agreement, any issue that has been tabled, traded off or negotiated in the course of in the round of negotiations and to all the commencement of the next round of negotiations in terms of this agreement.'

The Memorandum of Agreement

[8] The members of the Forum concluded a Memorandum of Agreement on 2 April 2012. It was signed, *inter alia*, by the appellant, but not by the first respondent although it is conceded that the agreement is binding on the respondents.

[9] Clause 2 of the Memorandum provides that:

> '2.1 The parties agree that the Agreement shall be submitted to the Minister of Labour in order that she may in accordance with the provisions of

Chapter 8 of the Basic Conditions of Employment Act 75 of 1997, include the conditions of employment contained therein in in the promulgation of a Sectoral Determination for the Private Security Sector thereby extending such conditions of employment to all participants in the said sector including but not limited to non-parties to this agreement, National Key Points, Armed Response, independent contractors, sub-contractors, car guards and labour brokers.

2.2 The parties agree that the Agreement and its provisions shall become effective only upon the promulgation of a Sectoral Determination. Insofar as the provisions of the Sectoral Determination differ from the Agreement by variation or omission, the promulgated provisions shall supersede any provision of the Agreement.

2.3 …

2.4. The Parties specifically record that all provisions of the Negotiating Framework Agreement are implied in this agreement.'

[10] Clause 12 of the Memorandum, under the heading "Centralised collective bargaining" provides that:

'12.1 The parties reaffirm their commitment to bargain centrally on all issues relating to the private security sector and the national bargaining forum, with the exception of the following items that may be dealt with at company level:

12.1.1 bicycle allowance, and

12.1.2 dog allowance.

12.2. Notwithstanding [12.1] above, the Parties agree that the individual trade unions may engage at company level with individual Employers on issues relating to compliance with the Sectoral Determination.'

[11] The Memorandum came into operation when the Sectoral Determination was amended with effect from 1 September 2012 to include some parts of the

Memorandum. It is common cause that clause 12 was not included in those amendments.

Failure to stay decision pending the outcome of CCMA ruling

[12] Mr Soldatas, who appeared on behalf of the appellant, submitted, while accepting that the court *a quo* was not obliged to have stayed its judgment on whether the respondents' demands were permissible ending a ruling on the interpretation of the memorandum by the CCMA, submitted that it ought to have done so.

[13] The submission outlined above differs radically from the grounds of appeal. In para 4.6 of the notice of appeal, it is asserted that the CCMA has the sole and exclusive power to interpret the Memorandum, as a collective agreement, and that the court *a quo* incorrectly usurped these powers. It does not appear that the court *a quo* was asked to exercise a discretion to stay the proceedings; rather it seems that it was submitted to that court that it could not do otherwise. Where a party has not asked a court to exercise a discretion and where there is no duty on a court to have exercised a discretion *suo motu*, it is not competent to raise such a complaint on appeal.

The appellant's concession

[14] During the appeal hearing, Mr Soldatas conceded that demands 2, 3, 4 and 5 in the strike notice (two structures of tactical unit; two full-time shop stewards; quality SABS approved bullet vests and one roster system) were issues that could properly be determined at company level and that the respondents were entitled to strike to bring about an agreement concerning them. This concession was not made in the court *a quo*.

[15] The import of this concession is twofold. First the demands were permissible demands and so a strike relating solely to those demands would be protected. The second is that notwithstanding the terms of the Memorandum that it constitutes the entire agreement between the parties, it is flawed in respect of the regulation of the issues of mutual interest designated for company level

bargaining. However, notwithstanding this concession, Mr Soldatas submitted that the remaining demands in the strike notice (the travelling allowance and payment for court attendance) were not designated by the Framework Agreement or the Memorandum for company level bargaining but restricted to national level bargaining. He makes two submissions in this respect; one based on clause 8.5 of the Memorandum, the other based on clause 12. These are the issues which this court is required to decide.

Limitations on the right to strike

[16] Both submissions are founded on the right of parties to limit a right to strike by means of a collective agreement. The Constitution of the Republic of South Africa of 1996 acknowledges the right of employers and employees to engage in collective bargaining. In *Minister of Defence and Others v SA National Defence Union and Another,*[1] the SCA said that:

> 'A trade union does not have a constitutional right to engage in collective bargaining on any issue at large. Counsel for both parties accepted that the scope of the right to engage in collective bargaining is limited to bargaining in respect of legitimate labour issues. But the scope of the bargaining right is itself capable of being limited if that can be justified under s 36.'

[17] A protected strike, which is a permissible mechanism to give effect to the right to bargain collectively, cannot extend further than the permissible bargaining issues. Every worker has the right to strike.[2] But the right to strike like other rights set out in the Bill of Rights may be limited in terms of a law of general application to the extent provided for in section 36(1).[3] Section 64(1) of the LRA, a law of general

[1] (2007) 28 ILJ 828 (SCA) at para 11.
[2] Section 23(2)(c) of the Constitution.
[3] (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

application, echoes the constitutional provision. It provides that every employee has the right to strike subject to certain procedural conditions.[4] Section 65 of the LRA limits the right to strike in several respects. One of the limitations gives

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(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[4] The conditions are:

(*a)* the *issue in dispute* has been referred to a *council* or to the Commission as required by *this Act*, and
(i) a certificate stating that the *dispute* remains unresolved has been issued; or
(ii) a period of 30 days, or any extension of that period agreed to between the parties to the *dispute*, has elapsed since the referral was received by the *council* or the Commission; and after that -
(*b)* in the case of a proposed *strike*, at least 48 hours' notice of the commencement of the *strike*, in writing, has been given to the employer, unless -
(i) the *issue in dispute* relates to a *collective agreement* to be concluded in a *council*, in which case, notice must have been given to that *council*; or
(ii) the employer is a member of an *employers' organisation* that is a party to the *dispute*, in which case, notice must have been given to that *employers' organisation*; or
(*c)* in the case of a proposed *lock-out*, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any *trade union* that is a party to the *dispute*, or, if there is no such *trade union,* to the *employees,* unless *the issue in dispute* relates to a collective agreement to be concluded in a *council*, in which case, notice must have been given to that *council;* or
(*d)* in the case of a proposed *strike* or *lock-out* where the State is the employer, at least seven days' notice of the commencement of the *strike* or *lock-out* has been given to the parties contemplated in paragraphs *(b)* and *(c).*
(2) If the *issue in dispute* concerns a refusal to bargain, an advisory award must have been made in terms of section 135(3)*(c)* before notice is given in terms of subsection (1)*(b)* or *(c).* A refusal to bargain includes -
(*a)* a refusal -
(i) to recognise a *trade union* as a collective bargaining agent; or
(ii) to agree to establish a *bargaining council*;
(*b)* a withdrawal of recognition of a collective bargaining agent;
(*c)* a resignation of a party from a *bargaining council*.
(*d)* a *dispute* about -
(i) appropriate bargaining units;
(ii) appropriate bargaining levels; or
(iii) bargaining subjects.
(3) The requirements of subsection (1) do not apply to a *strike* or a *lock-out* if -
(*a)* the parties to the *dispute* are members of a *council* and the *dispute* has been dealt with by that *council* in accordance with its constitution;
(*b)* the *strike* or *lock-out* conforms with the procedures in a *collective agreement*;
(*c)* the *employees* strike in response to a *lock-out* by their employer that does not comply with the provisions of this Chapter;
(*d)* the employer locks out its *employees* in response to their taking part in a *strike* that does not conform with the provisions of this Chapter; or
(*e)* the employer fails to comply with the requirements of subsections 4) and (5).
(4) Any *employee* who or any *trade union* that refers a *dispute* about a unilateral change to terms and conditions or employment to a *council* or the Commission in terms of subsection (1)*(a)* may, in the referral, and for the period referred to in subsection (1)*(a)* -
(*a)* require the employer not to implement unilaterally the change to terms and conditions of employment; or
(*b)* if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.
(5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of *service* of the referral on the employer.

expression to a so-called peace clause in terms of which the parties agree that neither employers nor employees may lock-out or strikes for the period and concerning the issues agreed upon. Section 65(3)(a) provides that:

> `(3) Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out -
>
> (a) if that person is bound by -
>
> (i) any arbitration award or collective agreement that regulates the issue in dispute;'

[18] Section 65(3)(a) permits parties to limit the right to strike by regulating the issue in dispute. The term "regulate" includes regulation by way of creating a process to resolve the issue. See *Fidelity Guards v PTWU and Others*.[5]

The clause 8.5 argument

[19] Mr Soldatas submitted that clause 8.5 of the Framework Agreement applies to the two remaining demands made by the respondents. He bases this submission on two legs. The first is that there was no other agreement to the contrary as envisaged by clause 8.5 and secondly the respondents as a member of a party to the agreement are precluded by the clause from raising for negotiation with the appellant "any issue that has been tabled, traded off or negotiated in the course of in the round of negotiations" and must stand over until the commencement of the next round of negotiations. The first leg may be accepted as a fact.

[20] As regards the second leg, Mr Soldatas concedes that the papers do not show that a travelling allowance or court attendance pay "had been tabled, traded off or negotiated in the course of in the round of negotiations". This would ordinarily mean that absent such evidence, clause 8.5 would not apply.

[5] 1997 11 BLLR 1425 (LC).

[21] However, Mr Soldatas contended that this Court may infer that the remaining issues/demands as they involved a cost to the employers bargaining at the Forum would have featured in the minimum terms and conditions ie the costs to the employers and so these demands were on the negotiating table and may not in terms of clause 8.5 be bargained for until the next round of negotiations.

[22] The law regarding the drawing of factual inferences in a civil case is clear. The law is summarized by Zulman JA in *Cooper NO and Another v Merchant Trade Finance Ltd,*[6] as follows:

> 'If the facts permit of more than one inference, the court must select the most "plausible" or probable inference. If this favours the litigant on whom the onus rests he is entitled to judgment. If on the other hand an inference in favour of both parties is equally possible, the litigant will have not discharged the onus of proof.'[7]

[23] In my view, an inference that respondents did not place a travelling allowance or pay for court attendance on the bargaining table at the Forum is at least as plausible as an inference that they did place such a demand on the table. The result is that the appellant who bears the *onus* of showing that its inference is the more plausible inference has not done so and consequently clause 8.5 does not assist the appellant.

<u>The clause 12 argument</u>

[24] Mr Soldatas then fell back on clause 12 of the Memorandum which featured in his concession. He submitted that this section is capable of being read that the parties agree to bargain centrally on all issues relating to the private security sector at the national bargaining forum, with the exception of the bicycle allowance, and dog allowance and other issues mentioned in his concession that may be dealt with at company level. In effect, the contention is that by precluding collective bargaining at company level, clause 12 of the Memorandum "regulates"

[6] (474/97) [1999] ZASCA 97 (1 December 1999).
[7] At para 7.

the issues in dispute by creating a process for resolving all such matters of mutual interest. And therefore section 65(3)(a) of the LRA precludes a strike on the issues raised by the respondents.

[25] It is true that on its wording, clause 12 may be read as restricting the issues that may be raised at company level and reserving all other issues for national level bargaining. But when it is conceded that clause 12 is not all embracing it must follow that clause 12 may not be intended to eliminate the two remaining demands from bargaining at that level. If this is the case, then it cannot be said that the collective agreement has competently limited the constitutional right to strike.

[26] The agreement is silent on what is to happen to demands or issues not raised at the national forum although it may be implied that demands that are not tabled cannot be raised during the currency of a collective agreement and must stand over until the next round of negotiations.

[27] The submission that the parties bargain at national level on actual terms and conditions and not minimum terms and conditions does not take the matter any further.

[28] It follows that the appeal stands to be dismissed.

Costs

[29] It was submitted that this Court should be slow to grant an order for costs where the parties are engaged in an ongoing relationship. This is true but had concession been made in the court *a quo*, it may have led, at least, to the abandonment of the grounds labelled impermissible and, as I have found, the refusal of the interdict prohibiting the strike. There is no reason to interfere with the costs order of the court *a quo*. It is fair that the respondent should be awarded the costs of the appeal.

[29] In the premises, I make the following order:

The appeal is dismissed with costs.

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A A Landman

Tlaletsi DJP, Ndlovu JA concurred in the judgment.

APPEARANCES:

FOR THE APPELLANT:	A C Soldatos of Fluxmans Inc
FOR THE RESPONDENTS:	Chris Todd and Nikita Reddy of Bowman Gilfillan Attorneys