THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 1746 / 16

In the matter between:

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY **Applicant**

and

SOUTH AFRICAN MUNICIPAL WORKERS UNION **First Respondent**

INDIVIDUALS LISTED IN ANNEXURE "A" **Individual Respondents**

Heard: **16 August 2016**

Delivered: **19 August 2016**

Summary: Strike – whether unprotected – true nature of issue in dispute determined – real issue about case of improper / incorrect application of grading – constitutes a rights dispute – strike unprotected

Strike – whether unprotected – issue of grading determined by collective agreement – issue in dispute thus regulated by collective agreement – strike unprotected

Essential services – cancellation of minimum service agreement – requirements for cancellation – agreement not validly cancelled and still in force – employees consequently not engaged in essential service

Strike – application for interdict – requirements of Section 68 – grounds for condonation – non compliance condoned

Interdict – principles stated – *prima facie* right shown and other requirements satisfied – interdict granted

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter came before me on 16 August 2016 as an opposed application by the applicant to interdict contemplated strike action by the respondents. The application was brought in terms of Section 68 of the LRA.[1] After considering the affidavits filed by both parties, and hearing submissions in Court, I issued the following order on 16 August 2016:

> '1. The provisions of the Rules relating to the time and manner of service are dispensed with and this matter is heard as one of urgency in terms of Rule 8.
>
> 2. The failure to comply with section 68 of the Labour Relations Act, 66 of 1995 ("the Act") as to prior notice of the application is condoned.
>
> 3. A *rule nisi* is issued calling on the Respondents to show cause on 11 November 2016 at 10h00 or so soon thereafter as the matter may be heard, why a final order not be granted in the following terms:

[1] Labour Relations Act 66 of 1995.

3.1 The strike threatened by the Respondents in the First Respondent's letter of 5 August 2016 ("the strike") is declared to be unprotected and unlawful;

3.2 The First Respondent is interdicted and restrained from calling, promoting, encouraging, supporting, participating in or otherwise furthering the strike;

3.3 The Second to Further Respondents are interdicted and restrained from calling, promoting, encouraging, supporting, participating in or otherwise furthering the strike;

4. The orders in paragraphs 3.2 and 3.3 above shall operate with immediate effect as an interim interdict pending the final determination of this matter on the return date hereof.

5. Costs are reserved for argument on the return date.

6. Written reasons for this order will be handed down on Friday 19 August 2016.'

[2] The matter was argued on the basis of interim relief being sought by the applicant. That being the case, the applicant must show, as was said in *National Council of SPCA v Openshaw*[2]:

'*(a)* A *prima facie* right. What is required is proof of facts that establish the existence of a right in terms of substantive law; *(b)* A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; *(c)* The balance of convenience favours the granting of an interim interdict; *(d)* The applicant has no other satisfactory remedy.'

[3] The applicant also sought condonation for failing to give the requisite prior notice of this application, as prescribed by Section 68(3) of the LRA.[3]

[2] 2008 (5) SA 339 (SCA) at 354.
[3] Section 68(3) reads: 'Despite subsection (2), if written notice of the commencement of the proposed strike or lock-out was given to the applicant at least 10 days before the commencement of the proposed strike or lock-out, the applicant must give at least five days' notice to the respondent of an application for an order in terms of subsection (1)(a)'.

[4] This judgment now constitutes the written reasons referred to in paragraph 6 of my order, *supra*.

Background facts

[5] This case has as its core a dispute about the grading of the individual respondents. The respondents contend that the individual respondents have not been properly graded by the applicant, and seek the consequential outcome that the individual respondents be graded at the level of superintendent and be remunerated accordingly.

[6] The applicant is a municipality established in terms of the Municipal Structures Act[4]. The applicant conducts a number of municipal owned entities, such as City Power, Pikitup, Johannesburg Water, Johannesburg Metrobus, Cityparks and Johannesburg Roads Agency. The municipal entity at stake in this matter is the Johannesburg Metropolitan Police Department ('JMPD').

[7] The individual respondents are all employed as educators in the JMPD training academy.

[8] In terms of Government Notice R1216 as contained in the Government Gazette dated 12 September 1997, all municipal traffic services and policing have been declared to constitute an essential service in terms of Section 71(1) of the LRA. This meant that all employees employed in the JMPD were designated to be part of an essential service.

[9] On 19 December 2003, the applicant, the first respondent and IMATU concluded a minimum service collective agreement ('MSA'), relating to *inter alia* the JMPD. In terms of the MSA, and with specific reference to the JMPD, various employment categories are listed with the accompanying amount of employees that would be regarded as being a minimum service for each of these occupational categories. Consequently, only those numbers of employees in those categories, as listed in the MSA, would be regarded as being part of the essential service component of the JMPD.

[4] Local Government: Municipal Structures Act 117 of 1998.

[10] After the conclusion of the MSA, it was submitted to the Essential Services Committee established in terms of the LRA for ratification. On 12 January 2005, the MSA was then ratified by the Essential Services Committee.

[11] In its founding affidavit, the applicant contended that the MSA had since become outdated, and stopped fulfilling a useful purpose. As a result, IMATU gave notice on 10 June 2014, insofar as it was a party to the agreement, of cancellation of the MSA. The applicant followed suit, and on 1 July 2014, it gave notice of cancellation of the MSA. These notices were unilateral, and were served on the first respondent. The first respondent did not answer these notices, and there is no evidence that it agreed with this approach adopted by the other two parties.

[12] In 2014, a dispute arose with regard to the grading of the individual respondents. The individual respondents contended, as supported by the first respondent, that they were not being properly graded as educators, and thus were not being properly paid. The nub of the issue was that the individual respondents considered that their proper grading should be that of superintendent level, and not the lower grading they were subjected to at the time.

[13] A task team was appointed in February 2014 to investigate this complaint. The task team proceeded to appoint an independent third party, being Divine ICT Placements ('ICT') to conduct a formal grading of the positions of educators. ICT conducted this grading and applied the 'Patterson' grading system. The applicant correlated its own internal grading system to this 'Patterson' grading conducted. The applicant concluded, pursuant to this exercise, that the individual respondents were properly graded and were in the correct grading band.

[14] Needless to say, the individual respondents were not satisfied with this outcome, and what followed was a number of formal disputes brought the applicant in this regard.

[15] Firstly, and in 2015, the first respondent, on behalf of four of the current individual respondents, referred an unfair labour practice dispute to the South

Africa Local Government Bargaining Council ('the bargaining council'). In this referral, the specific issue in dispute was described as being that the applicant's conduct in correlating the grading outcome to the actual occupational levels in the applicant was distorted, and this actually constituted a demotion of these individual respondents. In short, the case was that these individual respondents were entitled to be graded as superintendents, and any lower grading was a demotion.

[16] On 7 September 2015, and pursuant to arbitration proceedings, an award was handed down by Arbitrator Williams of the bargaining council. A perusal of the award reveals that case of the first respondent and the four individual respondents was squarely founded on a contention that the applicant incorrectly applied the ICT grading by allocating the wrong amount of points to the educators positions. According to these respondents, had the grading been properly and correctly applied, the four individual respondents should have received an allocation of 14 points and thus would have been placed in a Patterson Band D, and by not doing so, the applicant demoted them.

[17] Arbitrator Williams disagreed with the respondents' case. According to the arbitrator, the points allocated to the educators' post by the applicant fell 'squarely' in the graded bracket envisaged by the Patterson grading. The arbitrator accepted that the applicant conducted a proper and *bona fide* grading exercise. The arbitrator then dismissed the unfair labour practice case. This award was never challenged further.

[18] Also in 2015, and in particular in February, the first respondent referred what was described as a 'mutual interest' dispute to the bargaining council, on behalf of the individual respondents. In this referral, the dispute is described as 'corelation of employer is not based on grading results for educators; shifts & progression plans' (sic). Only the first issue raised is of relevance to the current matter before me. As to the outcome sought in this referral, it was recorded in the referral as 'correct correlation for correct placement'.

[19] This dispute was conciliated on 20 April 2015. In this instance, the conciliator, T I Boyce, accepted that the individual respondents were all engaged in an essential service, and issued a certificate of failure to settle recording that the dispute had to be referred to arbitration in terms of Section 74(4) of the LRA.

The dispute was then indeed referred by the respondents to arbitration that same day. However, and shortly thereafter on 26 April 2015, the respondents, through their attorneys, then withdrew what they described as the 'grading/correlation/remuneration of educators' dispute.

[20] On 16 March 2016, the first respondent, acting on behalf of its members employed in five other municipal entities[5] in the applicant, referred what it described as a mutual interest dispute to the bargaining council. This dispute was described as the applicant's failure to implement benchmarking and inconsistency with regard to the application of the remuneration policy. Part of the relief sought was the implementation of benchmarking.

[21] It was common cause that this dispute was settled following head office level facilitation by the CCMA. A comprehensive collective settlement agreement was concluded between the parties on 14 and 15 April 2016 respectively ('the collective agreement').

[22] Of critical importance to the current proceedings is that the collective agreement did not just apply to the five municipal entities referred to. In clause 1.4.1 of the collective agreement, it is recorded that: 'this settlement agreement resolves in its entirety all disputes between the parties in relation to benchmarking and/or the application of the remuneration policies and practices of the CoJ and all its municipal entities (and not limited to those ME's cited in the benchmarking dispute referral) through the adoption of a new remuneration philosophy'. The collective agreement goes on to define this new remuneration philosophy as:[6] 'the new remuneration philosophy is based on the principle (and supporting framework) of common job grading, external benchmarking, common salary key scaling with a common key scale adjusted / notched for tenure with progression based on performance, subject to affordability and sustainability'.

[23] As to the substance of the collective agreement, it was agreed that the applicant shall implement a common job grading system in all its entities.[7] It was further agreed that each job / job category would be graded using a TASK grading system with the view of external benchmarking, in order to determine

[5] Being Pikitup, Cityparks, Water, Citypower and Metrobus.
[6] Clause 1.4.2 of the collective agreement.
[7] Clause 3.

a fair, affordable and sustainable salary for each job.[8] A comparison would be conducted with similar weighted jobs in the public sector with particular reference to other metropolitan municipalities of similar size.[9] And finality, so as to be economically viable, the benchmarking had to be grounded in economic reality, affordability and sustainability, with due comparison to industries in the private sector.[10]

[24] It was specifically recognized in the collective agreement that notwithstanding the implementation of the principles in the collective agreement, anomalies may remain, but this would be normalised though time and individual application.[11] Provision was made for the implementation of the agreement, starting in July 2016.[12] It was also agreed that the collective agreement binds all the first respondent's members from time to time, and superseded and replaced all prior agreements on the subject matter of the collective agreement.[13]

[25] In the event of a dispute about the agreement, its interpretation or application, a dispute resolution procedure is agreed upon.[14] In particular, it was agreed that even if there was a material breach of the agreement by either party, the agreement would nonetheless remain of full force and effect. Disputes about breach, interpretation or application would be resolved by obligatory conciliation, followed by a referral to arbitration if the issue is not resolved. It is recorded, as part of the dispute resolution process, that[15]: '…. the parties commit themselves to the following:- …. That they will not either individually or collectively, engage in any conduct or action that undermines or frustrates the implementation of any of the terms of this agreement or the implementation of this agreement as a whole.'

[26] A final reference of importance in the collective agreement is clause 13.3, that reads thus: 'No party to this agreement or any other person bound by the terms of this agreement shall be entitled to call for, encourage, or participate in any strike

[8] Clause 4.1.
[9] Clause 4.2.
[10] Clause 4.3.
[11] Clause 7.
[12] Clauses 9 and 11.
[13] Clauses 1.5 and 2.1.1.
[14] Clause 13.
[15] Clause 13.2.4.2.

action in respect of any issue or demand dealt with or resolved in terms of this agreement whilst this agreement remains in force.'

[27] With the ink barely dry on the collective agreement, the first respondent, on behalf of the individual respondents, again on 9 May 2016 referred the exact same dispute referred to the bargaining council in 2015 (and which was aborted). Under the heading of facts in dispute in this referral, it is recorded that: '…. During 2014, ICT Placements (ICT) recommended that all educators be graded (and remunerated) at superintendent level. The City failed to implement ICT's recommendation. Educators whether acting or permanently appointed are graded and paid) at lower levels than that of superintendent. SAMWU members demand that all educators be paid superintendent levels with effect from the date of the ICT recommendation.'

[28] The applicant contended that the dispute referral was not competent as the individual respondents were employed in an essential service, the issues had been resolved by the collective agreement, and the matter was *res judicata* because of the 2015 arbitration award. The matter could not be resolved.

[29] On 5 August 2016, the first respondent then served the applicant with a notice of intention to strike. The notice indicated that the first respondent and its members would commence strike action on 17 August 2016. The issue forming the subject matter of the strike is recorded as being that the applicant implement the ICT recommendations issued in 2014 and that all educators be graded and remunerated at superintendent level.

[30] The applicant then brought this application on 12 August 2016 to interdict the proposed strike of the respondents due to commence on 17 August 2016. As stated, the applicant also sought condonation for its failure to comply with the requisite prior notice as prescribed by Section 68 of the LRA.

Condonation

[31] The first issue to be considered is the issue of condonation for the applicant's failure to comply with the 5 (five) day time limit as prescribed by Section 68(3) of the LRA. Section 68(3) applies because the first respondent gave notice of intention to strike longer than 10(ten) days before the intended date of commencement of the strike. The applicant served its application by telefax

on the late afternoon on 11 August 2016 and filed it in Court on 12 August 2016. The application is properly brought once it is filed in Court, and not just when it is served. This makes the application 1(one) day short of the 5(five) day time limit.

[32] Even though Section 68(3) does not specifically allow for condonation to be granted, I have dealt with this issue in *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members and Others (1)*[16], and accepted that the failure to comply with the time limit in terms of section 68(3) was condonable.[17] The applicant has indeed properly applied for condonation, and this application was not opposed.

[33] The period of non-compliance was minimal. It did not infringe on the requirement that the respondents be given a reasonable opportunity to be heard. The respondents were able to file an answering affidavit, and both parties were satisfied to argue the matter on the merits, and did so. The relevant facts, as set out above, are mostly common cause. With regard to the applicable legal provisions, I am satisfied that the parties understood the issues and these were fully and properly addressed in argument in Court. There was no indication of any prejudice to the respondents.

[34] I accept good cause has been shown for the granting of condonation. The application was brought, with due expedition, considering that the strike notice was only served late afternoon of Friday 5 August 2016, attorneys having been instructed on 8 August 2016, and the intervening public holiday on 9 August 2016. But what is most critical where it comes to good cause in this instance, in my view, is that the application is one that should be determined before the strike starts, especially considering issues of possible prejudice to both parties. It is in the interest of both parties that they know exactly where they stand as far as the envisaged strike is concerned, as its legitimacy has been placed in dispute.

[16] (2014) 35 ILJ 201 (LC).
[17] Id at para 19. See also *City of Johannesburg v SA Municipal Workers Union and Others* (2010) 31 *ILJ* 1175 (LC) para 18.

[35] The Court in *Mega Express (Pty) Ltd v Employees as Listed*[18] considered financial prejudice to the employer in the context of providing a service to the public as an important consideration in matters such as these. The applicant has made out such a case in its founding and supplementary affidavit. It is clear that the strike in this case will cause the applicant substantial financial prejudice and would prejudice the general public it serves to a large extent as well. This strongly mitigates in favour of granting condonation.

[36] I thus grant condonation for the applicant's failure to comply with the time limit in Section 68(3). With the strike scheduled to commence on 17 August 2016, and with the application having been brought virtually immediately upon the strike notice being received, this matter is indeed one of urgency and I condone any non-compliance with the Court Rules as well, and accept that this matter be considered as one of urgency in terms of Rule 8.

The issue of a *prima facie* right

[37] In its founding affidavit, the applicant has contended that the proposed strike of the respondents would be unprotected for a number of reasons. In short, these reasons are: (1) the individual respondents are designated to be part of an essential service and are thus not permitted to strike; (2) The issue in dispute in this instance is a rights dispute which must be resolved by way of arbitration or adjudication; (3) the issue in dispute is regulated by the collective agreement; and (4) the matter is *res judicata* because of a prior arbitration award. Based on these considerations, the applicant argues that it has a *prima facie* right to the relief sought.

[38] In turn, and in the respondents' answering affidavit, the respondents contend that the individual respondents resort under the part of the excluded employees under the minimum service agreement, this agreement was not validly cancelled, and thus the essential service prohibition does not apply. The respondents further contend that there is nothing in the collective agreement that actually determines or regulates the issue in dispute, and that the dispute is one of mutual interest that can competently form the subject matter of strike action. Finally, the respondents say that the arbitration award

[18] (2012) 33 ILJ 2634 (LC) at para 20.*

does not finally determine the issue, and related to a different cause of action. For these reasons, the respondent argue that no *prima facie* rights has been shown to exist, that would substantiate the relief sought.

Essential Service

[39] I will first deal with the essential services point. Because a MSA was concluded between the parties after the JMPD was declared an essential service, and this was ratified by the Essential Services Committee ('ESC'), Section 74 no longer applies. Only those employees as specified in the MSA would be subject to the prohibition against participation in strike action, and considering that the notice of intention to strike issued by the first respondent was only limited to participation by those employees not covered by the MSA, strike action would not be scuppered by the essential services prohibition in Section 65(1)(d). As the Court said in *Eskom Holdings Ltd v National Union of Mineworkers & others (Essential Services Committee Intervening)*[19]:

> '… a 'minimum service' … is intended to allow certain workers in an industry designated as an essential service to strike while at the same time maintaining a level of production or services at which the life, personal safety or health of the whole or part of the population will not be endangered. Recognizing this the legislature, presumably in a bid to prevent the declaration of an industry as an essential service from impinging unnecessarily on the right to strike …'

[40] The only issue that remains in this regard is whether the MSA was indeed cancelled in 2014. The applicant and IMATU gave unilateral notice of cancellation of the MSA, but the first respondent never did, nor agreed to this. The first respondent contended that the applicant and IMATU could not unilaterally cancel the MSA without the first respondent, because the agreement was ratified by the ESC. In terms of Section 72 of the LRA, the ESC may ratify any collective agreement that provides for the maintenance of minimum services in a service designated as an essential service, in which case the minimum services are to be regarded as an essential service in respect of the employer and its employees and Section 74 does not apply. Because ratification by the ESC is necessary for these consequences to find

[19] (2011) 32 ILJ 2904 (SCA) at para 8. See also para 29 of the judgment.

application, the question is whether the MSA was susceptible to be cancelled without similarly involving the ESC. I do not believe that it is, for the reasons to follow.

[41] It is so that any collective agreement for an indefinite term (unless the agreement provides otherwise) is cancellable on reasonable notice by any party in terms of Section 23(4) of the LRA.[20] The MSA is clearly a collective agreement concluded pursuant to collective bargaining just like any other collective agreement, and it is for an indefinite term. I am however of the view that the purpose behind such a MSA, and the actual requirement of ratification by the ESC for it to be effective, renders reliance by any of the parties to the MSA on Section 23(4) to unilaterally cancel it, without endorsement by the ESC, incompetent. In *Eskom Holdings*[21] the Court held:

> '… the determination of what is an essential service …. is a task entrusted by the legislature solely to the ESC, a body equipped with specific skills and experience to determine such important issues. …'

[42] Whilst the Court in *Eskom Holdings* recognized[22] that the MSA comes about by way of consensus between the parties which is ratified by the ESC, the Court further held:

> '…. a dispute as to how many employees in which particular categories are necessary to provide a minimum service at an acceptable level, seems to me to be equally capable of being construed as a dispute in regard to what service should be regarded as an essential service or the number and H category of employees needed to be engaged in the service designated as an essential service - and therefore susceptible to determination by the ESC under s 73.'

[43] Section 73, referred to by the Court in *Eskom Holdings*, reads:

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[20] Section 23(4) reads: '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.'
[21] (*supra*) at para 20.
[22] Id at para 22.

'(1) Any party to a dispute about either of the following issues may refer the dispute in writing to the essential services committee –

(a) whether or not a service is an essential service ; or

(b) whether or not an employee or employer is engaged in a service designated as an essential service . ….

(3) The essential services committee must determine the dispute as soon as possible.'

In casu, if the applicant wanted to effect any cancellation of the MSA, such a cancellation constitutes a change as to what would be considered to actually be an essential service in the designated industry and which employees were engaged such essential service. Any required change sought by one party (whether by cancellation or amendment), without consensus between all parties, would be a dispute about whether or not particular employees are engaged in essential services, and this would have to be referred to the ESC for determination in terms of Section 73. A unilateral cancellation of the MSA by the applicant thus falls foul of this process and cannot defeat the application of the MSA. In simple terms, the application of a ratified MSA can only be changed with the endorsement of the ESC, which did not happen *in casu*.

[44] Dhaya Pillay, in an article titled *Essential Services: Developing Tools for Minimum Service Agreements*[23] states that because of the fact that MSAs have to enjoy the approval and consequent certification of the ESC, singularly distinguishes bargaining for MSAs from bargaining for other rights and interests, considering that collective bargaining agreements for other rights and interests do not require ratification. The learned author further said that:[24]

> '…. In essence, bargaining for MSAs is aimed at agreeing a set of facts to persuade the ESC that the minimum service offered is truly essential and sufficient and that the ESC should certify the agreement. Bargaining partners should put themselves in the shoes of the ESC during bargaining to assess whether their agreement will pass muster. ….'

[23] (2012) 33 ILJ 801 at 811.
[24] Id at 812.

and concluded as follows:[25]

> '… Certification of MSAs is not a mere procedural rubber stamping formality. As an administrative authority the ESC applies its mind to the MSAs and all the material accompanying its application for certification. To secure certification, the bargaining partners should operate essentially as a subset of the ESC, doing all the ground work that the ESC would otherwise have to do if it investigates the service. …'

I agree with all these sentiments.

[45] The recent amendments to the LRA, effective 1 January 2015, in terms of which Section 72 was substituted, seems to confirm the above position. It is so that when the applicant sought to cancel the MSA, these amendments were not yet operative. But, and in my view, the amendments did nothing more than to simply confirm the true position, as discussed above, by introducing the following as a new Section 72(4):[26]

> 'A minimum service determination-
> *(a)* is valid until varied or revoked by the essential services committee …'

[46] It is therefore my view that without ratification by the ESC, the applicant's purported cancellation of the MSA in 2014 was of no force and effect. As such, the MSA continues to apply. If the MSA was not current and had become outdated, as the applicant suggested, the applicant needed to negotiate and try and procure consensus from all the other parties to amend it, and then submit the agreed amended product to the ESC for ratification. If the applicant was unable to secure such an agreement, the issue to change the terms of the minimum services had to be referred to the ESC for determination in terms of Section 73. The applicant did none of this, and was not entitled to simply unilaterally cancel the MSA.

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[25] Id at 815.
[26] Section 72 was substituted by Section 13 of Act 6 of 2014.

[47] But even if I am wrong in my reasoning as set out above, the terms of the MSA itself stood in the way of unilateral cancellation. The MSA has a specific clause dealing with cancellation,[27] which reads: 'This agreement …. shall remain in force for at least one (1) year and remain indefinite thereafter until superceded by another concluded between the parties to this agreement. …. The parties involved shall however not be precluded from agreeing on amendments to this agreement from time to time prior to the aforesaid date'.

[48] This kind of provision is exactly what is meant by 'unless the collective agreement provides otherwise' as reflected in Section 23(4). Where the agreement provides otherwise, unilateral cancellation of the collective agreement on reasonable notice in terms of Section 23(4) is not permitted. In *Edgars Consolidated Stores Ltd v Federal Council of Retail and Allied Workers Union*[28] the Court said:

> '….These words suggest an exception to the general rule that the balance of the sentence provides for. The balance of the sentence is to the effect that a party to a collective agreement concluded for an indefinite period may terminate that agreement by the giving of reasonable notice in writing to the other party. The exception contemplated is where the collective agreement itself provides otherwise. In other words a collective agreement cannot be terminated in the manner provided for in s 23(4) if it itself precludes that. Such a case would be where a trade union and an employer have included a clause in their collective agreement to the effect that a party must seek a third party's leave to terminate the agreement before it can terminate it, eg seek the court's leave or the CCMA's leave.'

[49] In simple terms, the MSA was kept evergreen. It could not be cancelled and could only be replaced by a subsequent agreement. The parties were free to vary its terms, but were not free to unilaterally terminate it. This is what the MSA, itself, as collective agreement, specifically provided. Accordingly, unilateral cancellation of the MSA on reasonable notice in terms of Section 23(4) was not competent.

[27] Under the heading of 'DURATION OF AGREEMENT'.
[28] (2004) 25 ILJ 1051 (LAC) at para 22.

[50] I therefore conclude that where it comes to the issue that the proposed strike would be unprotected because the individual respondents are engaged in an essential service, the applicant has not shown a *prima facie* right to exist. Strike action by the respondents would thus not be prohibited for this reason.

The nature of the dispute

[51] In each case where this Court is called upon to decide whether a proposed strike would be protected or unprotected, the Court must, for itself, determine the true or real issue in dispute, forming the subject matter of the proposed strike, no matter how the parties may have sought to describe or label the dispute. In *Coin Security Group (Pty) Ltd v Adams and Others*[29] the Court said:

> '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 & others (2)* (1997) 18 ILJ 671 (LAC) and *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers' Union & 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). ….'

And in *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members and Others*[30] it was held that: '…. 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 ….'.

[52] As to what must be considered by the Court when establishing the true or real issue in dispute, the Court in *TSI Holdings (Pty) Ltd and Others v National Union of Metalworkers of SA and Others*[31] said:

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[29] (2000) 21 ILJ 924 (LAC) at para 15.
[30] (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.
[31] (2006) 27 ILJ 1483 (LAC) at paras 29 and 31.

> 'The purpose of the concerted refusal to work must be determined in the light of all the conduct of the respondents. This includes what the respondents wrote in the referral of the dispute to conciliation and in the strike notice where these can shed light on such purpose. In the form used for the referral of the dispute to conciliation there is a space where the form required the respondents to state what they desired as an outcome of the conciliation process. ….
>
> What is said in the strike notice is particularly important because it will probably reflect the views of the union or the strikers at the time that they were notifying the employer of the commencement of their strike ….'

[53] Similarly the Court in *City of Johannesburg Metropolitan Municipality v SA Municipal Workers Union and Others*[32] 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'. And in *SATAWU v Coin Reaction*[33], 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'.

[54] Applying all the above considerations, I have little doubt that the real and true issue in dispute forming the subject matter of the proposed strike, crystalized down to its simplest form, is founded on an issue of right, and this is a right which accrued to the individual respondents as a result of the ICT grading conducted at the beginning of 2014. The 2015 arbitration proceedings between the applicant, the first respondent, and four of its members, as referred to above, which had as its foundation the exact same 2014 ICT grading, made it clear that the parties considered it to be a rights dispute. Further, the 2015 'mutual interest' referral by the first respondent reflected that there was no 'correlation' between the grading done and the grades attached to the positions the individual respondents occupied, and the outcome

[32] (2009) 30 ILJ 2064 (LC) 2069G-H. See also *Unitrans Supply Chain Solution (Pty) Limited v South African Transport and Allied Workers Union and Another* [2014] JOL 31172 (LC) at paras 9 – 11.
[33] (2005) 26 ILJ 1507 (LC) at 1512D.

required was a 'correct correlation'. Similarly, the 2016 "mutual interest' referral makes it clear that the dispute is that the individual respondents were actually graded as superintendents but his was not implemented, and the outcome required is that the individual respondents be paid in accordance with that grading. Finally, the strike notice itself puts the issue beyond doubt, in that the demand that would form the basis of the strike is recorded as being the implementation of the ICT grading and the payment of the individual respondents accordingly. All of this must surely envisage the enforcement of a right already considered to have accrued. This is a rights dispute.

[55] It is thus undeniable that the ICT grading was done, and then implemented on the individual respondents by the applicant. The outcome of this implementation was that the individual respondents were properly graded. The respondents disagreed. Whilst the respondents accepted the grading was indeed done, their view was that this grading in fact gave rise to the upgraded grading of superintendent. In short, the demand of the respondents was that the individual respondents' posts reflect the groper grading at which their posts had already been graded, and be paid accordingly. This is simply not a situation of the respondents raising a demand that the individual respondents be regraded where no such regrading or no proper grading existed, or where the applicant as employer had a discretion as to whether the individual respondents should be regraded or not. The Court in *Mathibeli v Minister of Labour*[34] dealt with a similar situation and said:

> '…. Two claims are made by the appellant:
>
> 16.1 First, the appellant's referred dispute alleged a fact: ie, that he was *already occupying* a grade 11 post. Unless that allegation of fact was proven, the appellant had no claim to more pay. This factual allegation was not a claim of entitlement to be promoted to a grade 11 post, which would indeed be an interest issue, but rather an allegation that he was, as a fact, in a grade 11 post. If he failed on that alleged fact, as he plainly did, the claim had to fail too. ….'

The Court concluded:[35]

[34] (2015) 36 ILJ 1215 (LAC) at para 16.
[35] Id at para 19.

> 'Accordingly, the view I take is that a rights issue was indeed referred by the appellant, ie a claim based on being paid the wrong amount. ….'

The exact same considerations apply *in casu*. In reality, the respondents are saying that the individual respondents are already in posts already graded at superintendent level in 2014, and should be paid accordingly. This has to be a rights issue.

[56] The Labour Court has in the past applied similar reasoning. In *National Commissioner of the SA Police Service v Potterill NO & others*[36] the Court dealt with a situation where employees contended that their posts had been regraded, but their salaries had not been increased in terms of the regrading, and held as follows:[37]

> '… The substance of the dispute pertained to the employees' complaint that their posts had been regraded but, despite the fact that they had continued to be employed in the same posts and despite the requirements of regulation 24, their salaries had not been increased. In my view this is a complaint about alleged unfair conduct "relating to the promotion" of the employees. ….
>
> I do not accept the argument that the dispute was a "dispute of interests" which, for this reason, fell beyond the jurisdiction of the arbitrator. The employees' case was that they were the victims of an unfair labour practice and that, as a matter of law, they were entitled to salary increases. This was a "dispute of rights". The fact that the remedy sought was an increase in salary does not change the character of the dispute. A claim for a higher salary as a matter of right is not an "interests dispute".'

[57] As a proper illustration to the contrary, so to speak, the Court in *Polokwane Local Municipality v SA Local Government Bargaining Council and Others*[38] dealt with a complaint by an employee was that her position should be evaluated and that she be placed on a higher grade and be paid accordingly, in circumstances where the employee's post was never so evaluated nor upgraded. The Court held that in such circumstances, the employee was

[36] (2003) 24 *ILJ* 1984 (LC).
[37] Id at paras 15 and 20.
[38] (2008) 29 *ILJ* 2269 (LC) at para 21.

seeking to create a new right of being placed and paid a salary at a higher or upgraded position, which was a matter of mutual interest.[39] In *Thiso and Others v Moodley NO and Others*[40] the Court held that where the employer had a discretion whether to upgrade the positions, and upgrading was demanded, it was a matter of mutual interest and not a rights dispute. *In casu*, and for the reasons as dealt with above, the opposite is true, meaning that the issue is indeed a rights dispute.

[58] I am therefore satisfied that the real dispute of the respondents constitutes a rights dispute. The dispute, at its core, is one of promotion. The respondents' case is that the individual respondents have been upgraded, and as such, are entitled to the implementation of such upgrade and to be paid increased salaries accordingly. The fact that the demand is coupled with an increase in salary matters not. The increase in salary flows from the right sought to be asserted by the respondents, which rights accrued pursuant to the 2014 ICT grading. It equally does not matter if the assertion of right is coupled with labelling describing it as unfair. The failure by an employer to implement a regrading and commensurate increase in salary that employees are of right entitled to would be unfair, per se. This kind of dispute must be subjected to arbitration pursuant to the unfair labour practice provisions in Section 186(2)(a) of the LRA. In simple terms, and as said in *Mathibeli*[41], if the respondents prove the facts that their posts were in fact regraded at superintendent level with commensurate pay increase, they would be entitled to the relief they now demand in the proceedings before me. If not, they get nothing.

[59] Accordingly, and because the issue in dispute in this instance is subject to resolution by way of arbitration under the LRA, strike action would be prohibited by way of the application of Section 65(1)(c) of the LRA, which reads: 'the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law'. The respondents' proposed strike would therefore be unprotected, and in this

[39] Id at para 21. See also *Member of the Executive Council, Department of Sport, Recreation, Arts and Culture, Eastern Cape v General Public Service Sectoral Bargaining Council and Others* (2015) 36 ILJ 2893 (LC) at para 62.
[40] (2015) 36 ILJ 1628 (LC) at para 14.
[41] (*supra*).

respect, the applicant has thus established a *prima facie* right to the relief sought.

The 2016 settlement agreement

[60] The above being said, and even accepting that the grading dispute of the respondents constitute an interest dispute, the question of the impact of the CCMA conciliated collective settlement agreement concluded between the parties in 2016 arises (the collective agreement). The applicant, as stated, contended that this collective agreement determined the issue in dispute forming the subject matter of the proposed strike by the respondents.

[61] As I have discussed above, the issue in dispute is about grading, or using the related term 'benchmarking', of the individual respondents. It is a dispute that arose by virtue of a grading process in 2014. The 2016 collective agreement clearly and unambiguously sought to finally dispose of all grading and benchmarking disputes in all the municipal entities of the applicant that existed prior to the conclusion of the collective agreement. This is confirmed in no uncertain terms in the clauses of the collective agreement I have set out above.

[62] In disposing of all the earlier grading / benchmarking disputes, the settlement agreement then implements a new system and basis of grading to be applied to all jobs and positions in the applicant. In other words, no matter what the position may have been before in the various municipal entities in the applicant, where it came to the grading / benchmarking of employees, this has been replaced with a new grading dispensation. This constitutes, in effect, a novation of all the obligations and possible entitlements relating to grading / benchmarking in the past. In *Tauber v Von Abo*[42] the Court aptly described novation as follows, which in my view is exactly what happened *in casu*:

> 'Novation can be described as the replacing of an existing obligation by a new one, the existing obligation being discharged by the new obligation.'

[42] 1984 (4) SA 482 (E) at 485C.

[63] Accordingly, the 2014 ICT grading issue which forms the cornerstone of the respondent's case is no longer, after the 2016 settlement agreement, a live dispute. The issue has been compromised, so disposed of, and in the end novated. In *Wilson Bayly Homes (Pty) Ltd v Maeyane and Others*[43], the Court said:

> 'The contract in the present case was one of compromise. The nature of such a contract is that it is concluded because the rights of the parties are uncertain, and they choose not to resolve that uncertainty. By the very nature of such a contract, there can be little room for finding that the parties must have intended their contract to depend upon the existence of one or other of the factors relevant to their respective rights. It is precisely to avoid testing them that they compromise.'

I am satisfied the same considerations apply *in casu*.

[64] Further, and in any event, the collective agreement itself, determines the issue in dispute in another way as well. In the collective agreement, the respondents commit themselves to an undertaking not to pursue strike action where it comes to any issue determined by the agreement. Where there may be a dispute about grading of employees in the applicant, the parties have further committed themselves to a process of conciliation, followed by arbitration. This dispute resolution process makes sense, for the simple reason that as the parties have agreed to a grading ideology, methodology and process where it comes to grading / benchmarking across the applicant which is to be applied to all positions, the only remaining issues can be that the grading was not properly or incorrectly applied, or not applied at all when it should have been. This would be readily determinable by way of arbitration.

[65] The relevant provisions of the LRA which need to be considered in this respect are Sections 65(1) (a) and 65(3) (a), which provide:

> '(1)(a) 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 if - (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute; …..

[43] 1995 (4) SA 340 (T) at 345E-F. See also *Van As v African Bank Ltd* 2005) 26 ILJ 227 (W) 231C-G.

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

[66] *In casu*, clause 13.3 of the collective agreement clearly prohibits strike action in respect of any issue or demand dealt with or resolved in terms of the agreement whilst it remains in force. I have no doubt that the dispute pursued by the respondents in this instance is such a dispute. Again, at its core, it is about grading, and grading is fully and finally determined by the collective agreement to the specific exclusion of all prior arising disputes on this issue. Section 65(1)(a) and (b) thus squarely stands in the way of the respondents' proposed strike action.[44] As the Court said in *CSS Tactical (Pty) Ltd v Security Officers Civil Rights and Allied Workers Union and Others*[45]:

> '….Section 65 of the LRA limits the right to strike in several respects. One of the limitations gives expression to so-called peace clause in terms of which the parties agree that neither employers nor employees may lock out or strike for the period and concerning the issues agreed upon.
>
> 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.'

[67] Further, and where it comes to the concept of 'regulation' in Section 65(3)(a), the Court in *Fidelity Guards v PTWU and Others*[46] 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

[44] Section 65(1)(a) and (b) reads: 'No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute; (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration ….'.
[45] (2015) 36 ILJ 2764 (LAC) at paras 17 – 18.
[46] [1997] 11 BLLR 1425 (LC) at 1433F-H.

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.'

[68] The judgment in *Fidelity Guards* was approved of in *Air Chefs (Pty) Ltd v SA Transport and Allied Workers Union and Others*[47] 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.' Further reference is made to the judgment in *ADT Security (Pty) Ltd v SA Transport and Allied Workers Union and Another*[48] where it was held also with specific reference to Section 65(3)(a) that 'the prohibition against a strike action 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.[49]

[69] The dispute resolution process as prescribed by the settlement agreement would be the kind of process regulation as contemplated by the judgment in Fidelity Guards. This means that Section 65(3)(a) finds application, and the respondents' proposed strike would be unprotected for that reason as well.

[70] In the circumstances, I am satisfied that the applicant has established a *prima facie* right to the relief sought.

Other considerations

[71] My above conclusions are sufficient to afford the applicant the relief sought in its notice motion. As such, I do not consider it necessary to determine any of the other issues raised by the applicant as to why the proposed strike is unprotected.

[72] The issues of prejudice, balance of convenience and an alternative remedy were not in contention and I accept that all these requirements, in the

[47] (2013) 34 ILJ 119 (LC) at para 27.
[48] (2012) 33 ILJ 2061 (LC) at para 18.
[49] 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.

circumstances of this matter, have been met. The applicant is thus entitled to the declaratory relief and the interdict it sought.

[73] As to costs, and because the relief was granted in the form of an interim order, the issue of costs can properly addressed on the return date, and I reserved the issue of costs accordingly.

[74] It is for all the above reasons that I made the order that I did on 16 August 2016, as referred to in paragraph 1 of this judgment.

_____

S.Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Advocate P Buirski
Instructed by:	Moodie and Robertson Attorneys
For the Respondents:	Mr R Daniels of Cheadle Thompson & Haysom Attorneys