IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN BRAAMFONTEIN)

CASE NR: J1312/09

In the matter between:

SOUTH AFRICAN FEDERATION OF CIVIL ENGINEERING CONTRACTORS (SAFCEC)obo its MEMBERS LISTED IN ANNEXURE "A" **Applicant**

and

NATIONAL UNION OF MINEWORKERS ("NUM") **First Respondent**

BUILDING CONSTRUCTION AND ALLIED WORKERS UNION ("BCAWU") **Second Respondent**

JUDGEMENT

AC BASSON, J

1] This was an application to declare a strike which is due to take place on Wednesday 8 July 2009 to constitute an unprotected

strike as contemplated in section 68 of the Labour Relations Act 66 of 1995 (hereinafter referred to as "the LRA") and to interdict and restrain members of the First and Second Respondents who are employees of members of the Applicant from participating in such unprotected strike. The Applicant also seeks an order interdicting and restraining the Respondents or their officials or office bearers from encouraging or inciting their members from engaging in such unprotected strike action. The parties were *ad idem* that should this Court grant the interdict it will only have a limited duration and will only operate until 31 August 2009. Why this is so will be discussed hereinbelow in more detail.

2] Although the Applicant approached this Court for an interim order, the parties have agreed that the matter be argued as a final interdict. The Respondents also agreed not to challenge the urgency of the matter. The parties were therefore in agreement that this Court is merely required to decide the merits of the dispute which is essentially a legal issue. The parties were also *ad idem* that costs should follow the result.

Parties to this application

3] The Applicant is the South African Federation of Civil Engineering

Contractors (hereinafter referred to as "SAFCEC"), an employer's organisation registered in terms of the LRA. The Applicant acts in these proceedings on its own behalf and on behalf of its members listed in Annexure "A". A cursory assessment of Annexure "A" reveals that the Applicant represents roughly 422 employers. The First Respondent (the National Union of Mineworkers - hereinafter referred to as "NUM") and the Second Respondent (the Building Construction and Allied Workers Union - hereinafter referred to as "BCAWU") are both registered unions. Approximately 20 000 of the 80 000 employees currently in the employ of the Applicant's members are in turn members of either NUM or BCAWU.

Factual background

Collective agreement of 4 May 2004 ("the procedural agreement")

4] It is common cause that on 4 May 2004 a collective agreement (the Civil Engineering Industry Interim Procedural Agreement) was concluded between the Applicants on the one hand and NUM and BCAWU on the other hand. Of particular relevance to this application is Clause 11 of the procedural agreement which imposes a peace obligation on the parties. This clause reads as

follows:

"11.1 Neither the employers' organization, the trade unions, its members nor officials of the trade union shall sanction, promote or participate in any industrial action against other parties to this agreement –

11.1.1 during the currency of a substantive agreement, which deals with the matter giving occasion for the strike or lockout;

11.1.2 during the currency of the Sectoral Determination on any issue tabled for negotiation or which formed the subject of negotiations at the national forum.[1]

11.1.3 until such time as the procedures contained in this agreement and the Labour Relations Act have been exhausted, save that industrial action shall be prohibited if the employees or employers who are or would be concerned in the strike or lock-out are employers or employees engaged in emergency work.

1 Own emphasis. The parties have agreed that all negotiations and agreements will be concluded by the national forum only and that no negotiations on wages and substantive issues may be conducted on a regional basis. See clause 3.6 of the procedural agreement. The National Forum is the national collective bargaining forum established in terms of the procedural agreement. The parties are not members of a bargaining council.

11.2 Insofar as the trade union and/or their members participate in picketing, the trade unions and the officials of the trade unions shall endeavour to ensure that such picketing is lawful and in accordance with the picketing procedures as had agreed to by the parties."

The Substantive Agreement[2] dated 31 August 2006 (hereinafter referred to also as the "current agreement")

5] On 31 August 2006 the Applicant on behalf of its members concluded a Substantive Agreement with NUM and BCAWU. The agreement regulates a range of issues including but not limited to wages.

6] It is clear from paragraph 1 of the Substantive Agreement that it would: -

"… commence on the date of it being promulgated as an amendment to the Sectoral Determination 2 for the Civil Engineering Industry, and will remain in operation for a

2 The substantive agreement is defined in the procedural agreement as "*an agreement concerning conditions of employment and any matters that may be of mutual interest to the parties concluded at the national forum"*

minimum period of 3 years or until amended by future agreement."

7] On 3 July 2007 the Applicant entered into separate agreements by way of addenda to the Substantive Agreement signed on 31 August 2006. Paragraph 2 of these addenda state the following under the heading "*Amendments*":

"Therefore the parties agree to incorporate the following amendments into the Substantive Agreement:

2.1 Clause 1 is herewith amended to read as follows: "This Agreement will commence on the first Monday of September 2006 and will remain in operation for period of three years ending on 31 August 2009"

2.2 LDC Gratuity, Medical Aid for permanent employees and LDC funeral benefit, as was proposed by the Task Teams and agreed to by the National Negotiating Forum will be implemented with effect form 1 August 2007."

8] It is thus clear from the aforegoing that the current Substantive Agreement came into effect on 31 August 2007 and will remain in

operation until 31 August 2009 whereafter a new Substantive Agreement will regulate terms and conditions and other matters of mutual interest between the parties.

9] Sectoral Determination 2 for the Civil Engineering Sector was amended in terms of section 56(1) of the Basic Conditions of Employment Act no 75 of 1997 by the Minster of Labour. This amendment was gazetted on 16 February 2007 and became binding on 1 March 2007 and will remain operative for a minimum period of three years until amended. The issue of minimum wages to be paid in the bargaining unit stated in the Substantive Agreement being grades 1 to 9 inclusive is regulated by this Sectoral Determination and is paid by the members of the Applicant.

Demands in respect of the period commencing September 2009

10] In terms of clause 5.8 of the procedural agreement, trade unions shall submit to the employer's organisation a written draft agenda and proposals concerning negotiations in respect of, *inter alia,*

conditions of employment, at least 12 months before the date on which the Sectoral Determination needs to be amended. In terms of clause 5.12 the first meeting between the parties shall be held at least 5 months before the date upon which the current agreement will expire. At this meeting the parties shall commence negotiations and endeavour to reach agreement within two months. In terms of clause 5.15 in the event the parties are unable to conclude an agreement, the negotiations shall be adjourned and the parties shall follow the dispute resolution procedures as per clause 10 of the agreement. These dispute procedures contemplate that should the matter not be resolved at the national forum, the dispute may be referred to the Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as "the CCMA"). Possible strike action after the parties have deadlocked and after a certificate of non-resolution has been issued, is not expressly excluded by clause 10 of the procedural agreement which regulates the dispute resolution procedures.

11] What is thus clearly contemplated by the aforementioned clauses of the procedural agreement is that negotiations in respect of a subsequent Substantive Agreement may commence during the currency (or put differently, before the expiry) of the current substantive agreement. In the event of a deadlock, the parties may

resort to the dispute resolution procedures including referring the dispute to the CCMA. What the Applicant argue the unions may not do is to call out their members on strike until the expiry of the Substantive Agreement as they are barred from doing so by the peace clause contained in clause 11 of the procedural agreement. I will return to this point hereinbelow.

12] In accordance with the aforementioned procedures, NUM duly tabled their demands in writing for the period commencing on the first Monday in September 2009 (which is the date of expiry of the current Substantive Agreement) on 3 December 2008. BCAWU tabled its demands in writing for the period commencing on the first Monday in September 2009 on 13 February 2009.

13] Negotiations between the parties commenced and deadlocked on 3 June 2009. NUM and BCAWU referred a dispute concerning matters of mutual interest to the CCMA for conciliation. In terms of the LRA Form 7.11, the dispute is summarised as follows: "…. *the parties failed to reach an agreement on wage negotiations...*" Conciliation failed and a certificate of outcome was issued by the Commissioner in terms of which it is certified that the issue in dispute remained unresolved. The dispute is described as

concerning "*mutual interest*" and relating to issues of "*wages and conditions of employment"*. It is trite that, in terms of section 64(1) of the LRA, the unions are entitled to call out their members on strike as the procedural requirements of acquiring the right to embark on protected strike action have been complied with. (As already pointed out, the Applicant in this matter is of the view that the employees may not strike in the present matter.)

14] In a letter dated 26 June 2009, the Applicant, thought its attorneys telefaxed a letter to NUM and BCAWU advising them that they are of the view that any strike action will be prohibited and thus be unprotected in terms of the LRA. As this letter embodies the position of the Applicant, I quote the relevant parts of this letter:

> *"1. We act for SAFCEC.*
>
> *2. We have been informed that a certificate of outcome was issued by the CCMA this afternoon after the parties deadlocked in the wage negotiation which was held in terms of the Civil Engineering Industry Interim Procedural Agreement.*
>
> *3. That certificate, a copy of which is attached for ease of reference, states that the dispute concerns mutual interest and relates to wages and conditions of*

employment.

We are further instructed to notify you as follows: -

4. *SAFCEC is of the view that any strike action by your members at any of SAFCEC's members in furtherance of the wage demands and other demands tabled in the course of the negotiations and CCMA conciliation proceedings between the parties, during the currency of the present Substantive Agreement between the parties, will be in contravention of section 65(1)(a) and/or section 65(3)(a)(i) and (ii) of the Labour Relations Act and unlawful;* ***and further, is in breach of the peace obligation contained in clause 11 of the Civil Engineering Industry Interim Procedural Agreement.***[3]

5. *Accordingly, in the event that the NUM and/or BCAWU give SAFCEC or its any of members (sic) notice of any such intended strike action or embarks on any strike action before the end of the currency of the present Substantive Agreement, i.e 31 August 2009, we are instructed to seek and obtain an order from the Labour Court declaring that strike to be unlawful and unprotected and interdicting you and*

3 Own emphasis.

your members from organizing, promoting or participating in any such strike action together with an appropriate cost order against the union.

6. *In the circumstances we are further instructed to formally request, as we hereby do, that the NUM and BCAWU provide SAFCEC with a written undertaking that you will not do anything that may lead any of your members to proceed with strike action before 1 September 2009.*
7. *Kindly provide the requested undertaking by no later than 12H00 on Monday 29 June 2009.*
8. *In the event that such undertaking is not given and that any unlawful and unprotected strike ensues, we reserve the right of all SAFCEC members to approach the Labour Court for an order against the NUM and/or BCAWU for payment of just and equitable compensation for any loss attributed to such a strike in terms of section 68(1)(b) of the Labour Relations Act."*

15] It is clear from this letter (and the argument in Court) that the Applicant does not dispute the right of the members of NUM and BCAWU to embark on strike action in support of the demands

tabled and which formed the subject matter of the negotiations (at the National Negotiating Forum and at conciliation under the auspices of the CCMA) once the current Substantive Agreement has come to an end. The Applicant therefore does not dispute that the members of NUM and BCAWU have acquired the right to strike as a result of the certificate of non-resolution issued by the CCMA on 3 June 2009. What is disputed is that the members are legally entitled to go on a protected strike on 8 July 2009 as, so it is argued by the Applicant, such action would be in contravention of the peace obligation contained in clause 11 of the procedural agreement which precludes strike action in pursuance of issues tabled in negotiations during the currency of the Substantive Agreement even if such tabled issues are not dealt with or covered by the current Substantive Agreement and even if such strike action will be in support of the next or yet to be concluded Substantive Agreement which will govern conditions of employment after the expiry of the current Substantive Agreement.

16] The Applicant thus based its argument on the fact that the Substantive Agreement, which regulates minimum wages via the Sectoral Determination, actual wages and annual bonuses for a period of three years ending on 31 August 2009, contains a peace

clause which precludes any strike action in support of any demands for further increases on wages during the period of the current Substantive Agreement. It is further argued that the strike will be unprotected in light of section 65(3)(a)(i) of the LRA because the members of NUM and BCAWU are bound by a collective agreement (the Substantive Agreement) that regulates the issue in dispute between the parties. The strike will further be unprotected in terms of the provisions of section 65(1)(a) of the LRA in light of the fact that NUM and BCAWU as well as their respective members are bound by clause 11.1.2 of the Substantive Agreement which prohibits a strike in respect of the issues in dispute during the currency of the Substantive Agreement which includes issues tabled for negotiation or which formed the subject of negotiations at the National Forum. In essence it was the argument obo the Applicant that the peace clause places a *"time ban"* on the members of NUM and BCAWU from striking during the currency of the current Substantive Agreement which only comes to an end at the end of August 2009. (As already indicated, the Applicant does not dispute that a strike will be competent *after* the expiry of the Substantive Agreement which contains the peace clause.)

17] Notwithstanding this letter both NUM and BCAWU gave notice of its intention to embark upon strike action at 12H00 on 8 July 2009.

18] The Applicant strongly argued that the members of the Applicant risk facing a very damaging breakdown in the continued operation of their business with a consequential negative effect on clients and projects, many of which are time-bound. It was further submitted that the financial losses will be irrecoverable and substantial. It was also argued that the members of the Applicant will suffer irrecoverable financial losses as a result of strike action in the form of penalties under construction contracts and the retarding of key infrastructural projects including those critical to the 2010 Soccer World Cup and other developmental objectives such as international airports in Johannesburg and Durban, the Gautrain, the Medupi and Kuseli power stations and Project Turbo for the upgrading and extension of the power station at Sasol. It was also submitted that the image of the members of the Applicant and the level of service to their clients may be placed in serious jeopardy.

19] The case for the Respondents was crisp. It is denied that there is any bar to the members of NUM and BCAWU to *immediately* engage in strike action in support of their demands. More in particular it is denied that such strike action is prohibited by any of the clauses of the procedural agreement concluded between the

parties or any of the provisions of the LRA. It was pointed out by the Respondents (and in fact common cause) that although they accept that the Substantive Agreement terminates on 31 August 2009, the demands for which the members of NUM and BCAWU intend to strike are for the terms of the new Substantive Agreement to be concluded and which will replace the current Substantive Agreement when it expires on 31 August 2009. It was further submitted that, as a matter of proper interpretation of the relevant provisions of the procedural agreement and an application of relevant case law, principles of constitutional and labour law which protect the right to strike, the contention advanced by the Applicant to the effect that no strike action can take place until 1 September 2009, is unsound and unsustainable. The crux of the argument was therefore that no clause in the procedural agreement nor in terms of the law, precludes the members of NUM and BCAWU to take part in strike action now with a view to pursuing demands for the new Substantive Agreement. In respect of the argument that the Applicant will suffer irrecoverable prejudice as a result of the strike, it was submitted that this is not a compelling reason in light of the Applicant's own version that the members of NUM and BCAWU would, in any event, be able to engage in a protected strike as from 1 September 2009 (which is the date upon which the current Substantive Agreement expires).

Legal framework

20] Section 23 of the Constitution affords *every* worker the right to strike. The principle purpose of a strike is to support collective bargaining. The Constitutional Court in *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and the Minster of Labour* [2003] 2 BLLR 103 (CC) emphasised the important role that collective bargaining and strike action play in the workplace especially in creating a fair industrial relations environment. Of particular importance is the comment by the Constitutional Court that the Courts should "*avoid setting in constitutional concrete, principles governing that bargain which may become obsolete or inappropriate as social and economic conditions change":*

> *"[13] In section 23, the Constitution recognises the importance of ensuring fair labour relations. The entrenchment of the right of workers to form and join trade unions and to engage in strike action, as well as the right of trade unions, employers and employer organisations to engage in collective bargaining, illustrates that the Constitution contemplates that*

collective bargaining between employers and workers is key to a fair industrial relations environment. This case concerns the right to strike. That right is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in section 23, therefore, the importance of those rights in promoting a fair working environment must be understood. It is also important to comprehend the dynamic nature of the wage-work bargain and the context within which it takes place. Care must be taken to avoid setting in constitutional concrete, principles governing that bargain which may become obsolete or inappropriate as social and economic conditions change."

21] It is trite that protected strike action will cause disruption and even severe economic harm to the employers of the strikers. This is, however, inherent to strike action and in fact, the purpose of strike action to place financial pressure on the employer to accede to the demands of its employees. See *Black Allied Workers Union &*

Others v Prestige Hotels CC t/a Blue Waters Hotel (1993)[4] 14 *ILJ* 963 (LAC):

> *"A lawful strike is one of the weapons in the armoury of employees which may be used in the power play in the process of collective bargaining. …… Section 79(1) of the Act provides an indemnity against civil legal proceedings to parties engaged in a legal strike. (See in this regard the remarks of Page J in NTE Ltd v Ngubane & others at 925A-F.) The court will not interfere with the power play between the parties for were it to do so, it would be rendering harmless the very weapon which legislature permits the employee to use.*[5]
>
> ***……***
>
> *A lawful strike is by definition functional to collective bargaining. The collective negotiations between the parties are taken seriously by each other because of the awful risk they face if a settlement is not reached. Either of them may exercise its right to inflict economic harm upon the other. In that sense the threat of a strike or lock-out is conducive and functional to collective bargaining. (See National Union of*

4 Although decided under the previous LRA, the comments in respect of the purpose of strike action are still valid.
5 At 970 – 971.

Mineworkers v East Rand Gold & Uranium (1991) 12 ILJ 1221 (A) at 1237F-G and Perskorporasie van SA Bpk v MWASA unreported LAC (Tvl) case no NH/1172/1824 16 November 1992 at 19-20.) The right to strike is important and necessary to a system of collective bargaining. It underpins the system - it obliges the parties to engage thoughtfully and seriously with each other. It helps to focus their minds on the issues at stake and to weigh up carefully the costs of a failure to reach agreement."[6]

See also *Stuttafords Department Stores Ltd v SA Clothing & Textile Workers Union* (2001) 22 ILJ 414 (LAC) where Zondo JP endorsed the intended effect of a strike as follows:

"[24] The very reason why employees resort to strikes is to inflict economic harm on their employer so that the latter can accede to their demands. A strike is meant to subject an employer to such economic harm than he would consider that he would rather agree to the workers' demands than have his business harmed further by the strike. The essence of a lock-out is that the employer denies the locked-out employees the opportunity to earn their wages, thereby causing financial harm to the locked-out employees, in the

6 *Ibid* 972.

> *hope that, after a certain point, the financial harm or pain inflicted on the employees would have been so much that they would consider that they would rather agree to the employer's demands than continue to be subjected to the lock-out and to lose more wages."*

In passing it should thus be pointed out that the mere fact that a strike inflicts economic harm on an employer – as the intended strike in the present circumstances will undoubtedly do – that in itself does not entitle an employer to an interdict. Potential prejudice or harm is, however, relevant in cases where a service has been declared an essential service. In those cases employees will not be able to embark on strike action.[7] Provision is thus made for a limitation of the right to strike in isolated instances precisely because the legislature has identified the need to eliminate potential harm in instances where the interruption of such a service will have the effect of endangering the life, personal safety or health of the whole or any part of the population.[8] Whether or not to interdict the impending strike in the present matter depends purely on legal considerations such as whether or not the employees are entitled in terms of the provisions of the LRA to embark on

7 Section 65(1)(a) of the LRA.
8 Section 213 of the LRA.

protected strike action. In the present case the pertinent question is whether or not the peace clause prohibits the members of NUM and BCAWU from embarking on strike action.

22] The LRA provides the legal framework for the exercise of the right to strike. Section 64(1) of the LRA subjects the right to strike to a number of limitations. The first limitation relates to the procedural requirements that must be followed for a strike to be protected. In essence it is required that the issue in dispute must be referred to conciliation. Once conciliation fails and a certificate of non-resolution is issued, employees may embark on strike action provided that the required strike notice is given to their employer. Of particular relevance to the present application is the limitation on strike action in terms of a peace clause (see section 65(1)(a) of the LRA) and the limitation on strike action where the subject of the strike is regulated by a collective agreement (section 65(3)(a) of the LRA).

23] Peace clause agreements are binding and the courts will hold parties bound to such agreements.[9] This is consistent with the provisions of section 65(1)(a) of the LRA which prohibits strike

9 The Labour Appeal Court in *Bader Bop (Pty) Ltd v National Union Of Metal & Allied Workers of SA & Others* (2002) 23 *ILJ* 104 (LAC) ad paragraph [3] recognised the limiting effect of a peace clause: *"A second limitation [of the right to strike] concerns the prohibition of strikes in respect of disputes and issues that are the subject of a peace clause or that are regulated by collective agreement."*

action where the parties have agreed not to embark on strike action in terms of a collective agreement.

24] It is trite that a collective agreement creates certain rights and obligations in respect of the parties to the agreement. A collective agreement is defined by the LRA as "*a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded between an employer on the one hand and a registered trade union on the other hand"*. In terms of section 23 of the LRA it is clear that a collective agreement as contemplated by the LRA binds the parties to the agreement as well as the members of the registered trade union. Collective agreements (especially those which regulate wages and other conditions of employment) usually endure for a certain period of time after which it is envisaged that the parties will negotiate with a view of concluding a new collective agreement which will replace the current collective agreement. One of the most important consequences of a peace clause in a binding collective agreement is that the parties may not strike over any issue regulated in terms of the collective agreement (see section 65(1)(a) and (b) of the LRA). [10]

10 See also *SACCAWU obo Members v The Spar Group Limited & Others* (Case No: D435/07) at paragraph [22] *et seq*.

25] Both parties were in agreement that, as a general rule, employees are not precluded from striking over an issue couvered by a *current* agreement in support of a demand relating to a *future* agreement. This principle was confirmed by the Labour Appeal Court in *South African National Security Employers Association v TGWU & Others* 1998 (4) BLLR 364 (LAC) (hereinafter referred to as the "SANSEA-case"). In that case the Labour Appeal Court confirmed that a strike is not prohibited during the currency of a collective agreement when the issue in dispute relates to terms and conditions applicable *after* its expiry. In the SANSEA-case the unions and the employers' organisation negotiated wages and other conditions of employment with unions annually since 1993. The LAC made it clear that the legislature had intended to provide that the parties are bound by a collective agreement for the period that it was operative and that they were precluded from resorting to industrial action to change its terms (at paragraph [23]). The parties are, however, not prohibited from striking about an issue not provided for in the collective agreement. It is also important to note that the collective agreement in the SANSEA-case provided that the parties were entitled to bargain collectively about the terms and conditions of the next or subsequent agreement during the currency of its predecessor. That was also the procedure that had been followed every year.

26] What is thus clear from the foregoing is that a collective agreement remains binding in respect of the issues identified and regulated in the current collective agreement. A fundamental consequence of this principle is therefore that the parties may not strike about any issue which is regulated by the current agreement. Nothing, however, prevents parties from *bargaining* in respect of an issue to be regulated in a following (or new) agreement. Nothing also prevents the parties from *striking* over issues to be included in the next agreement during the currency of the present agreement or, put differently, during the currency of the predecessor of the next agreement. The LAC in the SANSEA-case confirmed this principle as follows:

> *"[23] What the legislature intended with section 65(3)(b)(i), in my view, was to provide that the parties are bound to the terms of the collective agreement for the period that it is operative and that they are precluded from resorting to industrial action to change its terms. So, or example, having agreed on wages in the security industry for the period 7 April 1997 to 6 April 1998, the unions are not entitled to strike to increase the wages <u>for that period</u>.*

[24] What the 1995 Act does not expressly prohibit is a resort to industrial action by one of the parties to a collective agreement to resolve a dispute about an issue which is not regulated by the collective agreement.

[25] On the facts of this case the dispute between SANSEA and the unions which forms the subject matter of the strike is the wage dispute for the 1998/1999 year. The 1997/1998 agreement does not regulate that issue. Accordingly, in terms of section 65(3)(b)(i) the unions are not prohibited from embarking on a strike to compel compliance with its demand."

Zondo, J (as he then was) in the court *a quo*[11] confirmed this principle as follows:

[26] "In the light of the above I have therefore come to the conclusion that the period of application to which the proposals or demands of the unions relate is an inextricable part of the issue in dispute in a case such as this one. I am of the opinion that the fact that the subject matter of the strike relates to a period which is not covered by the current collective agreement between the parties renders section 65(3)(a)(i) inapplicable in this case because the issue in

11 *South African Security Employers Association v TGWU & Others (2)* [1998] 4 BLLR 436 (LC).

dispute is not regulated by the current collective agreement nor is section 65(1)(a) applicable because the collective agreement does not prohibit striking over this issue in dispute. I think this approach is not inconsistent with the approach which over the years has been adopted to the effect that, where an industrial council agreement or wage determination deals with wages, a strike over actual wages is not prohibited or regulated thereby because such agreements or wage determinations only deal with minimum wages..”

Does the peace clause in casu prohibit the impending strike?

27] I now turn to the crux of the present dispute. I have already pointed out that the pertinent question in the present matter is whether or not the relevant peace clause (contained in clause 11) prohibits the impending strike.

28] Mr. Van As, whilst not disputing the principle confirmed in both the court *a quo* and the LAC in the SANSEA-case, submitted that the SANSEA-case is distinguishable from the present matter as the agreement in that matter did not contain a peace clause prohibiting

any strike action on *any* issue during the currency of the (current) Substantive Agreement. The Applicant thus contended that the peace clause as contained in the Substantive Agreement in the present case contemplates a prohibition (albeit for a limited period only) on *any* strike action during the currency of the present Substantive Agreement and that such prohibition also extends to strike action in respect of a *future* Substantive Agreement until the expiry of the agreement at the end of August 2009.

29] During argument I pointed out to Mr. Van As that it would be extraordinary for unions to agree to such a limitation but that I accept that, in the event it is clear that the negotiating parties have indeed agreed to such a limitation, they would be bound by it. Consequently this Court will also hold the parties bound to such an agreement.

30] I am, however, not persuaded that the existing peace clause as contained in clause 11.1.1 and 11.1.2 should be read to include a prohibition on strike action during the currency of the (current) Substantive Agreement in support of demands tabled in respect of a subsequent Substantive Agreement. I have come to this conclusion taking into account the following: The peace clause does not expressly prohibit strike action in respect of a subsequent

collective agreement. It merely prohibits strike action on any issue tabled for negotiations or which formed the subject of negotiations at the national forum. At best what this Court is asked to do is to read into this peace clause an agreement on a time ban on industrial action or, to accept by necessary implication that such a time ban was intended by the parties.

31] Clause 11.1.1[12] does not provide the answer to the present dispute as it merely echoes what is, in any event, contemplated by section 65(1)(a) of the LRA which is to prohibit strike action during the currency of a collective agreement over an issue which is regulated by the (present) collective agreement. The answer must therefore be sought in clause 11.1.2 of the procedural agreement (which prohibits strike action "*during the currency of the Sectoral Determination on any issue tabled for negotiation or which formed the subject of negotiations at the national forum"*). Mr. Van As argued that it is clear from a reading of this clause that it contemplates strike action over *any issue* which was tabled for negotiation and which formed the subject of negotiations at the National Forum. In the present case the unions have already tabled their demands (in December 2008 and February 2009

12 Clause *11.1.1 prohibits strike action "during the currency of a substantive agreement, which deals with the matter giving occasion for the strike or lockout;"*

respectively) and negotiations have already taken place (although such negotiations have deadlocked) at the National Forum. It thus follows, so it was argued, that once an issue was tabled at the National Forum, employees cannot strike until three years have lapsed – hence the argument that the peace clause imposes a "time ban" on strike action until the end of August 2009. This, Mr. Van As submitted, include any demands in respect of a new or future Substantive Agreement.

32] My reading of clause 11.1.2 is different. Clause11.1.2, in my view, only prohibits strike action in respect of those issues which were tabled and which formed the subject matter of negotiations at the National Forum in the context of the Sectoral Determination which was subsequently concluded and which is presently in force. As such the clause therefore refers to the demands which were tabled during the negotiations which preceded the Sectoral Determination and not to any future demands that will be and have been tabled at the National Forum in respect of a new Substantive Agreement. As such the peace clause merely confirms the principle that parties may not strike during the currency of a (current) Sectoral Determination on those issues which were tabled during the negotiations and which resulted in the Sectoral Determination. There is, in my view, nothing in this clause which implies either

expressly or implicitly that strike action over a *future* collective agreement is prohibited during the currency of the (current) Substantive Agreement.

33] Clause 11.1.2 must, furthermore, be read in the context of the Substantive Agreement itself as well as against the broader constitutional framework within which labour law operates. I have already indicated that the procedural agreement contemplates and, in effect, expressly provides for negotiations in respect of a future or new collective agreement to commence long before the expiry of the current Substantive Agreement. To read into clause 11.1.2 a time ban on strike action until the expiry of the current Substantive Agreement is, in my view, simply irreconcilable with the negotiation process envisaged and provided for by the procedural agreement itself. I find it difficult to accept that the present peace clause envisages banning strike action until the expiry of the Substantive Agreement in circumstances where the very same agreement allows for parties to deadlock months before the expiry of the current agreement. The very same agreement also envisages that parties may refer the dispute to the CCMA for conciliation in the event of a deadlock. I also find it particularly difficult to accept the argument that, in the absence of a clear and unambiguous

agreement to that effect, it can be inferred or accepted that a negotiating party has agreed to a limitation of a fundamental labour right such as the right to strike. Lastly, the negotiating parties must have been aware of the SANSEA-decision at the time of the insertion of this clause and more in particular, about the principle endorsed by the LAC namely that parties may strike during the currency of an agreement in respect of a future agreement. If it was intended to limit strikes in respect of future agreements the clause would have stated so expressly.

34] In the event, I am of the view that the peace clause contained in clause 11 of the procedural agreement does not prohibit strike action during the currency of the Substantive Agreement in respect of a future agreement. I can also find no reason why costs should not follow the result

In the event the following order is made:

1. The application is dismissed with costs.

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AC BASSON, J

Date of proceedings: **3 July 2009**

Date or order and judgment: **6 July 2009**

For the Applicant:

Adv M van As instructed by O'Donovan Attorneys

For the Respondent:

Adv P Kennedy SC instructed by Cheadle Thompson & Haysom Attorneys