

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA119/2022

In the matter between:

**SOUTH AFRICAN COMMERCIAL CATERING AND
ALLIED WORKERS UNION**

Appellant

And

MASSMART HOLDING LIMITED

First Respondent

MASSDISCOUNTERS (PTY) LTD t/a GAME

Second Respondent

**MASSBUILD t/a BUILDERS EXPRESS, BUILDERS
WAREHOUSE AND BUILDERS TRADE DEPOT**

Third Respondent

**MASSMART WHOLESALE t/a JUMBO CASH & CARRY
Respondent**

Fourth

MASSTORES (PTY) LD t/a MAKRO

Fifth Respondent

MASSCASH (PTY) LTD

Sixth Respondent

**MASSMART RETAIL (PTY) LTD t/a CAMBRIDGE
FOOD & RHINO CASH & CARRY**

Seventh Respondent

Heard: 16 November and 1 December 2023

Delivered: 29 April 2024

Coram: Waglay JP, Savage JA and Malindi AJA

JUDGMENT

SAVAGE, JA

Introduction

- [1] This appeal, with the leave of the Labour Court, is against the judgment and order of that Court (per Van Niekerk J) in terms of which an exception to the jurisdiction of the

Labour Court, raised by the appellant, the South African Commercial Catering and Allied Workers Union (SACCAWU), was dismissed with each party ordered to pay its own costs.

- [2] The first to seventh respondents are Massmart Discounters Limited and a number of its subsidiary companies (collectively referred to as “Massmart”). In its statement of claim, Massmart sought damages in the sum of R9 383 454,57 as just and equitable compensation under section 68(1)(b) of the Labour Relations Act¹ (LRA) for losses suffered as a result of unlawful conduct and offences that took place during the course of a protected strike by SACCAWU and its members in 2021.
- [3] The union excepted to Massmart’s statement of claim on five distinct grounds. This appeal is concerned only with SACCAWU’s exception that the Labour Court lacked jurisdiction to order the payment of just and equitable compensation for any loss attributable to a strike or lock-out or conduct in contemplation or furtherance of a strike or lock-out in circumstances in which the strike was protected. In issue is whether such a claim is governed by section 68(1)(b) or whether it may only be pursued under the common law of delict in the High Court. There is no dispute that any unlawful conduct and breaches of the picketing rules that occurred during the course of the protected strike were not constitutionally protected.

Relevant statutory provisions

- [4] Section 67 of the LRA is headed “*Strike or lock-out in compliance with this Act*”. Section 67(1) and (2) provide that:
- ‘(1) In this Chapter, “protected strike” means a strike that complies with the provisions of this Chapter and “protected lock-out” means a lock-out that complies with the provisions of this Chapter.
- (2) A person does not commit a delict or a breach of contract by taking part in –
- (a) a protected strike or a protected lock-out; or
- (b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.’

¹ Act 66 of 1995, as amended.

[5] Section 67(6) states:

- ‘(6) Civil legal proceedings may not be instituted against any person for –
- (a) participating in a protected strike or a protected lock-out; or
 - (b) any conduct in contemplation or in furtherance of a protected strike or protected lock-out.’

[6] Section 67(8) provides that:

- ‘(8) The provisions of subsections (2) and (6) do not apply to any act in contemplation or in furtherance of a strike or a lock-out, if that act is an offence.’

[7] Section 68 is headed ‘*Strike or lock-out not in compliance with this Act*’. Subsection (1) states that:

- ‘(1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction—

- (a) to grant an interdict or order to restrain—
 - (i) any person from participating in a strike or any conduct in contemplation or in furtherance of a strike; or
 - (ii) any person from participating in a lock-out or any conduct in contemplation or in furtherance of a lock-out...’

[8] Following its amendment by section 17 of the Labour Relations Amendment Act, 2002² (LRAA), section 68(1)(b) reads:

- ‘(1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction –

...

- (b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct, having regard to –
 - (i) whether –
 - (aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;
 - (bb) the strike or lock-out or conduct was premeditated;

² Act 12 of 2002. Prior to its amendment, section 68(1)(b) referred only to orders made by the court for the payment of just and equitable compensation for any loss attributable to a strike or lock-out.

- (cc) the strike or lock-out or conduct was in response to unjustified conduct by another party to the dispute; and
- (dd) there was compliance with an order granted in terms of paragraph (a);
- (ii) the interests of orderly collective bargaining;
- (iii) the duration of the strike or lock-out or conduct; and
- (iv) the financial position of the employer, trade union or employees respectively.'

[9] Section 68(5) states:

'Participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike, may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account.'

[10] Section 69 is headed '*Picketing*'. Section 69(12) provides that:

'If a party has referred a dispute in terms of subsection (8) or (11), the Labour Court may, in addition to any relief contemplated in section 68 (1), grant relief, including urgent interim relief, which is just and equitable in the circumstances and which may include an order—

- (a) directing any party, including a person contemplated in subsection (6) (a), to comply with a picketing agreement or rule;
- (b) varying the terms of a picketing agreement or rule; or
- (c) suspending a picket at one or more of the locations designated in the collective agreement, agreed rules contemplated in subsection (4) or rules determined by the Commission.'

[11] Sections 69(8) and (11) concern the referral of a dispute about the right to picket or picketing rules first to the CCMA and thereafter to the Labour Court.

Judgment of the Labour Court

[12] The Labour Court dismissed the exception raised by SACCAWU with each party ordered to pay its own costs. It found that it would be anomalous if an aggrieved employer or union was entitled to pursue a claim for compensation in the Labour Court under section 68(1)(b) for loss attributable to a strike or lock-out not in

compliance with Chapter IV of the LRA, but not for loss attributable to conduct that constitutes a breach of the same Chapter simply because the strike or lock-out was protected. It was found that to limit an aggrieved party to the remedy of a common law delictual claim in the civil courts in such circumstances, would undermine the recognised role of the specialist Labour Courts in the determination of labour disputes, within the context of the comprehensive legislative framework regulating labour relations that the LRA represents. In arriving at this conclusion, the Court found that the immunities established by sections 67(2) to (6) are not absolute, with section 67(8) providing that the provisions of the subsections “*do not apply to any act in contemplation or in furtherance of a strike or lock-out, if that act is an offence*”.

On appeal

- [13] In oral argument for the first time, a number of new issues were raised by counsel for SACCWU which had not been canvassed in the heads of argument filed. It was therefore agreed that the parties be given an opportunity to file additional heads of argument whereafter judgment in the matter would be prepared.
- [14] SACCWU accepts that the conduct complained of by Massmart is not constitutionally protected but contends that Massmart’s claim and the remedy for unlawfulness does not lie in the LRA but in the common law, to be determined by civil courts in civil proceedings. This is contended to be so in that for just and equitable compensation to be ordered in terms of section 68(1)(b), the conduct must be in furtherance of or support for an unprotected strike or lock-out. Since the strike in this matter was protected, section 68(1)(b) does not apply and unlawful conduct cannot constitute conduct in furtherance or support of a protected strike, otherwise the LRA would sanction violence and criminal misconduct. The immunity in section 67(2) applies to conduct in compliance with the LRA and not to unlawful conduct. The heading of section 68 makes it clear that the provision pertains to an unprotected strike or lock-out, with express reference made in section 68(1) “*to a strike or lock-out that does not comply with the provisions of this Chapter*”. In addition, it was submitted that the reference in section 68(1)(b) to “*the*” strike could only be to an unprotected strike, with the decision of this Court in *Stuttafords Department Stores Ltd v SACTWU*³ (*Stuttafords*) said to support this interpretation. SACCWU contends further that the LRA was not intended to remove common law

³ (2001) 22 ILJ 414 (LAC).

causes of action or give the Labour Court exclusive jurisdiction where the common law applies. A special remedy for unlawful conduct during a protected strike that gives the Labour Court exclusive jurisdiction and requires only proof of unlawfulness does not need to be carved out. As to the power of the Labour Courts to interdict strike violence in protected strikes, it was submitted that the power is found in section 158, which provision permits the Court to grant interdictory relief.

- [15] In opposing the appeal, it was argued for Massmart that unlawful conduct during a protected strike is not protected as it is not “*conduct in furtherance of or support of a strike*” and that it is for this reason that the Labour Courts interdict strike violence that occurs in the course of protected strikes. If unlawful conduct is outside of the Labour Court’s jurisdiction, then it lacks the power to grant an order in terms of section 158. It would have a chilling effect on the Labour Court’s ability to control strike violence if it is not able to award compensation for losses attributable to such violence both in protected and unprotected strikes. Reliance on the memorandum relating to the 2012 amendments in relation to section 67 was argued to be misplaced in that the amendment did not occur. The Labour Court correctly concluded that the exception was without merit and it was submitted that the appeal must, for these reasons, fail.

Discussion

- [16] The purpose of the LRA, which gives effect to section 23 of the Constitution, is *inter alia* to promote and facilitate collective bargaining at the workplace and at sectoral level, and to regulate the right to strike and the recourse to lock-out in conformity with the Constitution. Statutes, including the LRA, are to be interpreted through the prism of the Bill of Rights.⁴ When legislative provisions are interpreted by a court, the interpretation given must be “*reasonably capable*” of bearing the meaning ascribed to it by the court.⁵ An interpretation given may not be “*unduly strained*”,⁶ with a constitutionally compliant interpretation, not one which “*cannot be readily inferred from the text of the provision*”.⁷

- [17] The Constitutional Court and the Supreme Court of Appeal have consistently recognised that the Labour Courts, as specialist courts steeped in workplace issues,

⁴ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 21.

⁵ *Id* at para 24.

⁶ *Id*.

⁷ *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwa-Zulu Natal* [2009] ZACC 31; 2009 JDR 1027 (CC); 2010 (2) BCLR 99 (CC) at para 120.

are best able to determine labour disputes and deal with complaints relating to labour practices and collective bargaining.⁸ This not only accords with the express purpose of the LRA, but is evident from provisions such as section 68, which grant exclusive jurisdiction to the Labour Court to interdict any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of Chapter IV.

- [18] Chapter IV, headed “Strikes and lock-outs”, is concerned not only with strikes and lock-outs but with a wider range of issues including picketing, essential services, replacement labour and other related matters. A protected strike or lock-out is one that, in terms of section 67(1), complies with the provisions of Chapter IV. Section 67(2) provides that taking part in a protected strike or a protected lock-out, or any conduct in contemplation or in furtherance of such a protected strike or a protected lock-out, does not amount to the commission of a delict or a breach of contract.
- [19] Although section 68 is headed “*Strike or lock-out not in compliance with this Act*”, it is apparent from section 68(1) that, in addition to a strike or lock-out, the provision is also concerned with any conduct in contemplation or furtherance of a strike or lock-out that does not comply with the provisions of Chapter IV. In issue in this appeal is whether the reference in section 68 to “*any conduct*” is only a reference to conduct which occurs in contemplation or furtherance of a strike that does not comply with the provisions of Chapter IV, or whether it includes a reference to conduct that is unlawful, even if it arises during the course of a protected strike.
- [20] The Labour Court recognised, more than twenty years ago in *Lomati Mill Barberton (A division of Sappi Timber Industries) v Paper Printing Wood & Allied Workers Union & others*⁹, that unlawful conduct that occurs in contemplation or furtherance of a strike or lock-out which constitutes a criminal offence is unprotected.¹⁰ In *Coin Security Group v SA National Union for Security Forces*,¹¹ it was recognised that, given the specialist nature of the Labour Court, it is the Labour Court alone that can interdict unlawful acts in a strike. Similarly, in *National Union of Metalworkers of South Africa and others v Dunlop Mixing & Technical Services (Pty) Ltd and others*,¹²

⁸ *Motor Industry Staff Association v Macun NO & others* [2015] ZASCA 190; (2016) 37 ILJ 625 (SCA) at paras 18 - 20, referring to *Chirwa v Transnet Ltd & others* [2007] ZACC 23; (2008) 29 ILJ 73 (CC) and *Gcaba v Minister for Safety and Security & others* [2009] ZACC 26; (2010) 31 ILJ 296 (CC)

⁹ (1997) 18 ILJ 178 (LC).

¹⁰ *Id* at 184D.

¹¹ 1998(1) SA 685 (C).

¹² [2020] ZASCA 161; [2021] 3 BLLR 221 (SCA); (2021) 42 ILJ 475 (SCA).

the Supreme Court of Appeal noted that a picket is a form of conduct to which employees may legitimately resort in order to further the objects of strike action and that the LRA regulates the exercise of the right to picket.¹³ Provided that the purpose of the picket is peaceful and conducted in support of or in furtherance of a protected strike, the trade union and the participants in the picket fall within the ambit of the provisions of the LRA and enjoy the protection afforded by sections 67(2) and (6).¹⁴ However, such protection is lost if any act which constitutes an offence is committed in furtherance of a strike. In such a case, the Labour Court may impose on the party the remedies against those responsible for such conduct in terms of section 68(1).¹⁵

[21] In the earlier decision of this Court in *Stuttafords*,¹⁶ which pre-dated section 17 of the LRAA, 2002 which broadened the scope of section 68(1)(b) through the inclusion of the words “*or any conduct in contemplation or in furtherance of a strike or lock-out...*”, compensation was claimed by the union on the basis that a lock-out initiated by the employer was unprotected, and that the employer’s conduct in engaging temporary labour was unlawful. This Court found that since the lock-out was protected, the Labour Court lacked jurisdiction under section 68(1)(b) to entertain a claim for compensation attributable to it. This was so in that the reference in section 68(1)(b) to “strike or lock-out” is a reference to an unprotected strike or lock-out given the use of the article “*the*” before those words. The decision in *Stuttafords* is distinguishable from the current matter however, given that it pre-dated the amendment of section 68(1).

[22] In the often-cited decision of *Natal Joint Municipal Pension Fund v Endumeni Municipality*,¹⁷ it was recognised that:

‘... Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed

¹³ At para 34.

¹⁴ Ibid at para 35.

¹⁵ Ibid para 36.

¹⁶ *Stuttafords supra*.

¹⁷ [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at para 18.

and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’ (footnotes omitted).

[23] A plain reading of the language used in section 68(1)(b) supports an interpretation of the provision that the reference to “...*or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter*” is not restricted to conduct which occurs within the context of a strike or lock-out that does not comply with the provisions of Chapter IV. This is so given the inclusion of the words “*or any conduct*”, read in context, make it clear that the conduct referred to is that which occurs “*within the context of a strike or lock-out*”. Having regard to the ordinary rules of grammar and syntax, it is apparent that, with regard had to the apparent purpose to which the provision is directed, the reference in section 68(1) to “*any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter*” is intended to refer to both to any strike or lock-out, or any conduct, that does not comply with Chapter IV. From the reference to “*any conduct*” which occurs within the context of “a” strike or lock-out, it is clear that such conduct may occur within the context of any strike or lock-out and not only one that does not comply with the provisions of Chapter IV.

[24] A sensible meaning of the provision does not support an interpretation that the provision is only intended to refer to any unlawful conduct which occurs within the context of an unprotected strike or lock-out, thereby immunizing unlawful conduct which occurs within the context of a protected strike from the ambit of the provision. To allow this interpretation would be to shield unduly such unlawful conduct in circumstances in which the apparent purpose of the provision is to allow for a

remedy to be granted by the Labour Court where unlawful conduct has occurred during any strike or lock-out, protected or not. An interpretation which limited the availability of remedies only to unlawful conduct which has occurred in the context of an unprotected strike would lead to an insensible or unbusinesslike result in that it would unduly distinguish remedies available simply because a strike or lock-out was unprotected.

[25] It follows therefore from the language of the provision, considered in context, and with regard had to the purpose to which the provision is directed, that section 17 of the LRAA, 2002 broadened the scope of section 68(1)(b) through the inclusion of the words “*or any conduct*”. The Labour Court therefore holds exclusive jurisdiction to order the payment of just and equitable compensation in the case of any unlawful conduct committed in furtherance of a strike, whether that strike is protected or unprotected. The fact that the Labour Court regularly interdicts unlawful strikes, lock-outs and conduct which occurs within the context of either a protected or unprotected strike bolsters such interpretation.¹⁸ SACCAWU’s contention that, in interdicting unlawful conduct which occurs in the context of a protected strike, the Labour Court does not source its power under section 68(1) but under section 158(1) is without merit. That is so in that, it is apparent from a plain reading of section 68(1), interpreted in context, that it expressly empowers the Labour Court to interdict unlawful action, which includes unlawful conduct whether it arises within the context of a protected or unprotected strike or lock-out.

[26] Since unlawful conduct committed during a protected strike falls outside of the immunity conferred by section 67(6), it would be anomalous and would amount to an insensible interpretation of the provision, if an aggrieved employer or union could pursue a claim for compensation in the Labour Court under section 68 for loss attributable to a strike or lock-out that does not comply with Chapter IV but not for loss attributable to conduct that constitutes a breach of the same Chapter, simply because the strike or lock-out is protected.

¹⁸ Section 68(1) reads:

‘(1) In the case of any strike or lock-out, or any conduct in contemplation or in furtherance of a strike or lock-out, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction –
 (a) to grant an interdict or order to restrain
 (i) any person from participating in a strike or any conduct in contemplation or in furtherance of a strike...’

- [27] The Labour Court placed reliance on the wording of section 69(12), inserted by the LRAA, 2014¹⁹, and amended in 2018 by the LRAA, 2018²⁰, which was introduced specifically to regulate the exercise of the right to picket and noted that section 69(12) extends the powers of Labour Court “*in addition to any relief contemplated in section 68 (1)*” to intervene in disputes concerning the exercise of the right to picket by making a variety of orders which may be just and equitable in the circumstances.
- [28] The fact that section 67(2) provides that a person does not commit a delict or breach of contract by taking part in either a protected strike or lock-out or “*any conduct in contemplation or in furtherance of protected strike or a protected lock-out*” and section 67(6) states that no civil legal proceedings may be instituted against any person for such participation or conduct, but section 67(8) provides that these two provisions do not apply “*to any act in contemplation or in furtherance of a strike or lock-out, if that act is an offence*”, does not warrant a different interpretation of section 68(1).
- [29] This is so in that, to limit an aggrieved party to the remedy of a common law delictual claim in the civil courts simply because the unlawful conduct committed occurred within the context of a protected strike, does not amount to a sensible interpretation of the provision or accord with a plain reading of the amendment which broadened the scope of section 68(1)(b). If such an interpretation were to be given to the provision, it would serve to undermine what the Constitutional Court and the Supreme Court of Appeal have consistently recognised as the role of the Labour Courts as specialist courts steeped in workplace issues and best able to deal with complaints relating to labour practices and collective bargaining in the determination of labour disputes.²¹
- [30] The Labour Court did not err in dismissing the exception raised and the appeal cannot succeed. Having regard to considerations of law and fairness, including the fact that the issue required the consideration of this Court, there is no reason why costs should be awarded in this matter.

[31] The following order is therefore made:

Order

1. The appeal is dismissed with no order of costs.

¹⁹ Act 6 of 2014.

²⁰ Act 8 of 2018.

²¹ See supra fn 8.

SAVAGE JA

Waglay JP and Malindi AJA agree.

APPEARANCES:

FOR THE APPELLANTS:

Instructed by Dockrat Inc.

FOR RESPONDENT:

Instructed by Edward Nathan Sonnenbergs Inc.

F Boda SC

A Myburgh SC and I Goodman

LABOUR APPEAL COURT