

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: J 266/24

In the matter between:

NEWREST INFLIGHT SOUTH AFRICA

Applicant

and

NATIONAL TRANSPORT MOVEMENT obo MEMBERS

First Respondent

Heard: 15 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 18 March 2024

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The applicant approached this Court on an urgent basis to seek a final order;

- (i) declaring that the respondent union, National Transport Movement (NTM) and its members are bound by the Collective Agreement concluded at the Bargaining Council For The Restaurant, Catering and Allied Trades (BCRCAT).

- (ii) interdicting and restraining NTM and its members from embarking on and participating in a strike related to salaries, wages or matters of mutual interest or any matter regulated by the Collective Agreement.
- (iii) declaring that any industrial action and strike embarked upon by NTM and its members in respect of any salaries, wages or matters of mutual interest or any matter regulated by the Collective Agreement is unprotected;
- (iv) declaring that the certificate of outcome issued by a Commissioner of BCRCAT dated 7 March 2024 is unlawful and reviewed and set aside.

Background:

- [2] The applicant as its name suggests, is in the business of providing inflight catering services to about 30 airlines. It has about 1435 employees is a registered member of BCRCAT. There is a dispute in regards to NTM's representation at the applicant. NTM alleges that it has 54% membership, whilst the respondent contends that it has 12.5%. Nothing however turns on this dispute.
- [3] Correspondence from BCRCAT, dated 28 July 2020, also¹ indicates that after an application by NTM, the Council resolved at a meeting held on 22 July 2020, to admit it as a party to the Council, and allocated it one seat. NTM despite complaints by the BCRCAT that it did not attend meetings, indicated in its correspondence to BCRCAT on 15 April 2021, that it was still interested in attending and participating in Council meetings.
- [4] There is a collective agreement that was concluded at the BCRCAT which regulates matters of mutual interest in the industry. NTM is not a signatory to that agreement. On 27 July 2018, the then Minister of Labour declared that the agreement is binding in terms of section 31 of the Labour Relations Act² (LRA) on the parties that concluded it, and further extended it to non-parties in

¹ Annexure 'C' to the Founding Affidavit.

² Act 66 of 1995, as amended.

the industry under section 32(2), and 32(5) of the LRA, until its end period on 31 May 2023. The agreement was again extended until May 2024. By virtue of that extension as correctly pointed out on behalf of the applicant and in reference to *Kem-Lin Fashions CC v Brunton*³, a non-party to the collective agreement is turned into a party by default, and is placed on the same level as a signatory to the agreement.

- [5] The dispute between the parties can be said to have arisen in June 2023 when NTM referred a demarcation dispute in terms of section 62(1) of the LRA to the Commission for Conciliation Mediation and Arbitration (CCMA). It was NTM's intention to extricate the applicant from being a member of BCRCAT, as it held the view that it ought to fall under the Aviation Industry. This was part of NTM's stratagem to negotiate matters of mutual interest especially salaries and wages with the applicant outside the scope of BCRCAT.
- [6] On 23 November 2023, and pending the hearing of the demarcation dispute, NTM also referred a dispute of mutual interest to the BCRCAT in terms of section 64(4) of the LRA. This time, the complaint was that the applicant (employer), refused to adjust employees' salaries.
- [7] At the arbitration hearing of the demarcation dispute on 12 December 2023, NTM withdrew that dispute, further advising the CCMA Commissioner that it intended pursuing a matter of mutual dispute. On the same day after withdrawing its referral before the CCMA, NTM referred a matter of mutual interest dispute at the same forum. NTM's contention in that referral was that the applicant was not willing to negotiate with it on wages and conditions of employment. The dispute was heard on 18 January 2024. The applicant had objected to the jurisdiction of the CCMA to conciliate the matter since the issues raised were regulated by the collective agreement at BCRCAT. The CCMA Commissioner found that indeed the CCMA lacked jurisdiction.

³ [2001] 1 BLLR 25 (LAC) at para 25.

[8] Conciliation of the further dispute referred to BCRCAT on 23 November 2023 took place on 7 March 2024. The applicant contends that at those proceedings, it had impressed upon the Conciliating Commissioner that the dispute related to matters under the collective agreement. The Commissioner is however said to have granted NTM an election as to whether it sought to have the matter arbitrated or to embark on industrial action. The Commissioner had without more, granted NTM its wish to embark on industrial action, and had issued a certificate accordingly. Needless to say, the applicant have since sent a complaint to BCRCAT, which had in turn written a letter to the CCMA in which it rebuked the Commissioner's conduct in issuing a certificate of outcome enabling NTM to strike, when the dispute in question ought to have been dealt with in terms of the provisions of the collective agreement.

[9] In the matter before the Court, the applicant contends that any strike action which NTM seeks to embark upon is unprotected on the grounds that the issues leading to the dispute are regulated under the collective agreement. It therefore submitted that it was impermissible for NTM and its members to strike over those issues under the provisions of section 65 of the LRA.

Urgency:

[10] In resisting the orders, NTM contended that the applicant has not demonstrated that the matter deserves the urgent attention of this Court. It further contends that the urgency claimed is self-created, and that the applicant's application is premised on conjecture as since there was no strike notice issued or any indication that NTM members would embark on any strike action.

[11] It is trite that the Court may at its discretion under Rule 8 of the Rules of this Court, relax or shorten the strict formal rules relating to time for service, and treat an application as urgent. In such applications, the applicant is required to first, set forth explicitly in the founding papers, the circumstances which renders the matter urgent. The applicant is also required to advance the reasons why it is claimed that it cannot be afforded substantial redress in due

course if the matter was brought to Court by way of an ordinary non-urgent procedure, instead of this extraordinary urgent procedure.

- [12] Whether the applicant will be able to obtain substantial redress in due course is dependent on the facts and particular circumstances of each case⁴. Of equal importance is that urgent relief may be refused in circumstances where the matter has become urgent owing to dilatoriness on the part of the applicant. This is because the primary objective of approaching a Court on an urgent basis, is to prevent harm or prejudice from occurring⁵. It further needs to be stressed that in the end, Courts enjoy a discretion in the overall determination of whether a matter should be accorded urgency or not, with due consideration of the facts of each specific case.
- [13] As a starting point, the Court should accept that the applicant acted with alacrity upon the certificate of outcome having been issued on 7 March 2024 in that given all the constraints, it had to first approach its Head Office in France about the matter, and had instructed its attorneys of record who in turn briefed counsel. The papers having been settled by counsel, the application was then delivered by 11 March 2024. NTM was given sufficient time to file an answering affidavit which it did, and a replying affidavit was equally delivered.

⁴ See *East Rock Trading 7 (Pty) Limited and another v Eagle Valley Granite (Pty) Limited and others* (2012) JOL 28244 (GSJ) at para 6 and 7; See also *Export Development Canada and Another v Westdawn Investments Proprietary and Others* (6151/2018) [2018] ZAGPJHC 60; [2018] 2 All SA 783 (GJ) at para 11; and *Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and others* (2014) JOL 32103 (GP) at para 63 – 64, where it was held;

“It seems to me that when urgency is an issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent.

Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): Whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondent's and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency.”

⁵ See *Golding v HCI Managerial Services (Pty) Ltd and others* [2015] 1 BLLR 91 (LC) at para 24; *Ntozini and Others v African National Congress and Others* (18798/2018) [2018] ZAGPJHC 415 (25 June 2018) at para 11. See also Erasmus in *Superior Court Practice* at D6 – 23, where it is stated that:

“An interlocutory interdict may be refused if the applicant has delayed long before applying. An application for an interdict *pendente lite* from its very nature requires the maximum expedition from an applicant, who may forfeit his right to temporary relief if he delays unduly in bringing the interim proceedings to finality.”

Equally so, all the parties had within the period of filing of the pleadings and set-down date, also filed heads of argument. Under these circumstances, there is no basis for a conclusion to be reached that the applicant was supine after the certificate of outcome was issued, nor can it be said that NTM was prejudiced by the truncated periods.

- [14] NTM contended that the urgency is self-created. The applicant however submitted that urgency arises from the fact that a strike action by NTM and its members is imminent. This was so in that once a certificate of outcome was issued, the employees obtained a 'right to strike', and that all that was required was for NTM to issue a strike notice, entitling it to strike within 48 hours. The applicant further contends that given its operations, a strike notice of 48 hours would impact negatively on it, its airline clients, and passengers travelling on those airlines. It was further contended that this would cause it extreme reputational damage which might effectively put it out of business as airlines expect reliability in timeously delivering catering services, as they also operate in accordance with their schedules.
- [15] Other than the fact that NTM and its members are in possession of a certificate of outcome, the applicant bases its trepidations on 'rumours' that a strike action is being planned. In this regard, reliance was placed on a transcript of disciplinary proceedings currently conducted against two of NTM's members charged with misconduct. It is contended that emanating from those proceedings, it had become apparent to it that should the two employees be dismissed, employees have threatened to use the certificate of outcome to embark on a strike in their support.
- [16] NTM's response was that the issuance of a certificate of outcome, whether lawfully or not could not be a basis for urgency. This was particularly since a strike notice had not been issued nor was there any intention to do so. It was denied that a strike was further planned should its members be dismissed following the disciplinary proceedings.

- [17] A few points need to be made about the effects of issuing a certificate under section 135(5) of the LRA. The significance thereof was held in *Air Chefs*⁶ to be essentially the end of the conciliation phase of a dispute, and that the description of the dispute on the certificate is nothing more than indicative of what the dispute might concern. The issuing of a certificate is not a finding by the commissioner, and there would not be any point in seeking to review the certificate prior to a party challenging its validity⁷.
- [18] Effectively, a certificate of non-resolution of a dispute has no legal significance beyond simply recording that a particular dispute was referred for conciliation and remained unresolved after conciliation. It does not serve as a determination of the dispute or the actual issue in dispute, binding on the parties. In *NUMSA and others v Driveline Technologies (Pty) Ltd*⁸, it was long held that a party is not bound by the description of the dispute indicated on the certificate by the conciliating Commissioner. It follows that the certificate of outcome especially for the purposes of industrial action, does not decide whether any such action contemplated would be protected or not.⁹
- [19] Against the above principles, it is therefore a misconception that a union party in possession of a certificate of outcome is akin to it having a loaded gun which it can use as a bargaining chip or threats against the employer under section 64(2) of the LRA. In effect, the certificate of outcome is not a license to do anything other than an indication that a dispute can be taken to the next level after conciliation, and only where the LRA permits. To use the analogy, the certificate might be a gun, but loaded with blanks.

⁶ *Air Chefs (Pty) Ltd v SA Transport and Allied Workers Union and Others* (2013) 34 ILJ 119 (LC) at para 15.

⁷ See *Seardel Group Trading (Pty) Ltd t/a Berg River Textiles v South African Clothing and Textile Workers Union (SACTWU) and Others* (C592/2011) [2012] ZALCCT 14 (14 March 2012).

⁸ (2000) 21 ILJ 142 (LAC).

⁹ See *Bombadier Transportation (Pty) Ltd v Lungile Mtiya & Other* [2010] 8 BLLR 840 (LC); *Gillet Exhaust Technology (Pty) Ltd t/a Tennaco v National Union of Metalworkers of SA on behalf of Members and Another* (2010) 31 ILJ 2552 (LAC) at para 17; *Strautmann v Silver Meadows Trading 99 (Pty) Ltd t/a Mugg & Bean Suncoast and Others* (2009) 30 ILJ 2968 (LC) at para 9; *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (JR 2006/08) [2009] ZALC 66; (2010) 31 ILJ 371 (LC) ; [2009] 12 BLLR 1214 (LC) at para 14.

[20] What the above therefore means is that for the purposes of a protected strike, once conciliation has failed, it is for the Court in such urgent applications, to determine whether the issues in dispute do not fall foul of the prohibitions under section 65. Thus, where the legality of a contemplated strike is challenged on account of falling foul of the prohibitions under section 65 despite what the certificate of outcome says, such applications deserve the urgent attention and intervention of the Court. This is so in that it would be unjustified for an employer to have to endure industrial action with immense repercussions to its business operations, in circumstances where that action is predicated on unlawfulness.

[21] It follows that it would be superfluous for this Court to consider a review of the certificate because there would be nothing of legal consequences engaging the powers of this Court under section 158 of the LRA. Equally so, an employer cannot wait to be served with a strike notice prior to approaching the Court for urgent relief. This implies that once a certificate of outcome is issued in such instances, one cannot therefore speak of any substantial recourse in due course available to an employer, other than to seek an interdict. This ordinarily implies that the Court should urgently engage the merits of the urgent application, to determine whether in fact a case has been made out for the relief sought, or whether in fact the employees are entitled to exercise their right to strike as guaranteed under section 23 (2)(c) of the Constitution.¹⁰ It follows that this matter must be treated as urgent.

The merits:

[22] In *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*¹¹, it was held that an interdict was an order made by a court prohibiting or compelling the doing of a particular act for the purpose of protecting a legally enforceable right, which is threatened by continuing or anticipated harm¹². It was further added that;

¹⁰ The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

¹¹ [2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC).

¹² At para 47.

‘In granting an interdict, the court must exercise its discretion judicially upon a consideration of all the facts and circumstances. An interdict is “not a remedy for the past invasion of rights: it is concerned with the present and future”. The past invasion should be addressed by an action for damages. An interdict is appropriate only when future injury is feared.’¹³

[23] To the extent that the applicant seeks final interdictory relief, the requirements to be met are trite. These are a clear right; there is an injury actually committed or reasonably apprehended, and there is no other satisfactory remedy¹⁴.

(i) *Clear right:*

[24] To determine whether an applicant has a clear right is a matter of substantive law. Whether that right is clear is a matter of evidence, and the applicant is required to establish that right, by demonstrating on a balance of probability, facts which in terms of substantive law establish the right relied on.

[25] In this case, the applicant contends that its right not to be subjected to unlawful industrial action emanates from section 65 of the LRA,¹⁵ which prohibits the strike on account of NTM and its members being bound by the provisions of a collective agreement in respect of the issues in dispute.

[26] It has been held that the limitations imposed by section 65(1)(a) on the exercise of a right to strike arise in circumstances where a trade union on behalf of its members, contracts out of that right by entering into a collective agreement that prohibits a strike in respect of the issue in dispute. Similarly, section 65(3)(a)(i) has its roots in contracting out, in the sense that it prohibits

¹³ At para 48.

¹⁴ *Setlogelo v Setlogelo* 1914 AD 221 at 227.

¹⁵ Section 65 of the LRA provides:

“(1) 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.”

strikes in circumstances where a binding collective agreement regulates the issue in dispute¹⁶.

[27] The starting point is to reiterate the obvious legal principles. Section 23(2)(c) of the Constitution entrenches every worker's right to strike, and that right is given effect to under the provisions of section 64 of the LRA¹⁷, provided that certain procedural and statutory requirements are met. It has been stated that the provisions of section 64 of the LRA ought to be interpreted to advance the objectives of the LRA, one of which is to ensure orderly collective bargaining¹⁸.

[28] Given the constitutional guarantees, the Court must not unduly limit the right to strike by reading in implied terms, and that the limitation provisions must be interpreted in a manner least intrusive of the right¹⁹. Section 23(1)(d) of the

¹⁶ *Chamber Of Mines Of South Africa obo Harmony Gold Mining Company Ltd and Others v Association Of Mineworkers Of SA and Others; In Re: Association Of Mineworkers And Construction Union and Others v Chamber Of Mines Of South Africa obo Harmony Gold Mining Company Ltd and Others* [2014] ZALCJHB 223; [2014] 9 BLLR 895 (LC); 2014 (11) BCLR 1369 (LC); (2014) 35 ILJ 3111 (LC) at para 54.

¹⁷ Which provides;

- “(1) Every employee has the right to strike and every employer has recourse to lock-out if-
- (a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and-
 - (i) a certificate stating that the dispute remains unresolved has been issued; or,
 - (ii) a period of 30 days or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that-
 - (b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer . . .”

¹⁸ *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction and Allied Workers Union* (1997) 6 BLLR 687 (LAC) at pages 701-702.

¹⁹ See *Transport and Allied Workers Union of South Africa obo Ngedle and Others v Unitrans Fuel and Chemical (Pty) Ltd Limited* [2016] ZACC 28; 2016 (11) BCLR 1440 (CC); [2016] 11 BLLR 1059 (CC); (2016) 37 ILJ 2485 (CC), where Jafta J held:

“[222] Recently in *Moloto* this Court expanded on the principle laid down in *Zuma*. It pronounced:

“The right to strike is protected as a fundamental right in the Constitution without any express limitation. Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning. The procedural pre-conditions and substantive limitations of the right to strike in the Act contain no express requirement that every employee who intends to participate in a protected strike must personally or through a

LRA²⁰ in particular, regulates the legal and binding effect of collective agreements. In expressing this point further, it was held in *Cusa v Tao Ying* that;

[55] The right of every trade union and every employers' organisation and employer to engage in collective bargaining is entrenched in section 23(5) of the Constitution. The concomitant of the right to engage in collective bargaining is the right to insist on compliance with the provisions of the collective agreement which is the product of the collective bargaining process.

[56] Compliance with a collective bargaining agreement is crucial not only to the right to bargain collectively through the forum constituted by the bargaining council, but it is also crucial to the sanctity of collective bargaining agreement. The right to engage in collective bargaining and to enforce the provisions of the collective agreement is an especially important right for the workers who are

representative give notice of the commencement of the intended strike, nor that the notice must indicate who will take part in the strike."

[223] Later the Court repeated this statement as an interpretative approach. It said: "As mentioned earlier, the right to strike is protected in the Constitution as a fundamental right without express limitation. Also, constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them, and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least intrusive of the right, if the text is reasonably capable of bearing that meaning. These are general interpretative principles that are also applicable to the interpretation of provisions of the Act, as explicitly affirmed in section 1(a) of the Act."

[224] What emerges from *Moloto* is that the right to strike is conferred without any limitation and that legislation like the LRA that limits it must be construed in a manner least intrusive of the right if the text is reasonably capable of bearing that meaning. What this means is that in determining whether the strike that started as protected in the contemplation of the LRA became unprotected at some point, we must interpret the relevant provisions of the LRA "in a manner least intrusive of the right" to strike."

²⁰ Which provides;

"(1) A collective agreement binds-

...

- (d) employees who are not members of the registered trade union or trade unions party to the agreement if-
- (i) the employees are identified in the agreement;
 - (ii) the agreement expressly binds the employees; and,
 - (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace"

powerless to bargain individually over wages and conditions of employment. The enforcement of collective agreements is vital to industrial peace and it is indeed crucial to the achievement of fair labour practices which is constitutionally entrenched. The enforcement of these agreements is indeed crucial to a society which, like ours, is founded on the rule of law.”²¹

- [29] Applying the above principles to the facts of this case, to the extent that it was argued on behalf of the applicant that the intended strike is prohibited by *inter alia* the provisions of the existing collective agreement, a determination needs to be made as to whether the issues in dispute upon which the intended strike is predicated, are indeed regulated by that collective agreement.
- [30] In establishing the true nature of the dispute, this Court must look at the substance of the dispute and not the form in which it is presented, as the characterisation of a dispute by a party is not necessarily conclusive²². Furthermore, the Court must examine the conduct of the parties leading to the dispute; the nature of the referral and the outcome sought; the contents if any, of the strike notice, the demands made by the union, and the pleadings²³.
- [31] In this case, I have already referred in the background, the fact that the applicant and NTM are party to the BCRCAT, and at which a collective agreement on all substantive issued was concluded, and further extended to non-parties by the then Minister of Labour. NTM sought to extricate itself from that agreement on the basis that it was not a signatory to it. This point is nonetheless of no moment since by virtue of the Ministerial extension, its members are indeed bound by the terms of that collective agreement.
- [32] NTM nonetheless however disputed that the extension was applicable to it on the basis that the signatories to the collective agreement elected to exclude

²¹ *Cusa v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC).

²² See *FAWU v Rainbow Chicken Farms* (2000) 1 BLLR 70 (LC); *Coin Security Group (Pty) Ltd v Adams* 2000 4 BLLR 371 (LAC).

²³ See *Unitrans Supply Chain Solution (Pty) Ltd v SATAWU and Others* (2014) 35 ILJ 265 (LC) at paragraphs 9 – 13.

non-parties inclusive of NTM. It contended further that in the absence of a written request for the extension to non-parties, the Ministerial declaration was unlawful taking into account section 32(2) of the LRA²⁴.

[33] NTM's position on the applicability of the collective agreement is not only untenable but further amounts to a red herring. The Ministerial declaration took place on 27 July 2018. It is extraordinary that NTM would seek to contest that extension when there is no evidence that there was any form of legal challenge to it, inclusive of any challenge to the further extension granted on 28 April 2023. Furthermore, NTM has not applied to be exempted from that collective agreement.

[34] A further consideration is that NTM as evident from Annexure 'C' to the founding affidavit, had made an application to be admitted as a party to BCRCAT, which application was successful on 28 July 2020. Despite its admission as a party, it had nonetheless failed to attend several Council meeting²⁵, and had when rebuked for its absenteeism at Council meetings, indicated its intention to attend such meeting in future²⁶. In these circumstances, I fail to appreciate on what basis it can be said that NTM was not a party to the BCRCAT, or bound by its collective agreement.

[35] NTM's misguided approach as evident from the pleadings and its various referrals is clear. It seeks to have the applicant extricated from BCRCAT, or in the alternative, extricate itself from its binding collective agreements for reasons that are equally obvious. It seeks to confront the applicant outside the

²⁴ Section 32 (2) (Under Extension of collective agreement concluded in bargaining council) provides that;

'Subject to subsection (2A), the Minister must extend the collective agreement, as requested, by publishing a notice in the *Government Gazette*, within 60 days of receiving the request declaring that, from a specified date and for a specified period, the collective agreement will be binding on the non-parties specified in the notice.'

Section 2A provides:

'If the registrar determines that the parties to the bargaining council are sufficiently representative within the registered scope of the bargaining council for the purposes of subsection (5)(a), the Minister must publish the notice contemplated in subsection (2) within 90 days of the request.'

²⁵ Annexure 'G' to the Founding Affidavit

²⁶ Annexure 'F' to the Founding Affidavit.

rules of engagement as set out in the collective agreement which is binding on it and its members. This is even more clearer from the demarcation dispute it had referred to the CCMA and subsequently withdrawn. In that referral, its complaint was that the applicant did not want to recognise it as a collective bargaining agent at plant level for the purposes of negotiating wages and other conditions of service.

- [36] As was stated in *Cusa v Tao Ying*, the concomitant of the right to engage in collective bargaining is the right to insist on compliance with the provisions of the collective agreement which is the product of the collective bargaining process, whilst the enforcement of collective agreements is vital to industrial peace.
- [37] Against the above, it is apparent from its various referrals, that the true nature and substance of NTM's dispute relates to salaries and wages. This is evident from its referral to the CCMA on 12 December 2023, which related to a matter of mutual interest dispute. NTM's contention in the referral was that the applicant was not willing to negotiate with it on wages and conditions of employment. The CCMA declined jurisdiction.
- [38] Undeterred, NTM referred another similar dispute to the BCRCAT resulting in the certificate of outcome. In that referral, it had indicated that the dispute was about mutual interest as the employer (applicant) refused to adjust salaries of employees. Of more concern, and whether it was intentional or not, it was further indicated in the referral that the applicant fell under the 'Aviation' sector. This was in circumstances where another dispute of a demarcation in which NTM contended that the applicant fell under that industry instead of BCRCAT had failed before the CCMA. This constituted a misrepresentation to the CCMA on the part of NTM, which the Court must frown upon.
- [39] NTM always knew that the applicant was a party to BCRCAT, having applied and admitted to the same Council. It always knew that there was a binding collective agreement in the Council through which all matters of mutual interests were regulated. Paragraphs 5 to 9 of that agreement regulates

wages, remuneration and payment of salaries. That agreement made provision for resolution of disputes at its paragraph 28(AA) and also prohibits industrial action under its paragraph 3.

[40] Thus, NTM's contention that the issues raised leading to the issuance of the certificate of outcome merely related to 'salary adjustments' and thus do not fall under the collective agreement is not only contrived and self-serving, but also far-fetched. In the circumstances of this case and given what was the true nature of the dispute that NTM was pursuing, it is apparent that its use of 'salary adjustment' is euphemism for matters of mutual interests pertaining to salaries and wages. NTM's dispute remains about salaries and wages, and can therefore not be colour coded to turn it into something else outside the four corners of the collective agreement. In line with *CUSA*, concomitant of NTM having been admitted to BCRCAT and further based on the Ministerial extension, was the right of the applicant to insist on compliance with the provisions of the collective agreement.

[41] In the light of the above, and in line with *Vodacom (Pty) Ltd v CWU*²⁷, where a matter in dispute is covered in a collective agreement which is applicable to the parties, and where a strike is embarked upon, the strike would be unprotected under section 65 of the LRA. Equally so, where the matter in dispute is covered in a collective agreement that has been extended, the strike contemplated will equally fall foul of the provisions of section 65. I agree with the submissions made on behalf of the applicant that it has a right to carry on with its business unhindered and for NTM to stick to the rules of engagement as contained in the collective agreement. This would be in furtherance of orderly collective bargaining, and also preserve the sanctity of collective agreements. It follows that there can be no doubt that the applicant has demonstrated a clear right in this matter under section 65(1) and (3) to have any strike contemplated by NTM to be declared unprotected.

(ii) *Irreparable harm:*

²⁷ [2010] 8 BLLR 836 (LAC).

- [42] It is trite that an interdict is not a remedy for a past invasion of rights but is concerned with present or future infringements. Thus, an interdict is appropriate only when future injury is feared²⁸. Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated. In this case, there is no doubt as already indicated, that NTM seeks to inflict harm on the applicant outside the rules of engagement as set out in the collective agreement., and embark on industrial action.
- [43] Whether a strike notice has been issued or not is irrelevant. The applicant indicated instances where the employees have in the past, and in pursuance of the same issues surrounding wages and salaries, disrupted operations; assisted in the organisation of a failed march to the applicant's premises with the assistance of a political party, as well as threats made should any adverse outcome be made against NTM's two members currently facing a disciplinary enquiry. Given NTM and its members' conduct in the past and their false sense of ammunition in the form of the certificate of outcome, the harm to the applicant is apparent.
- [44] The respondent as already indicated elsewhere in this judgment, is in the business of providing inflight catering services to passengers on its clients' airlines. A work stoppage or any disruption to these services has on the uncontested evidence, a rippling effect, inclusive of causing flight delays or at worst, cancellation of flights. The financial implications on the applicant, its sustainability and the security of employment of other employees are also issues to be factored into the equation. Equally of consideration is the now familiar acts of violence, intimidation and destruction of property that accompanies such strikes. It is apparent that the applicant has established the basis of a real fear of irreparable harm resulting from any contemplated strike, which for all intents and purposes, would be unprotected.

²⁸ See also *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at para 20.

Alternative remedy and balance of convenience:

- [45] The remedy of an interdict is discretionary in the sense that a court may not grant it in circumstances where there is an alternative remedy available which may satisfactorily safeguard the right sought to be protected. This aspect of final interdictory relief needs no further debate in this case. This is so in that NTM and its members are bent on embarking on a strike. That strike will have far reaching repercussions not only for the applicant but also for its employees, its clients, and their clients in turn (i.e. passengers). The repercussions are both financial and reputational. NTM cannot seriously dispute that the applicant has no alternative remedies at its disposal in the light of its intentions.
- [46] I have already dealt with the folly of any attempts at reviewing the certificate of outcome, and indicated that the applicant was correct in approaching the Court as soon as that certificate was issued. I have also indicated that it would not have served any purpose for the applicant to wait and hope that NTM does not call a strike. Equally so, a claim of damages against NTM is not worth the effort as the possibility of even a fraction of the damages being recovered is remote. Furthermore, there is no doubt in the light of all that has been said in this judgment, that it is the applicant that stands to suffer more prejudice should the interdict not be granted. NTM on the other hand if serious about mature collective bargaining, need only refer to the collective agreement in regards to legitimate concerns of its members it seeks to pursue with the applicant. It is therefore apparent that only this Court through an interdict, after consideration of the law and the facts, can come to the applicant's assistance.

Summary:

- [47] Upon a consideration of the facts and the applicable legal principles, I am satisfied that the applicant has demonstrated why this Court should accord this application urgency. Furthermore, the Court is compelled to exercise its discretion and grant the interdictory relief sought. This is further so since on a balance of probabilities, the applicant has satisfied all the requirements for final relief.

Costs:

[48] Any award of costs in this Court must be considered against the requirements of law and fairness in accordance with section 162 of the LRA. It was submitted on behalf of the applicant that it found itself compelled to approach the Court in the light of NTM's conduct in pursuing the issues that led to this application. To a large degree, I agree that NTM's posture and approach in pursuing issues of salaries and wages at various *fora* through multiple referrals was misguided as much as its opposition to this application. Of course the BCRCAT Conciliating Commissioner who had issued the certificate of outcome, added a false sense of impetus to NTM and its members in pursuing their agenda against the applicant. Be that as it may, NTM ought to have reflected on the folly of its approach in the light of the clear facts pertaining to the applicability of the collective agreement. A common sense approach to this application would have been not to oppose it unless of course in relation to costs. This is so in that the overall relief sought therein did not in any manner encroach on NTM's and its members rights. That self-reflection on the part of NTM and its members was lacking.

[49] It was further submitted on behalf of NTM that there is an ongoing relationship between the parties. It was correctly submitted on behalf the applicant that this fact is not a bar to costs, especially where that relationship was abused. NTM has indeed abused any relationship it has with the applicant. What it sought through its multiple referrals and opposition to this application was not a vindication of rights but an abuse of those rights. It is in accordance with these conclusions that the Court deems it fair that NTM be mulcted with the costs of this application.

[50] Accordingly, the following order is made;

Order:

1. The applicant's non-compliance with the forms and service provided for in the Rules of this Court is condoned and this matter is dealt with as one of urgency in terms of Rule 8.

2. It is declared that the Respondents, National Transport Movement (NTM) and its members, are bound by the Collective Agreement concluded at the Bargaining Council For the Restaurant, Catering and Allied Trades.
3. The Respondents are interdicted and restrained from embarking and participating in a strike in respect of salaries and wages or any other matter of mutual interest or matter regulated by the Collective Agreement.
4. It is declared that any form of industrial action embarked upon by the Respondents in respect of salaries, wages, matters of mutual interest or any matter regulated by the Collective Agreement is unprotected.
5. This order shall be served on the Respondents in the following manner;
 - 5.1 By email service on known officials of NTM at its head office.
 - 5.2 By attaching copies of this order to notice boards at the premises of the Applicant
 - 5.3 By SMS to known cellular phones or emails of members of NTM to the effect that;

'The Labour Court has interdicted the NTM, its members and all persons bound by the Collective Agreement from embarking on any strike relating to the dispute about salaries and wages referred to conciliation by NTM'

6. The National Transport Movement is ordered to pay the costs of this application.

Edwin Tlhotlhemaje
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv. M. Sikhakhane with Adv. P. Mahlati, instructed by Ndebele Attorneys/ Henkel Gregory Inc.

For the Respondents:

Mr. E. Mphahlele, of National Transport Movement.

LABOUR COURT