Of interest to other Judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: J 1549/18

In the matter between:

RCL FOODS CONSUMER (PTY) LTD **Applicant**

and

NATIONAL UNION OF FOOD BEVERAGE WINE SPIRITS & ALLIED WORKERS (NUFBWSAW) **First Respondent**

PAUL MADELA AND OTHERS **Second and further Respondent**

Heard: 22 May 2018

Delivered: 4 July 2018

Summary: (Interim strike interdict- non-compliance with s 68(3) of LRA cured – demand for disciplinary action against perpetrators of victimisation not equivalent to claim under s 5 of LRA – demand to determine selection of investigators and chairpersons of disciplinary enquiries tantamount to demand to vary or amend code albeit only in certain cases – dispute over whether procedure for consultation or negotiation followed not a refusal to bargain dispute – striking without referring issue to a consultative forum as required by a collective agreement amounts to conduct in breach of collective agreement

rendering strike unprotected, even if dispute mechanism is same as statutory dispute mechanism - costs for non-compliance with s 68(3)))

JUDGMENT

LAGRANGE J

Background

[1] The applicant, RCL Foods Consumer (Pty) Ltd ('RCL'), launched an urgent application on 9 May 2018 to interdict a planned strike by NUFBWSAW ('the union'), which it set down for 11 May. When the matter came to court on 11 May, the application was postponed by agreement until 22 May, with answering and replying affidavits to be filed by 15 and 17 May respectively.

[2] In summary, RCL seeks the following relief:

2.1 Condonation for failing to give 48 hours' notice in terms of section 68 (2).

2.2 An order interdicting the alleged unprotected strike.

Narrative:

[3] Sometime in the last quarter of 2017, the union referred a dispute of mutual interest to the CCMA. The copy of the referral form in the court file is completely illegible, and the applicant did not take the trouble to rectify this omission even after it was pointed out to the applicant's representative. In any event, fortunately for the applicant, there is no dispute about the contents of that form. The dispute was described in a letter attached to the CCMA referral, which read:

Wide Spread Perception

> There is a wide spread perception amongst members of the Nufbwsaw that there exists a systemic abuse and sidelining of employees belonging to Nufbwsaw and there shop stewards. The practice is so entrenched and widespread <u>that it is impossible to deal with the following normal</u>

disciplinary procedures. There is also a perception that about 90% of managers and supervisors are supporters and sympathisers of the rivalry [sic] union in the plant, hence we say that this is deeply entrenched in the system. We also take note that it is extremely difficult to prove these widespread perceptions.

The members of Nufbwsaw demand the following

1. Allegations of unfair treatment and victimisation of Nufbwsaw members must be investigated by an independent investigator who does not work for the company.
2. The disciplinary hearings concerning unfair treatment and victimisation of Nufbwsaw members must be chaired by an independent chairperson who does not work for the company.
3. The independent investigator and the independent chairperson in clauses (1) and (2) above must be agreed upon by both parties.
4. The company must bear the costs of both the independent investigator and independent chairperson.
5. All disciplinary actions against Nufbwsaw shop stewards must be handled by independent investigator and independent chairperson.
6. The case of an employee (John Tiro) who assaulted our member (Johannes Mphahlele) must be rescheduled and must be handled by an independent investigator and independent chairperson.

(Emphasis added)

[4] A previous version of the demands had expressly required the disciplinary code and procedures to be amended to include the demands in paragraphs 1 to 5 of the letter above. However, this demand was expressly abandoned on 12 October 2017.

[5] The dispute was conciliated on 30 November 2017 and on 12 December 2017 the commissioner issued a ruling on an *in limine* point raised by RCL. The objection concerned two of the issues raised by RCL in this application, namely that the appointment of chairpersons in disciplinary matters is regulated by a collective agreement and the CCMA had no jurisdiction to entertain the dispute.

[6] The Commissioner was of the view that the appointment of chairpersons and initiators of disciplinary enquiries was a matter of management prerogative and that, in any event, the employees appearing in such enquiries were entitled to object to the appointment of any particular chairperson if they feared they were biased, and had a right of appeal against any decision made in any event. Further, if the dismissal was unfair for that reason they could dispute the procedural fairness thereof. Accordingly, the Commissioner decided that issue concerned a dispute of right and the CCMA lacked jurisdiction. He also decided that the issues had to be handled in terms of the collective agreement concluded by the parties.

[7] Nothing further transpired until 28 April 2018, when the union issued a strike notice in respect of RCL's Rustenburg processing plant. The strike notice read:

> Notice of Strike at RCL Foods Rustenburg Processing Plant
>
> We hereby notify the company that the workers at RCL Foods Processing Plant have taken the resolution to embark on strike. This relates to the dispute that remained unresolved even after an attempt at conciliation on 30 November 2017 at CCMA Rustenburg (NWRB4046-17).
>
> The strike will commence on 14 May 2018 at 06H00.
>
> However, we are still committed to negotiations with the aim of resolving the dispute.

(emphasis added)

[8] In response, the applicant asserted in an email of 2 May 2018 that, as far as it was concerned, that the matter had been resolved by the arbitrator's jurisdictional ruling of 12 December 2017, in which he had found, amongst other things that the dispute was a dispute of right and not one of interest. Accordingly, the union could not resort to strike action to resolve a rights dispute. RCL warned that any strike action taken by the union and its members would consequently be unprotected and could attract disciplinary action. The company reserved its rights and called on the union to withdraw the strike notice by 4 May 2018 failing which it would instruct its lawyers to deal with the matter and the union would be "sued

for costs". The only response of the union to this was to advise RCL which email addresses their lawyers should use in any communications to the union.

[9] A few days later on 9 May 2018, RCL launched the application.

Urgency and s 68(3) of the LRA

[10] The union did not dispute that the application was urgent but objected to the application on the basis that RCL had not complied with section 68(3) of the Labour Relations Act 66 of 1995 ('the LRA'). The relevant provisions of the LRA state:

> (2) The Labour Court may not grant any order in terms of subsection (1)(a) unless 48 hours' notice of the application has been given to the respondent: However, the Court may permit a shorter period of notice if-
>
> (a) the applicant has given written notice to the respondent of the applicant's intention to apply for the granting of an order;
>
> (b) the respondent has been given a reasonable opportunity to be heard before a decision concerning that application is taken; and
>
> (c) the applicant has shown good cause why a period shorter than 48 hours should be permitted.
>
> (3) Despite subsection (2), if written notice of the commencement of the proposed strike or lock-out was given to the applicant at least 10 days before the commencement of the proposed strike or lock-out, the applicant must give at least five days' notice to the respondent of an application for an order in terms of subsection (1)(a).

[11] The union is quite correct that RCL did not comply with section 68 (3). It should have given clear notice of the application to the union on 4 May 2018. It seems RCL or its legal representatives were ignorant of the provision, because it only applied for condonation in terms of section 68 (2), which is inapplicable. In ***Automobile Manufacturers Employers' Organisation v NUMSA***[1], Landman J (as he then was) held that the notice mentioned in s 68(3) is not merely notice of an intention to bring an urgent application but requires service of "(a) notice of motion together

[1] [1998] 11 BLLR 1116 (LC)

with supporting affidavits".[2] RCL's email of 2 May could hardly be sent to meet that requirement, even though it clearly hinted at some kind of legal action if the strike notice was not withdrawn. It was only when it served its application on 9 May that it fulfilled these requirements, but then it ought to have given the union five days' notice.

[12] However, as things turned out, the union did not oppose the matter on grounds of urgency and the application was postponed in any event. Consequently, the union ultimately had the same opportunity to deal with the requisite notice of the application and five court days to file its answering affidavit, though the date of the strike's commencement, if it proceeded, was postponed. Accordingly, the object of sufficient notice in section 68 (3) was fulfilled and accordingly, it is not necessary to condone the original non-compliance, if indeed it can be condoned. Nevertheless, the union was unnecessarily brought to court prematurely, which is a consideration when it comes to the matter of costs.

<u>Has the applicant established a *prima facie* right based on the legal status of the strike?</u>

[13] RCL raised four grounds on which it sought to establish a *prima facie* right to interdict the planned strike on the basis that it was unprotected. These are dealt with below, but not in the order in which they were raised.

First ground: allegedly defective strike notice

[14] In essence, this claim is that, the strike notice merely referred to the unresolved conciliation of 30 November 2017 but did not set out the demands, which were being pursued and if met by RCL would avert the strike. It is well established that in order for a strike to be protected, the employer must be able to ascertain what demands it is expected to meet when the strike notice is issued. In, ***National Union of Food Beverage Wine Spirits & Allied Workers & others v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union***

[2] At 1118, para [8].

of Food Beverage Wine Spirits & Allied Workers & others, the jurisprudence on this question was usefully summarised:

> [25] The legal principles that apply to the minimum content of a notice of intention to strike are fairly well-established. In the present instance, what is disputed is the sufficiency of the content of the notice in relation to the demands made by the union. In SA Airways (Pty) Ltd v SA Transport & Allied Workers Union (2010) 31 ILJ 1219 (LC); [2010] 3 BLLR 321 (LC), this court said the following at para 27:
>
> > 'The same purposive approach adopted by the Labour Appeal Court requires that a strike notice should sufficiently clearly articulate the union's demands so as to place the employer in a position where it can take an informed decision to resist or accede to those demands. In other words, the employer must be in a position to know with some degree of precision which demands a union I and its members intend pursuing through strike action, and what is required of it to meet those demands. Some of the issues giving rise to the intended strike, as they are articulated in the strike notice, are clear. The issue of the disciplinary action demanded in respect of Venter, as well as the demand in relation to retention bonuses, are relatively clearly expressed, and to require more would be to adopt an unnecessarily and unjustifiably technical approach. The same cannot be said however in respect of the reference to "demands for which certificate of non-resolution was issued on 21 September 2009". This is particularly so in a case such as the present, where the referral to conciliation was made, it would seem, in respect of unspecified and various grievances and petitions lodged over a period of months preceding the notice. Any employer faced with a strike notice issued in such imprecise terms would A be hard pressed to know which element of what grievance and petition it was being asked to resist or concede.'
>
> [26] Mr Orr, who appeared on behalf of the respondents, submitted that the Constitutional Court's judgment in SA Transport & Allied Workers B Union & others v Moloto NO & another 2012 (6) SA 249 (CC); (2012) 33 ILJ 2549 (CC); [2012] 12 BLLR 1193 (CC) (SATAWU) suggested that no more was required by the LRA than that the strike notice state the date on which the intended strike would commence. The SATAWU case concerned a strike notice issued by a majority union at a workplace and, specifically, whether it

was necessary for non-union members employed in the bargaining unit for which the union was the recognised representative were required to issue their own notices. Put another way, the issue before the court was whether every employee who intends to embark on a strike must notify the employer that intention personally, or through a representative (for example, a trade union), for a strike to be protected. In the course of its judgment, the court emphasised that the right to strike is protected in the Constitution as a fundamental right without express limitation and that constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them (see para 53 of the judgment). The court observed that the provisions ofs 64(1)(b) of the LRA do not extend the requirements of the content of a notice beyond the simple and express requirement of when the strike will start, to an interpretation that requires fuller disclosure. The crisp issue was which interpretation of s 64(1)(b) was better aligned with the spirit, purpose and objects of the Bill of Rights — an interpretation that required only one notice rather than separate notices by on behalf of each employee intending to strike. At para 74 of the judgment, the court said the following:

> 'In our view there is really no contest. Interpreting the section to mean what it expressly says is less intrusive of the right to strike; creates greater certainty than an interpretation that requires more information in the notice; serves the purpose of the Act — specifically that of orderly collective bargaining — better; and gives proper expression to the underlying rationale of the right to strike, namely, the balancing of social and economic power.'

The majority of the court went on to find that the union, which had represented non-members in the bargaining unit in the course of wage negotiations and in the referral for conciliation, was entitled to give a single notice of intention to strike.

[27] In para 90 of the judgment, the Constitutional Court went on to say the following:

> '*Provided that the strike notice sets out to the issues over which the employees will go on strike with reasonable clarity*, the cases show that orderly collective bargaining and the right to strike, in its proper sense as a counter-balance to the greater social and economic power of

> employers, has been considered to be well served by the acceptance of a single strike notice.' (Emphasis added.)
>
> [28] In short, the approach adopted by this court in relation to the content A of a strike notice and, in particular, the requirement that the union articulate the issue over which employees will go on strike, does not offend an interpretation of s 64(1)(b) that is aligned to the spirit, purport and objects of the Bill of Rights. However, this court must be cautious when reading in requirements to s 64(1)(b)that are not expressly stated — an interpretation less intrusive of the right to strike must be preferred. [3]

[15] In the *Universal Product Network* case, the strike notice read:

> 'Following the negotiations held on 24 August and 18 September 2015 B between the union and company and their failure to reach an agreement, the union members hereby seek to exercise their rights to embark on a protected strike in terms of s 64(1)(a)(ii).
>
> As the employer, you are therefore given notice of the union's members at your Midrand Distribution Centre that will be embarking a protected strike. …
>
> The union remains committed for the resolution of same provided management would bring their revised position meaningfully (sic).

In that matter too, the union had set out it is wage demands in a letter to the company and subsequently referred a dispute to the CCMA stating that the dispute was about wages and the desired outcome was for the employer to meet the union's demand in respect of wage negotiations.

[16] In this instance, the demands were clearly set out in the letter attached to the CCMA referral, which in themselves are self-explanatory. Moreover, it is apparent from the arbitrator’s ruling and RCL’s own response to the strike notice that it was not mystified about the nature of the dispute, but merely that it did not regard it as an issue the union was entitled to embark on a protected strike over. I agree with the submission by *Mr Kennedy,* who appeared for the union, that it is a question of whether the substance of the demands are known and not whether they are expressly detailed in

[3] (2016) 37 *ILJ* 476 (LC) at 486-7.

the strike notice. Where a notice of a strike genuinely surprises an employer because the demands underlying the strike have never been clearly articulated in the course of other documents or minutes, an objection to the strike notice may carry more weight and if the employer could not reasonably be expected to know what demands it was expected to meet, it would be incumbent on the union to provide clarity on being requested to do so, before it could be said that proper notice of the strike had been given.

[17] However, that is not the case here, where the demands were set out with sufficient clarity in the letter quoted in paragraph [3] above, which was attached to the CCMA referral, and read with the strike notice which unambiguously referred to that dispute. Consequently, there could be no doubt in RCL's mind, in my view, which dispute the union was referring to and what demands it had made in that respect. Accordingly, RCL has failed to establish even on a *prima facie* basis that the strike notice was defective.

Second ground: failure to obtain an advisory arbitration award

[18] Section 64 (2) provides that a strike notice may not be issued if the dispute concerns a refusal to bargain, unless an advisory award has first been issued. RCL argues that there is a dispute about whether to negotiate about amendments to the disciplinary procedures. The union's contention is that, it is not demanding the amendment of the disciplinary procedures, but has tabled specific demands relating to the establishment of an independent investigation and the use of independent investigators and chairpersons. It argues that merely because the employer does not agree to this demand does not make the dispute one about a refusal to bargain. The union simply does not admit that its demands require any alteration of the disciplinary code after it dropped that as an explicit demand.

[19] Even though I am inclined to accept that the union's demand, effectively does mean this, the applicant itself does not refuse to bargain over it as such but simply says this must be done through the mechanism of the National Working Committee. I fail to understand how these facts can

support a conclusion that the dispute is one about a refusal to bargain as defined in s 64(2).

Third ground: non-compliance with the recognition agreement

[20] RCL and the union are parties to a National Recognition and Procedural Agreement ('the agreement') together with another union, FAWU. The Objectives clause, 2.1, inter alia, that "(t)his agreement regulates the relationship between the company, the unions and the employees of the company on a national level." . Clause 5 of the agreement describes the bargaining unit as "the sum of all areas in which the company employs workforces", and comprises "grades A 1-B1". The clause further creates to national structures, a National Bargaining Forum (NBF) and a National Working Forum (NWF). Clause 6 of the agreement provides that the NBF "… is to bargain on national issues of mutual interest", but limited to wages, benefits and other terms and conditions which equate to be the remuneration and/or benefits". Under the same clause, issues listed within the ambit of the NWF are specifically excluded from the remit of the NBF. Unlike the NBF, the NWF is expressly established as a consultative forum in terms of clause 7 of the agreement and the objective of the forum is described as consulting "on national issues that do not fall within the exclusive ambit of the National Bargaining Forum and may include but not limited to:- 7.1.1 any changes or amendments to disciplinary codes and procedures;…"(Emphasis added). If consultation fails to yield consensus then clause 7.1.12 provides that:

> The company and the unions shall, in the National Working Forum, consult issues and, if no consensus is reached, the parties will proceed dispute resolution mechanisms provided by the Labour Relations Act.

[21] RCL contends that the demand for the appointment of independent investigators, and war alternatively chairpersons of disciplinary enquiries amounts to an amendment of its current disciplinary procedures in terms of which it appoints internal investigators and chairpersons to deal with disciplinary matters. Inexplicably, the applicant did not attach a copy of its disciplinary procedures to the application, but the union does not dispute this characterisation of the existing disciplinary procedures insofar as they

deal with the appointment of investigators and chairpersons. RCL argues therefore that the demand to appoint external chairpersons amounts to a demand to amend disciplinary procedure, and since the matter was not referred to the National working committee for consultation, the union could not invoke the dispute resolution mechanisms of the LRA before that had been done and no consensus had been reached.

[22] The point of impasse between the parties is that, RCL still contends that the demands are tantamount to demanding an amendment of the disciplinary code and procedure, whereas the union simply argues that the demand concerns who is chosen to conduct the particular investigations and inquiries. As I understand the pleaded version of the disciplinary code and procedure provision governing the appointment of such persons, management has a choice as to who it appoints to fulfil these roles. That does not, in principle, prevent it from deciding in a particular case to appoint an external chairperson or investigator, but that remains a matter for it to decide under the code and procedure. The effect of acceding to the union's demands in respect of the chairing of any disciplinary enquiries would necessitate RCL abandoning its right to appoint persons in those cases, and would be no different to varying the disciplinary procedure, albeit not for all disciplinary matters. That would appear to be a demand that should be processed through the NWC.

[23] The union contends that even if this is so, it has effectively complied with the dispute resolution procedures in the LRA and it is not necessary for it to do so only after proceedings through the NWC consultative process. In support of this argument the union relies on the LAC decision in ***County Fair Foods (Pty) Ltd v Food & Allied Workers Union & others*** in which the court held in that matter:

> [15] The main point on which this matter was argued in the court a quo appears to have been that, even though the requirements of the Act had been complied with, the respondents had not complied with the dispute procedure provided for in the collective agreement. Mlambo J rejected this argument. In doing so he followed Landman J in Columbus Joint Venture t/a Columbus Stainless Steel v National Union of Metalworkers of SA (1998) 19 ILJ 279 (LC). In the appellants' heads of argument this contention

was pursued. Although it was not pursued in argument, it was not abandoned. In the light of this it requires to be dealt with in this judgment.

[16] In my judgment there is an insurmountable difficulty with the appellant's contention. The Act sets out specific requirements which must be met in order for an employee to acquire the right to strike. Once those requirements have been complied with, the Act confers a certain protection and status on the strike. That is the protection and status of a protected strikes as defined in s 67(1). Section 67(1) provides: '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' (emphasis added). From this it will be seen that the only requirement for a strike to acquire the status of a protected strike is that it must comply with the provisions of the chapter on strikes and lock-outs in the Act. Section 64(3)(b) provides in effect that, if a strike conforms with the procedures in a collective agreement, the requirements of s 64(1) of the Act need not be complied with. There are also other provisions which deal with situations which exempt a party from having to comply with the requirements of s 64(1) in certain situations (see 64(3)(a) , (c) , (d) and (e)).

[17] It is clear from the provisions of s 64(3)(b) that the legislature did consider a situation where a party complies with procedures in a collective agreement but not with the requirements of the Act and decided that, in such a case, such party should not be required to comply with another procedure, namely the statutory pre-strike procedure before a strike could be resorted to. This was one of the deficiencies of the strike procedures under the old Act. Under that Act a party who had complied with a domestic pre-strike procedure was required to also comply with the statutory procedure before it could acquire the right to strike. This was one of the reasons why the ILO's Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa criticized the South African pre-strike procedures under the old Act in its report as being inconsistent with freedom of association. (See (1992) 13 ILJ 739 at 755-6 para 644.)In that case the employer sought to rely on section 65 (1) (a) of the LRA, which provides that no party may participate in a strike or a lockout if "… that person is bound by a collective agreement that prohibits a strike or a lock-out in respect of the issue in dispute".[4]

[4] (2001) 22 *ILJ* 1103 (LAC) at 1107-8

[24] The NWC dispute procedure is simply an invocation of the statutory dispute procedure for interest disputes. However, the point made by the employer is that the union was bound to have attempted to reach consensus on an amendment to the disciplinary code using the NWC mechanism *before* invoking any dispute procedure. This is no different to a provision requiring parties to negotiate in certain collective bargaining forum. If the union were correct, it would be entitled to declare a dispute about amending a disciplinary code without first referring it to the tripartite body for consultation despite being bound by collective agreement to deal with such issues in such a forum. The effect would be to undermine the consultative functions of the NWC which it had been a party to agreeing to. Accordingly, the union's procedural non-compliance which is at issue here is not its invocation of the statutory procedures for embarking on a protected strike, but its failure to raise the issue in the agreed forum before invoking dispute mechanisms. It is thus distinguishable from the issue under consideration in *County Fair.*

[25] Consequently, notwithstanding the withdrawal of the formal demand to amend the disciplinary code and procedures, I am satisfied that the effect of the remaining demands would be the same, albeit perhaps to require the variation of the procedures only in respect of the particular complaints of the union and its members.

Fourth Ground: The dispute is a rights dispute for which a remedy exists and therefore cannot be the subject matter of strike action.

[26] The contention in this regard is that what the union and its members are in truth alleging is that, its members and shop stewards are being systematically prejudiced by the employer on account of their union membership. This, RCL submits, is no different from a claim of what used to be called 'victimisation', and is one that can be referred to adjudication in terms of s9(4) read with s 9(2)(c) of the LRA. Section 9(2)(c)(i),(ii) and (iii) of the LRA protects employees from any prejudice they might suffer on account of their union official affiliation or performing their functions as a shop steward, thus:

(2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following-

…

(c) prejudice an employee or a person seeking employment because of past, present or anticipated-

(i) membership of a trade union or workplace forum;

(ii) participation in forming a trade union or federation of trade unions or establishing a workplace forum;

(iii) participation in the lawful activities of a trade union, federation of trade unions or workplace forum; ….

[27] In terms of section 9(4) of the LRA this right can be enforced through adjudication by the Labour Court. That said, it does not follow that a successful prosecution of a claim of victimisation of this sort would ordinarily result in an order requiring disciplinary steps to be taken against individuals responsible for such conduct. That can conceivably still be the subject matter of a separate dispute from an action seeking to provide relief to individuals who have been victimised on account of their union affiliation. Accordingly, although there may be some overlap between the factual basis for a demand for disciplinary action to be taken and a claim of victimisation under section 5 (2) (c), the latter dispute does not necessarily entail a determination of whether or not disciplinary action will be taken against any individuals responsible for such prejudicial conduct, even if it might result in a prohibitory order and other forms of relief. It is also perfectly possible for a claim to be successfully prosecuted under the provision, and that arising from the outcome of that case, demands could be made for consequential disciplinary action to be taken against certain individuals. Consequently, I am not satisfied, on a *prima facie* view, that the disciplining of those responsible for such conduct, in and of itself, necessarily falls within the ambit of a dispute under section 5(2)(c) and it could be the subject of a separate demand, provided such disciplinary action should be procedurally and substantively fair.

Conclusion

[28] In light of the discussion above, I am satisfied that RCL has established at least a *prima facie* claim that the strike would be unprotected because the issue in dispute ought to have been tabled in the NWC and that by not doing so the union and its members would be striking in breach of a collective agreement regulating the amendment of the disciplinary code and procedures, which first requires the tripartite body to consult on the issue in an attempt to reach consensus.

Harm and the balance of convenience

[29] The dispute is a long-standing one dating back to 2017 and the additional prejudice the union might suffer by waiting for a final determination of the dispute before being able to embark on strike action at a later date, if a final determination is in its favour, does not outweigh the prejudice to RCL of facing substantial irrecoverable losses, which it would not have to sustain if it is vindicated subsequently in a final determination of the application.

<ins>Costs</ins>

[30] In relation to the merits of the dispute, which were argued on 22 May 2018, I am satisfied that both parties acted in good faith in initiating and opposing the application and no cost order should flow in that regard.

[31] However, in relation to appearances of the parties on 11 May 2018, in view of the fact that the application was launched contrary to the provisions of section 68(3) of the LRA, which would have necessitated a postponement in any event, I am satisfied that the requirements of law and fairness require the applicant to pay the wasted costs of the respondent's appearance and preparation for that day. Had the respondents sought a punitive cost award in this regard I would have been inclined to grant it.

Order

[1] The provisions of the Labour Court Rules relating to the time and manner of service referred to therein are dispensed with, and the matter is dealt with as one of urgency terms of Rule 8 thereof.

[2] A rule *nisi* is issued calling upon the respondents to show cause on 15 November 2018 why a final order should not be made the following terms:

2.1 declaring the intended strike by the second and further respondents (‘the individual respondents’) to constitute an unprotected strike as contemplated in the Labour Relations Act, 66 of 1995 (‘the LRA’);

2.2 interdicting and restraining the individual respondents from participating in the intended unprotected strike related to the present demands and issues raised by the respondents arising from the dispute referred to the CCMA under case number NWRB 4046-17;

2.3 the first respondent is required to do all such things and take all such steps as are necessary to ensure that the provisions of paragraph as set out in paragraph 2.2 above are complied with;

2.4 ordering the first, second and further respondents, jointly and severally, to pay the costs of this application, save for the costs of the hearing on11 May 2018, the one paying the others to be absolved.

[3] Paragraphs 2.1 to 2.3 above shall operate with immediate effect as an interim order pending the final determination of this application.

[4] The Applicant must pay the wasted costs of the Respondents’ appearance and preparation for the hearing on 11 May 2018.

[5] It is directed that service of the order must be affected as follows:

5.1 upon the First Respondent by the applicant’s attorney sending a copy of the order to the First Respondent’s facsimile at 011-8331503 and that the Sheriff serve a copy at the first respondent’s premises at fourth floor, Vusa House, New Street South, Johannesburg;

5.2 upon the Second and Further Respondents by the Applicant placing a copy of the order on the noticeboard of the applicant’s premises and providing copies of the order to shop stewards of the first respondent that are present.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	C Nel of Macgregor Erasmus Attorneys
RESPONDENT:	P Kennedy SC, instructed by Haffagee Roskam Savage Attorneys