IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 3280/18

In the matter between:

SBV SERVICES PROPRIETARY LIMITED **Applicant**

and

SASBO THE FINANCE UNION OBO MEMBERS **First Respondent**

THE EMPLOYEES LISTED IN ANNEXURE

"A" TO THE NOTICE OF MOTION, BEING

MEMBERS OF THE FIRST RESPONDENT

EMPLOYED AT THE APPLICANT **Second Respondent**

Heard: 18 September 2018

Delivered: 28 September 2018

JUDGMENT

MAHOSI J

Introduction

[1] On 10 September 2018, the first respondent (SASBO) on behalf of the employees gave the applicant (SBV) a strike notice which was later withdrawn. On 11 September 2018, SASBO issued a new strike notice in terms of which it demanded the following:

> 'RE: 48 HOURS' NOTICE OF PROPOSED INDUSTRIAL ACTION
>
> Demand 1
>
> 3.1 SBV entered into a collective agreement on salary increases with SASBO on 1 September 2017.
>
> 3.2 From the outset it was the understanding that any agreement with any other union will not be on more favourable terms as agreed to between SBV and SASBO.
>
> 3.3 Subsequently, SBV entered into an agreement with another union on terms more favourable than the terms recorded in the agreement with SASBO.
>
> 3.4 This resulted in severe prejudice suffered by SASBO in the loss of membership.
>
> 3.5 SASBO demands parity in treatment as a recognized union within SBV.
>
> Demand 2
>
> 3.6 The performance-based distribution of salary increases has not been resolved.'

[2] Subsequent to the SBV's filing of this application, the parties legal representatives, entered into an agreement, terms of which are as follows:

> '1. The applicant shall approach this Honourable Court for a declarator order, effectively seeking a declaration as to whether the strike notice dated 11 September 2018 would be protected or not.
>
> 2. The said application would be heard at 10H00 on Friday, 14 September 2018.

3. The First Respondent undertook not to commence with strike action until such time that the Honourable Court has pronounced on the said application'.

[3] On 14 September 2018, the matter was postponed to 18 September 2018 to afford the applicant an opportunity to file its replying affidavit.

[4] Prior to considering the issues that gave rise to the dispute, it is necessary to summarise the facts that form relevant background to the dispute between the parties.

Material Background

[5] SBV currently employs 6043 permanent employees. Of these employees, 1549 are SASBO members and 3098 are members of Motor Transport Workers Union (MTWU). SASBO enjoys both organisational rights and recognition at SBV in terms of a Recognition and Procedural Agreement concluded on 22 May 1991 (the Recognistion Agreement).

[6] On 1 September 2017, SBV and SASBO, signed a Collective Agreement – 2017 and 2018 Salary Increases (the Wage Agreement) regulating, amongst others terms and conditions of employment, including wages for a period between 1 July 2017 to 30 June 2019.

[7] On 28 September 2017, SBV and MTWU concluded a one-year collective agreement (the MTWU agreement) effective from 1 October to 30 September 2018.

[8] On 26 May 2018, SASBO addressed a letter to SBV declaring a dispute in terms of the provisions of the Recognition Agreement. SBV responded to SASBO in a letter dated 1 June 2018 disputing the declaration. It proposed that a meeting between the parties be held on 8 June 2018.

[9] SBV and SASBO convened a meeting of the Standing Joint Committee as required by the Recognition Agreement on 8 June 2018. The parties were unable

to resolve the dispute. On 8 June 2018, SASBO referred an alleged dispute of mutual interest to the Commission for Conciliation, Mediation and Arbitration (CCMA) under case number HO250-18.

[10] The conciliation was set down for hearing on 5 July 2018 and at the conciliation SBV raised a preliminary point to the effect that the dispute referred by SASBO about wages, salary and overtime had been fully and finally settled by way of the Wage Agreement. Accordingly, there was no wage dispute capable of being adjudicated for the duration of the Wage Agreement.

[11] Pursuant to the representations made by the parties, commissioner Mduduzi Khumalo issued a ruling dated 17 July 2018 (the Ruling) in terms of which, *inter alia*, he ruled that the CCMA had jurisdiction to deal with the matter, SASBO's dispute existed and fell within a category of mutual interest and the matter should be enrolled for further conciliation.

[12] On 26 July 2018, SBV addressed a letter to SASBO in terms of which it stated, *inter alia*, that:

> '2. [SBV has] taken advice on the Ruling and intend[s] on taking it on review to the Labour Court. [SBV is] of the view that this dispute has been settled by the Collective Agreement dated 1 September 2017 (**"Collective Agreement")** and therefore the CCMA does not have jurisdiction to conciliate the matter. To be clear, SBV will not participate in any further conciliation meetings on matters which are governed by the provisions of the Collective Agreement.
>
> 3. Furthermore, and [SBV] wish to place on record that, since this dispute has been settled by the Collective Agreement, [SASBO] and its members are prohibited under section 65(3)(a)(i) of the Labour Relations Act, 66 of 1995, from engaging on a strike in support of this demand. Any employees who participate in unlawful strike action will be subject to disciplinary action'.

[13] On 13 August 2018, SBV instituted a review application in respect of the Ruling under Labour Court case number JR 1595/18 on the basis that, *inter alia*, the commissioner committed an error of law in finding that the CCMA had jurisdiction to adjudicate the dispute.

[14] A conciliation meeting in respect of SASBO's dispute was set down again on 14 August 2018. SBV did not attend the conciliation meeting on 14 August 2018 on the basis that SASBO's dispute had already been settled by the Wage Agreement. Instead SBV sent Ms Jessica Braum, an attorney working at the offices of its attorneys of record, Webber Wentzel, to ensure that the commissioner was aware of the institution of the review application and to collect any certificate of outcome. The commissioner issued a certificate of non-resolution indicating that SASBO may refer the matter to a strike. It is on the basis of this certificate that SASBO seeks to embark on a strike.

[16] It is common cause that SASBO and its members seek to embark upon a strike in pursuit of two demands as recorded in the second strike notice. These two demands are central to the determination of whether the strike would be protected or whether it would be in contravention of the provisions of section 65 of the Labour Relations Act[1] (LRA).

[17] SBV's contention is that the two demands recorded in the second strike notice were not referred to the CCMA for conciliation and further that section 65(3)(a)(i) prohibits SASBO and its members from engaging in a strike in respect of their dispute as wages, salary and overtime for the period 1 July to 30 June 2019 have been fully settled and are regulated by the Wage Agreement. SASBO contends the opposite.

<u>Applicable law and analysis</u>

[18] Section 64(1) provides as follows:

> '64. Right to strike and recourse to lock-out

[1] Act 66 of 1995 as amended.

(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, unless -

(i) the issue in dispute relates to a collective agreement to be concluded in a council , in which case, notice must have been given to that council ; or

(ii) the employer is a member of an employers' organisation that is a party to the dispute , in which case, notice must have been given to that employers' organisation ; or

(c) in the case of a proposed lock-out, at least 48 hours 'notice of the commencement of the lock out, in writing, has been given to any trade union that is a party to the dispute , or, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council , in which case, notice must have been given to that council; or

(d) in the case of a proposed strike or lock-out where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c).'

[19] Section 65(3)(a)(i) provides as follows:

'(3) Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out -

(a) if that person is bound by -

(i) any arbitration award or collective agreement that regulates the issue in dispute; or.'

[20] The crisp question for determination is whether SASBO and its members are prohibited from striking in respect of the demands as recorded in the second strike notice. This issue thus requires a careful engagement with the two demands. The first question is whether both demands were referred to conciliation.

Were the demands conciliated?

[21] SASBO submitted that a *bona fide* and real dispute of fact exists on the papers in relation to the question whether its demands as recorded in the second strike notice were conciliated. It referred the Court to the decision of *Kwa-Zulu Natal Tourism Authority and Others v Wasa*[2] in support of its submission that the factual dispute ought to be determined by reference to its version, as opposed to the applicant's. The basis of SASBO's submission is that it unambiguously pleaded that both issues formed part of the dispute placed before and communicated to the commissioner during the conciliation proceedings. SASBO further submitted that the general probabilities emanating from the pleadings supports the conclusion that both demands were in fact conciliated.

[22] The dispute resolution procedure as embodied in the Recognition Agreement appears on clause 7 thereof and it states as follows:

'Disputes Procedure

7.1 For the purposes of this agreement a dispute shall have arisen when the appropriate Company procedure or negotiating procedure has been exhausted and a dispute has been declared.

7.2 in the case of a dispute the following procedure shall apply:

[2] [2016] 11 BLLR 1135 (LAC); (2016) 37 ILJ 2581 (LAC).

7.2.1 Declaration of dispute

The aggrieved party shall declare a dispute in writing and shall furnish full particulars of the dispute to the other party (the answering party). Such notice shall set out the nature of the dispute and the proposed terms of settlement required.

7.2.2 Answering Statement

Within 7 (seven) days of receipt of the declaration of dispute, the answering party shall serve on the aggrieved party an answering statement in which it shall respond in detail to the allegations in the statement of dispute and shall further set out a statement of the party's position in regard to the solution required.

7.2.3 Meeting of the parties

If the dispute remains unresolved, the aggrieved party shall convene a meeting of the Standing Joint Committee within 14 (fourteen) days of receipt of the answering statement. In the event of the meeting failing to resolve the dispute the meeting may determine whether to refer the dispute to mediation or arbitration and if so the procedure to be followed in respect of such referral.

7.3 By mutual agreement the party's may agree to reduce or extend any time period or omit any stage referred to in Clause 7.

7.4 In the event of any dispute not being resolved in accordance with the provisions referred to above, then either party shall be entitled to exercise their rights at law.'

[23] In its notice of declaration of a dispute dated 26 May 2018, SASBO recorded as follows:

'Our meeting of 20 April 2018 and 4 May 2018 refers.

We hereby declare a dispute in terms of clause 7 of the Recognition Agreement between the parties, this is relation to the Salary Negotiations of the review period 2018-2019 and following failed attempts made by the parties to try and reach an agreement on the aforementioned matter.

We place on record that we remain open to negotiations and the union will seek external remedy as a last resort.

We await SBV's response, together with the proposed meeting date/s and time/s for the holding of the dispute meeting/s.'

[24] SBV's response recorded as follows:

'1 SASBO's dispute declaration of 26 May 2018 refers.

2. We confirm that the 2018 salary increases are regulated by the collective agreement that SBV and SASBO concluded on 1 September 2017. Paragraph 5.2.1 of the agreement provides for the salary increases to be equal to the CPI for March 2018 + 3.0%, with a minimum increases of 8.5% and a maximum increase of 8.75%. The CPI for the March 2018 was 3.8%. The salary increases for 2018 is therefore 8.5% as per 1 September agreement. Only the distribution of the 8.5% salary increases per performance appraisal rating is left to be determined in 2018.

3. We repeat our advice of 4 May 2018 that SBV will not exceed to SASBO's demand to renegotiate the 2018 salary increases. SBV regards the collective agreement of 1 September 2017 as binding on both parties. We therefore implore SASBO to consider the distribution of the 8.5% salary increases in terms of employees' performance appraisal ratings and to provide us with a distribution proposal as soon as possible.

4. SBV proposes that a dispute meeting envisaged in the recognition agreement takes place on either Friday 8 June or Tuesday 12 June 2018 at 10:30 at SBV's House.'

[25] In its referral to the CCMA, SASBO describes the dispute at paragraph 3 of its referral form as follows:

'The parties are engaged in Annual Remuneration Negotiations and have not been able to reach an agreement. The Union declared a dispute as per the Recognition Agreement between the parties. An internal dispute meeting was held in accordance with the Recognition Agreement, to no avail. In line with the dispute resolution procedures stipulated in the Recognition Agreement, the Union has accordingly decided to refer the matter to the CCMA for conciliation/mediation as per section 64 of the LRA'.

[26] As aforesaid, the applicant raised a preliminary point challenging the CCMA's jurisdiction. In his ruling, the commissioner summarised the background to the dispute as follows:

'BACKGROUND

[5] SBV is in financial services and in the main provides cash transportation and security to its clients who conduct business in the banking industry. The respondent is a Trade Union registered in term of the Labour Relations Act 66 of 1995.

[6] In September 2017, the parties entered into a two year substantive collective agreement on terms and conditions of employment. The collective agreement was to remain in force until 30 June 2019.

[7] In terms of the collective agreement SASBO was the only Trade Union organized at the employer. However, during the wage talks a new player had entered the fray which reduced the level of representation of the respondent. The applicant decided to engage the two trade unions individually for purposes of wage negotiations. SASBO concluded its wage talks first, whereas MTWUSA concluded its wage negotiations around October 2017. (MTWUSA collective agreement was not presented to me).

[8] The parties agreed that the other labour formation agreement was more favourable with regards to minimum wage and this prompted the applicant to seek the review of certain terms of its collective agreement. SASBO submitted demands to SBV, which the employer presented to its principals who was not keen to entertain the demands. This communicated to the union (SASBO), that led to the mutual interest dispute being filed with the Commission.'

[27] The commissioner further summarised arguments on behalf of SABO as follows:

> '[12] SASBO gave extensive background to the matter, largely restating what is contained in the collective agreement. He confirmed that the Trade Union was fully mandated to conclude same by the members and that this was done relying on available information. He sought to blame the information obtained from the employer and that it resulted in the union accepting lower offer from the SBV. To illustrate this point, he referred me to clause 6 of the collective agreement, which refers to job protection.
>
> [13] He argued that a month after conclusion of their collective agreement, SBV entered into a collective agreement with the other Labour formation which was significantly greater than the collective agreement entered into with their trade union. He insisted that this had an adverse effect on their agreement as the amounts achieved by the other labour formation were significantly as they amounted to a difference of about R700. This resulted in loss of membership to the trade union. Further that the increase in cost of living has affected the achievements made by the Trade Union in the last round of collective bargaining.'

[28] From the reading of the commissioner's ruling and the evaluation of the pleadings and correspondences between the parties, it appears that both demands at all relevant times formed part of the dispute between parties. Consequently, these issued formed part of the unresolved dispute between the parties that was ultimately referred to the CCMA. SVB's contention that the intended strike in relation to the first demand falls foul of procedural agreement and section 64(1) of the LRA is baseless.

<u>Is the strike protected in terms of section 65(3)(a)?</u>

[29] The next question is whether section 65(3)(a)(i) prohibits SASBO and its members from engaging in a strike in respect of their dispute. Clause 1.1 of the Wage Agreement provides that:

> 'The Parties have been engaged in negotiations regarding the review of salaries and overtime arrangements for the Bargaining Unit for the period 1 July 2017 to 30 June 2018.'

[30] Clause 1.3 of the wage agreement provides that "the parties have concluded their substantive negotiations for period 1 July 2017 to 30 June 2019, and the parties have reduced their agreement to writing as set out below".

[31] Clause 9 provides as follows:

> 'Full and Final Settlement
>
> This Agreement will amend all current existing terms and conditions of employment of all employees referred to in this Agreement, and will constitute a full and final settlement of all demands and proposals made by the Union on behalf of its members in respect of the review of wages for the duration of this Agreement.'

[32] And clause 13 provides that:

> 'This Agreement contains all the provisions agreed on by the Parties with regard to the subject matter of the Agreement and supersedes and novates in its entirety any previous understandings or agreements between the Parties in respect thereof, and the Parties waive the right to rely on any alleged provision not expressly contained in this Agreement.'

<u>The demand of parity treatment</u>

[33] In relation to the first demand, SASBO seeks "parity in treatment." In this regard, SASBO demands that, to an extent that SBV entered into a collective agreement on salary increases with MTWU on terms more favourable than the terms of the agreement with it, these terms must apply to its members as well. SASBO effectively demands for increased wages for its members. The demand is made

despite the existence of the parties' collective agreement that regulates minimum wages and wage increases.

[34] This seeks to reopen a matter already regulated by the collective agreement entered into by the parties during the term thereof. I agree with SBV that this demand falls squarely within the substantive prohibition on strike action as contemplated in section 65(3)(a)(i) of the LRA and further that it is in breach of clause 8.1 of the recognition agreement which provides that:

> '… no industrial action shall take place concerning any issue which is a subject matter of an agreement during the perid of such agreement…'

[35] It follows that section 65(1)(a) prohibits SASBO's strike action in support of the first demand.

<u>The demand relating to performance-based distribution of salary increases.</u>

[36] From the reading of the collective agreement, it is apparent that the relevant salary increases based on performance appraisals for the year 1 (that is 1 July 2017 to 30 June 2018) are recorded in the agreement. However, the salary increases based on performance appraisals and the distribution of the increases for the year 2 are regulated by Clause 5.2.1 of the collective agreement, which records that:

> '5.2 **Year 2 of the Agreement 1 July 2018 to 30 June 2019**
>
> 5.2.1 <u>Salary (RFI) increase FOR 2018</u>
>
> - The 1 July 2018 salary (RFI) increase for each performance appraisal rating will be agreed by the Parties in May 2018 once the distribution of the 2018 performance appraisal ratings for the Bargaining Unit employees is known.
> - The cost of 1 July 2018 salary increases for the Bargaining Unit will be equal to CPI + 3.0% (based on the March 2018 CPI), unless:

- CPI + 3.0% is higher than 8.75% in which case the cost of the 2018 salary increases will be capped at 8.75%; or
- CPI + 3.0% is lower than 8.5% in which case the cost of the 2018 salary increases will be capped at 8.5%.

5.2.2 Salary scale increases and minimum salaries for 2018

- The minimum and maximum of all salary scales will increase by CPI + 3.0% (based on March 2018 CPI), unless CPI + 3.0% is higher than 8.5% in which case all salary scales will increase by 8.5%.
- The minimum Protection Officer (PO) salary will increase to R11 000.00 per month and the minimum Assistant Senior Protection Officer (ASPO) salary will increase to R11 500.00 per month from 1 July 2018.
- The minimum job grade 5 salary will increase to R9 400.00 per month from 1 July 2018.
- Salaries that remain below the minimum of the salary scale after increases are awarded will only be adjusted to the minimum if the employee achieved a performance appraisal rating of at least 3.0.
- Historically the salaries of new processing employees were adjusted to the job grade 5 salary scale minimum once they have attained two years' service in SBV. It is agreed that the difference between the minimum salary for "Processing 2 years" and the job grade 5 scale will be adjusted from 95% to 1005 from 1 July 2018, when the difference in these minimum salaries will be abolished.
- New employees who were employed after 1 December 2017, whose salaries are below the new scale minimum will move to the new scale minimum.
- Employees who were employed before 16 December 2017 will receive a performance based RFI increase on 1 July 2018, as reflected in clause 5.2.1 above.
- Salary scales relate to minimum RFI. The salary scales do therefore not apply to Ex-Absa employees, Ex-Standard employees and ATM Consultants who are remunerated on a Cost to Company basis.

…"

[37] SBV sent a correspondence to SASBO dated 15 August 2018 stating, amongst others, that:

> 'The only outstanding matter to be implemented for 2018 is the distribution of wage increases in accordance with clause 5.2.1 of the Collective Agreement. This distribution has been sent to SASBO for agreement on 3 May 2018. However, SASBO has not respondent thereto. The proposed distribution has been prepared based on principles agreed in previous wage negotiations and has been attached to this letter…'

[38] SASBO, on 17 August 2018, in its response to the aforesaid letter, *inter alia*, stated that:

> 'We advise that we are following the process and are preparing for our members to embark on legally protected strike action in support of the following demands:
>
> 1. That the quantum for 2018 salary increases be 8.75% and not 8.5% - distribution based on performance to be deliberated on once the quantum has been agreed to; and in addition…'

[39] It is apparent from the pleadings that the distribution of the increases according to the performance appraisal ratings have not been agreed between the parties. SBV contended that SASBO has consistently refused to engage with it in respect of the calculation and implementation of performance based increases. Although the agreement provides that the issue would be agreed between the parties in May 2018, it is silent on either party's respective rights in the event of failure to reach an agreement.

[40] SASBO submitted that to the extent that the agreement provides that the terms thereof are in full and final settlement, the agreement contains all the provisions agreed on by the parties and that the parties waived their rights to rely on any alleged provision not expressly contained in the agreement, SBV's claim to any right to summarily implement on the issue does not derive from the agreement. This is a fair proposal.

[41] I agree with SASBO that in the absence of such agreement and any express mechanism to resolve this issue, the only available mechanism would be to resort to proverbial power play. As such, the planned strike in support of the second demand should therefore be declared protected.

[42] In the premise, SASBO's second demand, being the demand relating to performance-based distribution of salary increases, is a demand upon which it is entitled to call upon its members to strike. SASBO, however, cannot continue to persist with both demands that it has made if it decides to proceed with its intended strike, the first demand of parity treatment must be severed from its list of demands as it is not entitled to call upon its members to strike in respect of that issue.[3]

[43] Accordingly, I make the following order:

<u>Order</u>

1. The strike action called by the first respondent in support of its demand relating to "parity treatment" is declared unprotected.
2. The strike action called by the first respondent in support of its second demand relating to performance-based distribution of salary increases is declared protected.
3. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

[3] See: *Unitrans Fuel and Chemical (Pty) Ltd v Transport and Allied Workers Union of South Africa (TAWUSA) and Another* (2010) 31 *ILJ* 2854 (LAC)

Appearances:

For the Applicant:	Advocate G. Fourie
Instructed by:	Webber Wentzel
For the First Respondent:	Advocate C. Goosen
Instructed by:	BJ Erasmus Pieterse Attorneys