DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

2019/05/14 .....
DATE SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: J558/19

In the matter between:

TETI TRAFFIC (PTY)LTD	**Applicant**
and	
NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	**First Respondent**
ENOCK MANYONI	**Second Respondent**
HOSEA WALENG	**Third Respondent**
SIZAKELE KUBEKA	**Fourth Respondent**
EPHRAIM BEREDA	**Fifth Respondent**
PERSONS WHOSE NAMES ARE LISTED	

IN ANNEXURE "A" ATTACHED HERETO **Sixth to Further Respondents**

Heard: 10 May 2019

Judgment delivered: 14 May 2019

JUDGMENT

VAN NIEKERK J

[1] This is the return date of a rule *nisi* issued on 13 March 2019. The terms of the rule provide for an interim interdict, amongst other things, declaring a strike on which the respondents intended to embark unprotected, and restraining them from participation in strike-related misconduct.

[2] Neither party opposes the confirmation of the rule *nisi*. The only issue to be determined is that of costs.

[3] The factual background is not disputed. The applicant's principal business is to provide services to SANRAL in terms of a contract that expires in December 2019. The applicant and the first respondent (the union) concluded a recognition agreement on 3 October 2017. After the agreement was concluded, the parties engaged in a process of collective bargaining in respect of a number of demands tabled by the union by way of a letter signed by the second respondent (Manyoni), on16 August 2017. The demands included the establishment of a provident fund (with a 50% contribution by the applicant), the implementation of a medical scheme (with a 40% contribution by the applicant), and payment of an annual bonus.

[4] The parties held a number of meetings between November 2017 and April 2018 and agreed ultimately in April 2018 to request the CCMA to appoint a senior commissioner to facilitate a resolution of the dispute. A facilitation meeting took place on 25 May 2018, but the dispute could not be resolved. The union referred

the dispute to conciliation in June 2018, after which the dispute was referred to arbitration, by agreement, in July 2018. On 24 August 2018, before the commencement of the arbitration hearing, the deadlock was broken and the parties reached an in-principle agreement. On 28 August 2018, Manyoni addressed a letter to the applicant stating that the proposals presented to the members had been accepted.

[5] On 3 September 2018, the parties concluded a substantive agreement, which operates for the period 1 January 2018 to 31 December 2019. Clause 9 of the substantive agreement provides for the establishment of a task team to determine the feasibility of implementing a provident fund or retirement savings vehicle and a medical aid fund for the union's members. On the issue of the annual bonus, the parties agreed in clause 6 to meet on a monthly basis to track the applicant's financial performance and that the applicant would discuss the issue and make a final determination in relation to the payment of the bonus by the end of November 2018.

[6] Of significance for present purposes is clause 8 of the agreement, which reflects the union's agreement to withdraw the dispute referred to the CCMA and agreement that the substantive agreement constituted a full and final settlement of claims by the union against the applicant and clause 7, which records that neither party would for the remainder of the applicant's contract with SANRAL engage in any collective bargaining regarding the amendment or improvement of any substantive terms and conditions of employment of the union's members. The union subsequently withdrew the dispute by way of a letter addressed to the CCMA, by Manyoni, on 3 October 2018.

[7] A task team was duly established in terms of the agreement. On 5 December 2018, the applicant informed the union that on account of its financial position it was unable to implement a provident fund or a medical aid scheme, and that this issue should be postponed to June 2019. The applicant also indicated that it was unable to afford an annual bonus but that the task team should similarly revisit this issue in June 2019.

[8] At the conclusion of the meeting, Manyoni stated that he would refer a dispute to the CCMA regarding the implementation of a provident fund, medical aid and the payment of a bonus.

[9] On 18 January 2019, the union referred a dispute to the CCMA. The referral form indicates that the result required is that the employer party agree to a provident fund, medical aid and annual bonus.

[10] A conciliation meeting was convened in February 2019, when the conciliating commissioner directed the parties to file papers on a jurisdictional issue that the applicant had raised. On 15 February 2019, the applicant filed a formal application objecting to the CCMA's jurisdiction, on the basis that there was no live dispute between the parties, the issues of the provident find, medical scheme and bonus having been resolved on the terms reflected in the substantive agreement. The point was argued on 27 February 2019, when the commissioner reserved judgment.

[11] On 6 March 2019, prior to any jurisdictional ruling, the union issued a strike notice in terms of s 64(1) of the LRA. On the same day, the applicant's attorney addressed a letter to the union contending that the union's demands were regulated by the substantive agreement and that any strike would be a material breach of the agreement and thus unprotected. The letter specifically advised that should the strike notice not be withdrawn, the applicant would approach this court for an urgent interdict, with an order for costs.

[12] On 13 March 2019, the rule nisi was issued, with an interim interdict. The costs of the application were reserved. On the same day, a copy of the interim order was furnished to the union's attorneys and served in accordance with the terms of the order. The threatened strike did not materialise on 14 March 2019.

[13] On 28 March 2019, the CCMA issued a jurisdictional ruling in which the commissioner ruled that the CCMA had jurisdiction to conciliate the dispute referred by the union. A notice of set down for the conciliation was issued. On 8 April 2018, the applicant's attorneys advised the union of the interim order

declaring the strike unprotected. On 12 April 2019, Manyoni attended at the CCMA and urged the commissioner to issue a certificate of outcome. The conciliating commissioner refused to issue a certificate on the basis that an interim order had been granted declaring the strike unprotected.

[14] The applicant submits that the union's conduct in referring the dispute, issuing a strike notice and seeking to obtain a certificate of outcome was aimed at creating discomfort, frustration and inconvenience for the applicant, and is the antithesis of the system of harmonious industrial relations contemplated by the LRA. In these circumstances, the applicant submits that the conduct of the union and Manyoni warrant censure by the court in the form of an order for costs.

[15] The legal principles to be applied are well-established. Section 162 confers a discretion on the court to make orders for costs according to the requirements of the law and fairness. In *Zungu v Premier of the Province of KwaZulu-Natal and others* (2018) 39 *ILJ* 523 (CC), the Constitutional Court said the following (footnotes omitted):

> [23] ... The correct approach in labour matters in terms of the LRA is that the losing party is not as a norm ordered to pay the successful party's costs. Section 162 of the LRA governs the manner in which costs may be awarded in the Labour Court. Section 162 provides:
>
> "(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.
>
> (2) When deciding whether or not to order the payment of costs, the Labour Court may take into account—
>
> (a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and
>
> (b) the conduct of the parties—
>
> (i) in proceeding with or defending the matter before the Court; and
>
> (ii) during the proceedings before the Court."

[24] The rule of practice that costs follow the result does not apply in Labour Court matters. In *Dorkin*, Zondo JP explained the reason for the departure as follows:

> "The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless the requirements are met. In making decisions on costs orders this Court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to Court."

[16] Although the rule is clearly that costs do not necessarily follow the result, the outcome of proceedings in respect of which costs are sought is a relevant factor to be weighed in the balance, together with all others. In the present instance, the applicant succeeded in obtaining an interim order which the union elected not to oppose, and the confirmation of the rule *nisi* is similarly not opposed. The applicant has therefore succeeded in obtaining the substantive relief it sought against the respondents.

[17] To the extent that the applicant relies on Manyoni's issuing a strike notice prior to the CCMA issuing its jurisdictional ruling, this is not a relevant factor. On the other hand, the conduct of the union and Manyoni in particular, leaves much to be desired. Manyoni was aware of the terms of the substantive agreement, having negotiated the agreement on behalf of the union. He was well aware that the demands regarding the provident fund, medical scheme and annual bonus were settled in terms of that agreement. His declaration of a further dispute in respect

of those issues is nothing less than cavalier and resulted in the applicant having to institute these proceedings to protect its interests. Yet Manyoni persisted with his baseless demands, to the point of issuing a strike notice. Further, after the strike notice was issued, the union was specifically invited to withdraw it for the reasons set out by the applicant, the same reasons, no doubt, that have prompted the union not to oppose the confirmation of the rule *nisi* but for the issue of costs. The union elected not to withdraw the notice or provide any substantive basis on which it considered that any strike would be protected, thus compelling the applicant to file an urgent application. On a consideration of all of the above factors, the interests of the law and fairness are best served by an order that will ensure that to some extent at least, the applicant will not be out of pocket on account of Manyoni's egregious conduct.

[18] I must also take into account that there is a collective bargaining relationship between the parties, and the continued existence of that relationship (see *National Union of Mineworkers v East Rand Gold and Uranium Co ltd* (1991) 12 *ILJ* 1221 at 1243 (A)). The respondent's representative urged me to have regard to this factor and to exercise my discretion in relation to costs. I have outlined above Manyoni's campaign to resurrect the demands that had been settled in the agreement concluded between the parties in September 2018, despite the terms of that agreement. Manyoni's conduct has undermined the collective bargaining relationship between the parties, and the present proceedings are a direct consequence of that conduct. It is not open to the union now to rely on the existence of an on-going collective bargaining relationship as a factor militating against a costs order, in circumstances where its officials have acted in blatant and flagrant disregard of the terms of a binding collective agreement. On the contrary, a refusal to grant the applicant its costs runs the risk of this court indicating to the parties (and more broadly) that union officials may flout binding collective agreements and thus subvert the institution of collective bargaining with impunity.

[19] No evidentiary basis was laid for an order for costs against any of the third to further respondents, and I intend therefore to limit the order for costs to one in respect of the first and second respondents.

I make the following order:

1. The rule *nisi* issued on 13 March 2019 is confirmed, with costs, such costs to be paid jointly and severally by the first and second respondents, the one paying the other to be absolved.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. H Viljoen instructed by Cowan Harper Madikizela

For the respondent: MR R Daniels, Cheadle Thompson & Haysom Inc.