IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 1958/19

In the matter between:

AIR CHEFS (SOC) LTD **Applicant**

And

NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA **First Respondent**

THE INDIVIDUAL RESPONDENTS WHOSE NAMES APPEAR ON ANNEXURE 'A' OF THE FOUNDING AFFIDAVIT **Second to Further Respondents**

Heard: **6 October 2019**

Delivered: **7 October 2019**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] With this urgent application, the applicant, Air Chefs (Soc) Ltd, (Air Chefs), seeks an interim order declaring the intended strike of the Second to Further Respondents which was due to commence on 7 October 2019 at 06h00 as unprotected in terms of section 65(1) read together with section 65(3) of the Labour Relations Act (the LRA)[1]; interdicting and restraining the second to further respondents from participating in any unprotected strike action at the premises or in any conduct in pursuance of the unprotected strike; or from encouraging, participating in, or promoting the unprotected strike.

[2] In the alternative, and should the Court be of the view that the intended strike action is not unprotected, Air Chefs seeks an order that the strike may not commence, until such time as the first respondent has conducted a secret ballot, as required in accordance with the new amendments to the Labour Relations Act.[2]

[3] The urgent application was opposed on Air Chefs' papers. Following the hearing of the application, judgment was reserved, with a further order issued interdicting the respondents from embarking on any strike action pending the delivery of judgment and order.

[1] Act 66 of 1995

[2] The Labour Relations Amendment Act, No 8 of 2018 (Amendment Act) , which sets out transitional provisions in s19 and require Trade Unions and Employers' Organisations to provide for secret strike ballots in circumstances where their constitutions do not provide for such ballots. The transitional provisions require trade unions and employers' organisations, which are in the process of amending their constitutions to give effect to Section 95(5)(p) of the LRA, to conduct a secret ballot of members before engaging in a strike or lockout.

Section 95(5)(p) of the LRA provides;

'95. Requirements for registration of trade unions or employers' organisations

(5) The Constitution of any trade union or employers' organization that intends to register must;

(p) provide that the trade union or employers' organization before calling a strike or lockout, must conduct a ballot of those of its members in respect of whom it intends to call the strike or lock-out'

The background:

[4] Air Chefs is a state owned company with staff deployed at most major airports in South Africa, *viz*, Cape Town International, King Shaka, East London and Port Elizabeth. Air Chefs is in the business of catering for a number of outbound airline operators both domestically and internationally, as well as catering for various business lounges and clients at these airports, collectively referred to as 'The Premises'. Central to Air Chefs' business is the preparation of meals and beverages in accordance with the demands of clients and passengers that utilise airline services of its customers. It services a variety of customers and airlines such as SAA, Swiss Air, British Airways, SA Express, by preparing on a daily basis, fresh meals which are in turn provided to daily flights on domestic, regional and international routes.

[5] Air Chefs and the first respondent (NUMSA) have in place a recognition agreement. Air Chefs seeks the order on the basis that the issue in dispute, which is in relation to the continued payment of an anniversary payment, and which was provided for in the 'Old Main Agreement' and subsequently deleted and substituted in its entirety in the current Main Agreement, is an issue that is regulated in the Main Agreement as a 'substantive issue' relating to wages, benefits and other conditions of employment between the parties.

[6] The initial dispute raised by the respondents in the submissions made by Ms Naidoo on their behalf that Air Chefs was not in any event a party to the Main Agreement dissipated when Mr Boda made reference to the extension of that agreement to non-parties as promulgated in a Government Notice issued on 27 July 2019 by the Minister of Labour in terms of section 32(2) read with section 32(5) and 32(8) of the LRA. I was further satisfied that Air Chefs is indeed a member of CATRA, an employers' association which was party to the Main Agreement upon a production of a certificate of membership in that regard.

[7] The brief background to this dispute is as follows;

7.1 Air Chefs and NUMSA operate under the auspices of the Bargaining Council for the Restaurant, Catering and Allied Trades. The current

Main Agreement (Published in the Government Gazette on 27 July 2018) which is applicable to the parties was concluded at the Bargaining Council in January 2018, and governs all substantive issues related to wages, benefits and conditions of employment.

7.2 As with all similar agreements, the parties are bound by its provisions and are prohibited from engaging in any strike or conduct in furtherance of a strike in respect of any matters governed in terms of the Agreement for its duration. Furthermore, the Bargaining Council is the forum for negotiations and conclusion of substantive agreements on wages, benefits and conditions of employment. There is no room made for plant bargaining in the agreement.

7.3 Air Chefs' contention is that all disputes pertaining to wages, whether it be the calculation, quantum or make up thereof, are substantive in nature and not strikable under the provisions of section 65(1) read with section 65(3) of the LRA.

7.4 Since 2009, the old main Collective Agreement made provision for a payment known as 'anniversary payment', which was payable to employees after two years of employment with any employer. This equated to a one week payment of the anniversary of each employee's employment after the first two years.

7.5 Air Chefs' contention is that following the conclusion of the Main Agreement in November 2014, which was to last until May 2018, the anniversary payment and its abolition and replacement with an annual bonus was the subject matter of substantive negotiations, and it was agreed under clause 5 of that Agreement to delete the anniversary payment clauses, and to effectively replace it with an annual bonus payable during December. The payment in this regard would *inter alia* be one weeks wages for one year completed service; two weeks wages for two years completed service; As from January 2015, three weeks wages for three and four years completed service; and four weeks for five or more years of completed service.

7.6 The effect of the above according to Air Chefs is that there was a deliberate and negotiated novation of the anniversary payment, to be replaced with a bonus payment.

7.7 Despite the alleged novation, Air Chefs nonetheless continued to pay the anniversary payment until the end of December 2018. Effectively, payments were stopped in April 2018. Thereafter, the respondents demanded the payments together with that of the bonus under the Main Agreement be made.

7.8 An email sent to Air Chefs by a NUMSA shop steward, Mr. Samuel Malema in which he complained about the non-payment of the anniversary payment triggered subsequent events, which included a meeting on 17 May 2018 between NUMSA and a designated agent of the Bargaining Council (Mr Abbey Mohono), who it is alleged had explained to the parties that Air Chefs was not obliged to pay the anniversary payment any longer as it was abolished and replaced with a bonus payment.

7.9 According to Air Chefs, after Mohono's explanation, Malema had then requested that the anniversary payment be continued with until the end of 2018 so that none of the employees lost out on their expectations for the year. The request was acceded to. In January 2019, Air Chefs then stopped all anniversary payments and made the bonus payments.

7.10 NUMSA's position since February 2019 however was the stopping of the payments constituted a unilateral changes to terms and conditions of employment as there was no agreement in that regard. Meetings between the parties were held in February 2019, and on 21 February 2019, NUMSA then referred an unfair labour practice dispute to the Bargaining Council. That dispute was withdrawn on 8 May 2019 before it could be arbitrated.

7.11 NUMSA referred another dispute on 7 April 2019 related to unilateral changes to terms and conditions of employment. The dispute was set down for conciliation on 7 May 2019 and extended to 14 May 2019. On

28 May 2019, the Bargaining Council referred the matter to the Commission for Conciliation Mediation and Arbitration (CCMA) for picketing rules, which were then issued on 19 August 2019.

7.12 Air Chefs, which held the view that the dispute did not concern mutual interest dispute or one of unilateral change to terms and conditions of employment, referred a dispute to the Bargaining Council on 13 September 2019 regarding the interpretation and application of the Main Agreement, particularly in relation to the non-payment of the anniversary bonuses. The dispute related to the interpretation and application of the collective agreement is set down for conciliation on 8 October 2019.

7.13 On 13 September 2019, NUMSA requested that a ballot be conducted at the workplace failing which it would issue a strike notice. On 16 September 2019, NUMSA gave a formal notice of its intention to conduct a ballot. Air Chefs granted the permission for ballots to be conducted on 17 September 2019 at its premises.

7.14 Air Chefs' contention is that in conducting the ballot, NUMSA failed to ensure that such a ballot was held in secret and instead, had compelled those of the individual respondents that were present, to complete the ballot forms in open and alongside one another, and to return the forms to it. It is alleged that NUMSA watched the votes being cast, closely observing each member's election thereon. Its ER Manager, Mr Tebogo Moloto, who had closely observed the conduct of the ballot had raised concerns about how it was done, and was chased away by certain of the individual respondents, who also chased away Air Chefs' security personnel, who were similarly avoiding the balloting process. Moloto deposed to a confirmatory affidavit in that regard. Air Chefs through Moloto formally raised its concerns with NUMSA in an email dated 17 September 2019.

7.15 On 20 September 2019, Air Chef addressed a letter to NUMSA stating that the latter would be entitled to conduct fresh ballots, but that the

ballot would in any event remain superfluous since the strike would remain unprotected. It also sought an undertaking by 23 September 2019 that the respondents would not embark on any strike action pending the final determination of the interpretation application dispute. NUMSA failed to make such an undertaking as it intended to proceed with balloting and to issue a strike notice. Further correspondence followed to NUMSA in accordance with section 68(2) of the LRA, in which it was advised that this Court would be approached on an urgent basis upon receipt of the strike notice.

7.16 The strike notice was issued by NUMSA on 4 October 2019 at about 17h11, with NUMSA giving 24 hours for the strike to commence at 06h00 on 7 October 2019. In response, Air Chefs sent an additional Notice in terms of section 68 (2) of the LRA.

[8] Given the timeline of the events as described above, it cannot be doubted that Air Chefs has complied with the provisions of section 68(2) of the LRA, and also acted with the necessary haste in approaching the Court for the relief that it seeks. Accordingly, the urgency of the matter can also not be doubted.

The legal position and evaluation

[9] Other than the issue of balloting, it can be accepted in this case that NUMSA has complied with the procedural requirements outlined in the provisions of section 64 of the LRA[3]. That compliance however does not necessarily equate

[3] Section 64. **Right to strike and recourse to lock-out**

(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

to the strike being protected, as the question remains whether the issue in dispute that led to the demand and the intention to strike is one over which the union can go on strike.

[10] I further accept that the fact NUMSA had initially referred the dispute to the Bargaining Council as an issue related to unfair labour practice is of no consequence, as that referral was subsequently withdrawn. Even if it can be read into that initial referral that NUMSA had referred the dispute as a rights dispute, this does not imply that it was bound to that characterisation for all intents and purposes.

[11] Central to the dispute, and in further reference to the basis upon which Air Chefs claims a *prima facie* right, is the question whether the strike would be unprotected on the grounds that the demand, *i.e.,* the reinstatement or continued payment of the anniversary bonus, is an issue regulated in the current Main Agreement, precluding NUMSA and its members from striking

---

(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 lockout, 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).

(2) …

(3) …

(4) Any *employee* who or any *trade union* that refers a *dispute* about a unilateral change to terms and conditions or employment to a *council* or the Commission in terms of subsection (1)*(a)* may, in the referral, and for the period referred to in subsection (1)*(a)* –

(a) require the employer not to implement unilaterally the change to terms and conditions of employment; or

(b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.

(5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of *service* of the referral on the employer.

under the provisions of section 65 (1) read together with section 65(3) of the LRA[4].

[12] In opposing the application, Ms Naidoo for the respondents correctly pointed out that the starting point would obviously be an examination of the provisions of the Main Agreement in order to determine whether indeed the issue in dispute is regulated by that Agreement. As to the meaning of *'regulates the issue in dispute'* within the meaning of section 65(3)(a), of the LRA, this was explained in *Fidelity Guards v PTWU and Others*[5] to include controlling or dealing with an issue, activity or process, which also includes creating a procedure for resolving the issue.

[13] As to whether the issue in dispute relates to those under section 64(4) of the LRA or any other provision is for the Court to determine, irrespective of the findings made by the Bargaining Council's Commissioner in a ruling dated

---

[4] **65. Limitations on right to strike or recourse to lock-out**

(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*.
  (b) that person is bound by an agreement that requires the *issue in dispute* to be referred to arbitration;
  (c) the *issue in dispute* is one that a party has the right to refer to arbitration or to the Labour Court in terms of *this Act* or any other employment law;
  (d) that person is engaged in -
    (i) an *essential service*; or
    (ii) a maintenance service

(2) …

(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
    (ii) any determination made in terms of section 44 by the *Minister* that regulates the *issue in dispute*; or
  (b) any determination made in terms of Chapter Eight of the Basic Conditions of Employment Act and that regulates the *issue in dispute*, during the first year of that determination

[5][1997] 11 BLLR 1425 (LC) at 1433F-H, where it was held;

"…a substantive regulation of the issue or a process leading to the resolution of the issue. Must this regulation be comprehensive? Or is it sufficient that the issue be regulated generally by providing for instance, that the issue is settled, at least for the present year of bargaining, or is assigned to a specific process or that an issue is assigned to a particular level of bargaining or to a particular forum? I think that the wider sense is meant here.'

See also *CSS Tactical (Pty) Ltd v Security Officers Civil Rights And Allied Workers Union (SACRAWU) and Others* (2015) 36 ILJ 2764 (LAC) at para 18

20 May 2019, or the certificate of outcome issued by the CCMA on 19 August 2019[6].

[14] 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 characterization of a dispute by a party is not necessarily conclusive. 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 of the strike notice, the demands made by the union, the negotiations between the parties, the preceding state of facts and negotiations; and the pleadings.[7]

[15] It is common cause that Air Chefs has made payments of the anniversary payments to the second to further respondents for over a period of ten years. Air Chefs however relies on the amendments made to the old Main Agreement emanating from a meeting held on 18 November 2014 between Labour and CATRA, and which preceded the new Main Agreement, wherein it was recorded that the issue of anniversary payment be deleted and substituted in its entirety with a 13th cheque/bonus clause.

[16] Emanating from that meeting and agreement reached, it was recorded in a signed outcome of the substantive negotiation in clause 5 (In Annexure 'B') that sub-clause 5(8) and 5(8)(a) of the Collective Agreement (the old), be substituted with an annual bonus payment. In effect, as Air Chefs submitted, this constituted a deliberate and negotiated novation of the anniversary payment, to be replaced with the annual bonus clause. Thus, according to Air

---

[6] See *Coin Security Group (Pty) Ltd v Adams and Others* (2000) 21 ILJ 924 (LAC) at para 15, where it was held that;

> 'It is the court's duty to ascertain the true or real issue in dispute (*Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building Workers Union & others (2)* (1997)18 ILJ 671 (LAC) and *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers' Union & others (1)* (1998) 19 ILJ 260 (LAC)). In conducting that enquiry a court looks at the substance of the dispute and not the form in which it is presented (*Fidelity* at 269G-H; *Ceramic* at 678C). The characterization of a dispute by a party is not necessarily conclusive (*Ceramic* at 677H-I; 678A-C). ….'

See also *Pikitup (SOC) Ltd v SA Municipal Workers Union on behalf of Members and Others* (2014) 35 ILJ 983 (LAC) at para 47

[7] See *Coin Security Group (Pty) Ltd v Adams and Others* (2000) 21 ILJ 924 (LAC) at para 15; *TSI Holdings (Pty) Ltd and Others v National Union of Metalworkers of SA and Others* (2006) 27 ILJ 1483 (LAC) at paras 29 and 31; *Johannesburg Metropolitan Municipality v SA Municipal Workers Union and Others* (2009) 30 ILJ 2064 (LC) 2069G-H.

Chefs, there was a replacement of an existing obligation by a new one, with the existing obligation being discharged by the new obligation[8].

[17] In *National Health Laboratory Service v Mariana Lloyd-Jansen van Vuuren* [9], it was held that;

> '[15] …There is a presumption against novation because it involves a waiver of existing rights. When parties novate they intend to replace a valid contract with another valid contract. In determining whether novation has occurred, the intention to novate is never presumed. In Acacia Mines Ltd v Boshoff, the court held that novation is essentially a question of intention.'
>
> [16] In Proflour (Pty) Ltd & another v Grindrod Trading (Pty) Ltd t/a Atlas Trading and Shipping & another5 the court, when determining whether the agreement resulted in a novation, referred to the decision of Electric Process Engraving and Stereo Co v Irwin 1940 AD 220 at 226- 227 where the court said:
>
> > 'The law on the subject was clearly enunciated as far back as 1880 in the well-known case of Ewers v The Resident Magistrate of Oudtshoorn and Another, (Foord) 32, where DE VILLIERS, C.J, said: "The result of the authorities is that the question is one of intention and that, in the absence of any express declaration of the parties, the intention to effect a novation cannot be held to exist except by way of necessary inference from all the circumstances of the case."'
>
> It follows that in order to establish whether novation has occurred, the court is entitled to have regard to the conduct of the parties, including any evidence relating to their intention.'

[18] NUMSA denies that any agreement was reached to phase out anniversary payment and contend that Air Chefs simply made a decision to stop the anniversary payment, thus constituting a unilateral change to terms and

---

[8] *Tauber v Von Abo* 1984 (4) SA 482 (E) at 485F-486B, where it was held'
"Novation can be described as the replacing of an existing obligation by a new one, the existing obligation being discharged by the new obligation. Cf. Caney The Law of Novatoin (supra at 4 and 21); Voet 46.2.2.; Wessels The Law of Contract in South Africa 2nd ed vol 2 paras 2369, 2375, 2379 and 2395; De Wet and Yeats Kontraktereg en Handelsreg 4th ed at 239."See also Combrink v Maritz 1952 (3) AS 98 (T)

[9] (20044/2014) [2015] ZASCA 20 (19 March 2015) at para

conditions of employment. That denial was without the answering affidavit, based on Air Chefs' own concession in the founding affidavit that this was indeed NUMSA's stance. In order to determine whether by concluding the subsequent agreement, there was a novation, it is necessary, to consider i*nter alia*, whether such contract obliterated the rights and obligations that were created by the original agreement.

[19] In this case, it can be accepted that notwithstanding the Air Chefs' contentions as to the reason the payment of the anniversary payment had to be stopped, it had continued to make such payment at least until April 2019. There is nothing to gainsay its contentions that it did so either as a result of an error on its part, or as a result of negotiations with NUMSA to continue the payments.

[20] NUMSA however is faced with several difficulties in its contentions that the demand in regard to the anniversary payment is not regulated by the New Main Agreement as it relates to actual wages as opposed to minimum wages, or that novation did not take place for the following reasons;

20.1 The first is that it entered into a Recognition Agreement with Air Chefs after the old Main Agreement was entered into, and was further not a party to the 18 November 2014 negotiations between Labour and CATRA, which negotiations concluded issues on wages and substantive issues up to 13 May 2018, nor was it a party to the negotiations leading to the new Main Agreement concluded in January 2018. Effectively, it cannot contribute much to what the intentions of the parties were in concluding those agreements.

20.2 The second difficulty is that it is correct as NUMSA has pointed out, that Air Chefs failed to produce a copy of the old Main Agreement it relied on as containing the clause related to anniversary payment to demonstrate the alleged novation. In similar vein however, NUMSA relies *inter alia*, on a practice of payment of the anniversary payment, without demonstrating the basis upon which that payment came to be in place. Even if there was merit in the contention that the anniversary payment came about as a result of practice, and was accordingly an

existing term and condition of employment, in the absence of a contractual right or collective bargaining right to the anniversary payment, that payment would in any event constitute a work practice that fell within management's prerogative. At most, the term and condition relied upon has since been eroded by its novation. The facts of this case are therefore clearly distinguishable from those in Transport and Allied Workers Union of South Africa obo Ngedle and Others v Unitrans Fuel and Chemical (Pty) Ltd Limited[10], which the respondents sought to rely on.

20.3 In the absence of evidence to demonstrate that the anniversary payments were not made consequent upon the provisions of the old agreement despite a copy not having been produced, the Court has no reason not to be satisfied that indeed such an agreement existed, and was amended by the provisions of the concluded wage negotiation and substantive issues on 18 November 2014.

20.4 In a nutshell, the practice of making payment of the anniversary payment was based on the old Main Agreement, which was

---

[10] (CCT131/15) [2016] ZACC 28; 2016 (11) BCLR 1440 (CC); [2016] 11 BLLR 1059 (CC); (2016) 37 ILJ 2485 (CC), where it was held;

'[30] The first LAC judgment concluded that the wage cut demand regarding the former Shell seven workers was a legitimate demand, as it related "to the fact that [Unitrans] unilaterally decided to reduce the wages of those of its workers who previously serviced the Shell contract for [Unitrans]". The LAC understood the demand in relation to the Shell seven workers to be a demand that would undo the employer's unilateral change and reinstate a cost that had always been there. It was a demand to restore the terms and conditions of employment that had applied to them prior to the termination of the Shell contract. The LAC therefore concluded that this demand did not amount to a wage increase as the employer would not pay more than what it legally had been paying had it not cut the Shell seven workers' wages. Again, the first LAC judgment limited the ambit in which the wage cut demand could be exercised.

[31] I agree with the reasoning of the LAC. In my view, this demand cannot be described as an increase in wages as there was no cost implication to the employer. Of course the restoration of the terms and conditions of employment would mean that Unitrans should also pay the Shell seven workers their back pay from the time that Unitrans commenced paying them at reduced rates. That, however, cannot be regarded as a wage increase nor cost implication to Unitrans, as it had unilaterally reduced those wages and, over a period, enjoyed a saving at the expense of the workers who had to endure hardships. Therefore, it would have to pay what it should have paid had it not changed the terms and conditions of employment. All that was required from the employer was for it to restore the *status quo ante*. That demand was permissible only to the extent that the wage cut demand related to the Shell seven workers.'

subsequently amended, and for such payments to be converted into annual bonuses as per clause 5 of 18 November 2014 agreement. Consequently, the decision to discontinue the anniversary payment did not constitute a change to their terms and conditions of employment in the light of that novation. In any event, when Air Chefs took a decision to stop the payment, on its uncontested version, Malema of NUMSA had then requested that the anniversary payment be continued with until the end of 2018 so that none of the employees lost out on their expectations for the year. That request was acceded to, and the invariable conclusion to be reached is that at best, NUMSA was aware of the basis upon which the payments were discontinued.

20.5 It was further submitted on behalf of the respondents that a consideration of the main Agreement only regulated minimum wages, and not actual wages, and that their case was that their demand related to actual wages as opposed to minimum wages. This was particularly so since clause 5 of the new main Agreement referred to minimum wages and not actual wages. The argument went further that since Air Chefs did not plead that every single employee was earning the minimum wage, and in line with the definition of the term 'regulates', it cannot be said that the Main Agreement either substantively or authoritatively regulated the issue of actual wages, for the purposes of a prohibition in the main agreement over actual wages.

20.6 It is my view that the above argument lacks merit. It is correct as stated by NUMSA that the clause 5 of the Main Agreement refers to 'wages' and minimum prescribes rates, and no mention is made of actual wages. Even then, the issue is whether a payment of anniversary payment is or was a component of actual wages which NUMSA was entitled to insist on as a demand, even if a new one. This issue however has not been raised at any bargaining level, and to the extent that plant level bargaining is impermissible, the issue remains one regulated by the Main Agreement resulting from the novation as already alluded to.

20.7 I agree with the submissions made on behalf of the respondents that a limitation on the right to strike should not be lightly inferred as the Court ought to adopt an interpretation of the provisions of the LRA which gives full effect to that right. I further agree that if orders such as sought by Air Chefs are easily granted, it would imply that employees' right to strike will be rendered nugatory, thus eroding the principle of powerplay in the workplace. The difficulty however is that the right to strike is not unfettered in the light of the limitations imposed under section 65(3) of the LRA, and that right can only be exercised were permissible.

20.8 The issues or the demand leading to the dispute, or the true issue in dispute forming the subject matter of the proposed strike, if crystalized down to its bare essentials, is that NUMSA seeks the retention of the anniversary payment in circumstances where there is clearly no legal basis for it, as it has since been done away in accordance with clause 5 of the agreement ('Annexure B') concluded on 18 November 2014, and replaced with an annual bonus. It is not correct as it was submitted on behalf of the respondents, that they are not seeking to negotiate the retention of the anniversary payment. In the end, NUMSA's demand is thus unsustainable in the light of the prohibition of plant level bargaining and the overall binding effect of the Main Agreement. The fact that NUMSA's own recognition agreement with Air Chefs provides for negotiations on mutual interests issues[11], does not derogate from the fact that ultimately, the provisions of the standing Main Collective Agreement in respect of substantive issues remain intact, and cannot be simply altered by any other agreement that may be reached between the two parties without consequences for the other parties to that Agreement[12].

[11] Clause 19

[12] See *Wallenius Wilhelmsen Logistics Vehicle Services v National Union of Metalworkers of South Africa and Others* (2019) 40 ILJ 1254 (LAC); [2019] 8 BLLR 795 (LAC) where it was held;

> '[27] Firstly, the MIBCO constitution is a collective agreement as defined in section 213 of the LRA in that it is a written agreement concerned with matters of mutual interest concluded by registered trade unions and employer organisations. The MIBCO constitution remained (and remains) extant despite the expiry of the 2013 agreement. Clause 11 of the

[21] The issue of the intended strike being prohibited on account of irregular balloting procedures is of equal importance. A strike will be unprotected until such time that a union has conducted a secret ballot before engaging in strike action, as this was required by the transitional provisions set out in section 19 of the LRA Amendment Act. The transitional requirements apply to those unions whose constitutions do not provide for a 'recorded and secret ballot' and that in the interim, prior to complying with the requirements relating to a secret ballot, they "must conduct a secret ballot of members" before engaging in a strike. These are peremptory provisions and until the respondents complied with them, they may not engage in a strike.[13]

[22] I have no reason to differ with the above authority, as there is a reason behind these provisions, which is to ensure *inter alia*, that the decision to embark on a strike, is preceded by a democratic process that protects employees to freely exercise or not to exercise their rights to strike. These added 'limitations' are purely procedural requirements that do not erode employees' right to strike in circumstances that would ordinarily be permissible. They merely suspend the exercise of that right until the peremptory prerequisites are met. It is appreciated that a strike is by its very nature a collective effort.

> MIBCO constitution makes it abundantly clear that proposals and bargaining in respect of the amendment of any existing agreement, the introduction of a new agreement *or any matter of mutual interest* are to be negotiated at MIBCO level and not at plant level; and clause 12 prohibits strike action unless and until the dispute about a matter of mutual interest has been dealt with at central level. These are substantive prohibitions regulating levels of bargaining and go beyond mere process, notice provisions or a prerequisite of conciliation for industrial action of the kind required by section 64 of the LRA. The level of collective bargaining impacts substantively on sectoral wage rates. The prohibition on plant level bargaining is directed at uniformity and orderly substantive outcomes. The attempt by NUMSA to introduce two-tier bargaining sought to alter substantive wage rates at plant level in respect of a single employer. That is a matter of mutual interest reserved by the MIBCO Constitution for centralised bargaining.
>
> [28] It follows that while the immunisation clause in the settlement agreement permitted NUMSA to demand an additional R40.00 per day for its members working at the appellant, and notwithstanding the fact that the centralised bargaining clause in the 2013 agreement (which survived in the 2017 agreement by virtue of the reservation clause) was not operative between 1 September 2016 and 14 April 2017, it was still obliged to raise the demand and negotiate it at central level in terms of the MIBCO constitution. NUMSA's failure to do that meant that the strike was prohibited in terms of section 65(1)(a) of the LRA. NUMSA was bound by a collective agreement (the MIBCO constitution) that prohibited a strike in respect of a demand for increased wages at plant level. The Labour Court accordingly erred in not confirming the rule *nisi*.

[13] *Mahle BEHR SA (Pty) Ltd v NUMSA and Others ; FOSKOR (Pty) Ltd v NUMSA and Others* (D448/19;D439/19) [2019] ZALCD 2; (2019) 40 ILJ 1814 (LC)

The collective however cannot be separate from the individual employee and his or her concomitant right to make choices. The argument that the 'union's position is supreme' is a debate for another day.

[23] In line with the above, and to the extent that Moloto's contentions in regards to the irregularities accompanying the ballot process followed by NUMSA remain unchallenged, it ought to be concluded that indeed the balloting process was flawed and not legitimate for the purposes of compliance with the requirements set out section 95(9) of the LRA.

[24] In summary, I am satisfied that Air Chefs has made out a case why this matter should be accorded urgency. But for the 'interim order' granted by the Court at the hearing of this matter, the strike was due to commence at 06h00 on 7 October 2019, following upon the strike notice issued on 4 October 2019. Furthermore, I am satisfied that Air Chefs has demonstrated a *prima facie* right to the relief that it seeks, and has demonstrated that the issue in dispute is one that the respondents can pursue by way of industrial action. Air Chefs has further demonstrated that it stands to suffer irreparable harm should the relief not be granted. Furthermore, there is no doubt that Air Chefs has no other alternative remedy available to it, and that given the circumstances of the demands leading to the dispute and the conclusions made in that regard, the balance of convenience clearly favours Air Chefs. In the circumstances, the following order is made;

Order:

1. A rule *nisi* is hereby issued calling upon the respondents to show cause on 27 November 2019 at 10:00, why a final order should not be granted on the same terms as those set out in paragraph 3 below; and

2. Pending the return date, paragraphs 3.1 to 3.5 below, shall operate as an interim order with immediate effect.

3. Non-compliance with the requirements of Rule 7 of the Rules of this Court is condoned and dispensed with and this matter is heard as one of urgency in terms of Rule 8 of the Rules of this Court:

3.1 Declaring the intended strike of the second to further respondents due to commence on 7 October 2019 at 6:00 as unprotected in terms of section 65(1) read with section 65(3) of the Labour Relations Act 66 of 1995.

3.2 Interdicting and restraining the second respondents from participating in any unprotected strike.

3.3 Interdicting the first and second to further respondents from participating in any conduct in pursuance of the unprotected strike.

3.4 Interdicting the first and second to further respondents from encouraging, participating in, or promoting the unprotected strike.

3.5 Ordering the first respondent to publicly call upon the second to further respondents, not to participate in any unprotected strike or any conduct in furtherance of such unprotected strike.

4. Any party affected hereby, may anticipate the return date on 48 hours' notice to all other parties.

5. The first and second respondent must by no later than 10h00 on 8 October 2019 serve and file an affidavit demonstrating compliance in terms of this interim order.

6. The service of this order shall be effected:

6.1 By telefax on the first respondent's head offices by way of fax to 011 6[…] as well to the relevant union official, namely Mr Robert Seroka per email to Roberts@nu[...a] in terms of Rule 4 of the Rules of this Court.

6.2 By communicating the provisions of the order to the second to further respondents at such premises they find themselves by

issuing copies of the order and to be placed on the notice boards which the second to further respondents have access to.

6.3 The first respondent is ordered to publicly call upon the second to further respondents, in the manner prescribed hereunder, not to participate in any unprotected strike or any conduct in furtherance of such unprotected strike.

6.4 The first respondent is ordered to give effect to paragraph 2.11.3 above by means of –

6.4.1 Public announcement *via* loud hailer to those members of the first respondent who are present at the time, in such languages which are commonly used for communication at the premises.

6.4.2 Distribution of any form or written communication, be it trade union leaflets, SMS's, emails or WhatsApp, which reads:

'On 7 October 2019, the Labour Court issued an order declaring the planned strike to be unprotected and unlawful. We urge you not to embark on any strike and to continue working. Should you require further explanation of the court order, please approach your union management.'

7. The costs of this application are reserved for determination on the return date.

_____

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	F Boda SC, instructed by Cliffe Dekker Hofmeyr INC
For the Respondents:	P Naidoo, instructed by Cheadle Thompson & Haysom INC