IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS409/18

In the matter between:

UASA-THE UNION obo MEMBERS **Applicant**

and

IMPALA PLATINUM LIMITED **Respondent**

Heard: **25 – 27 November 2019**

Delivered: **21 January 2020**

Summary: Leave – respondent unilaterally placed its Level D employees on leave for 5 months during a strike by Amcu in which they did not participate – the leave they had to take comprised accrued leave and future unaccrued leave – the employer deducted contractual (non-statutory) leave days – the employees did not apply for leave – more leave taken than available - whether deduction of contractual leave (in addition to statutory leave) lawful. Employer has no statutory or contractual discretion and the policy does not permit the deduction – reliance upon tacit consent for deduction – consent not established – deduction unlawful

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JUDGMENT

COETZEE, AJ

The parties

[1] The applicant is UASA-THE UNION ("the union") acting on behalf of its members ("the individual applicants") listed on Annexure "A" to the statement of claim. At the commencement of the proceedings an amended Annexure "A" was handed in reflecting the particulars of 66 (sixty-six) members.

[2] The respondent is Impala Platinum Ltd, which is the employer ("the employer") of the 66 members of the union.

The issue

[3] The applicant approaches the court in terms of section 77 of the Basic Conditions of Employment Act[1] (BCEA) for relief.

[4] It seeks an order declaring that the respondent is not entitled to deduct any leave from the leave entitlement of the applicant's members who have not agreed thereto on the strength of the so-called leave regime and default rule unilaterally implemented by the respondent and to credit the members with any leave deducted from them on the strength of the so-called leave regime and default rule unilaterally implemented by the respondent.

[5] At the heart of the matter is the question whether the respondent unlawfully deducted leave days from the individual members.

The facts

[6] In terms of their individual contracts of employment, the individual applicants are entitled to 35 days leave per annum. Of these 35 days, 21 days are

[1] No. 75 of 1997a, as amended.

referred to as compulsory leave ("CL"), and the remaining 14 days are referred to as accumulative leave ("AL") or contractual leave. This case concerns only the AL.

[7] On 23 January 2014 AMCU members employed by the employer commenced with a protected wage strike within the AMCU bargaining unit, which strike endured until 24 June 2014.

[8] On Friday, 24 January 2014, and following various acts of violence, intimidation, breaches of the picketing rules and other unlawful conduct, the employer obtained an urgent interim interdict interdicting AMCU and its members from engaging in such unlawful activities.

[9] The individual applicants did not participate in the strike action and at all material times tendered their services to the employer during the 5-month strike.

[10] On 3 February 2014 the employer communicated its decision by way of a Strike Brief that all non-striking employees would be sent on paid leave until further notice and that the position would be reviewed on a weekly basis.

[11] At the time nobody expected the strike to last 5 months.

[12] Mr Barnard ("the witness") testified on behalf of the union and the individual applicants and was the only witness that was called during the trial.

[13] He testified that the communication of 3 February 2014 was made to them orally by the General Manager during a meeting. The written Strike Brief did not reach him or the other employees.

[14] The employer communicated with the individual applicants, and its other employees, by way of electronic communications. They normally receive the communications on their computers.

[15] Their computers were locked away at the office when they were sent on leave and they had no access thereto during the strike.

[16] The employer issued further strike briefs which they also did not receive until such time as they had access to their computers once the strike ended. According to him, they were told to communicate with their HOD's during the strike.

[17] The strike brief issued by the employer explained that the leave would be "*issued from your current portion of AL*.", and that if individual applicants did not have sufficient AL, it would be advanced "*from your next leave cycle*". This leave arrangement is referred to as the leave regime.

[18] The decision to embark on the leave regime was explained as follows in the strike brief:

> "The Rustenburg operations have therefore again become ungovernable and it is necessary to implement measures to protect non-striking employees and the company property. We are certain that it is clear from what has been explained that it is (i.e. the leave regime) necessary to protect you from further unlawful acts as the Rustenburg operations have, to our great sadness and regret, become ungovernable."

[19] The strike brief of 3 February 2014 recorded that:

> "If you however have any further questions, please contact your Human Resources Officer for the Strike Hotline on 0145692499."

[20] It was common cause that the leave regime was unilaterally imposed by the employer and remained in place until the strike ended on 24 June 2014. On 6 and 13 March 2014 the employer issued a strike brief advising its individual applicants as follows:

> "At this point in time, the forced leave practice will remain in place for all employees who qualify for the paid AL arrangement with the following options available to these employees:
> Take AL due do you. If you have none at this stage, we will in the days to employees who qualify, or

Take annual leave, or

Take unpaid leave.

The decision to send our employees on leave as meant that Impala have no deaths or injuries because of the strike to date. The safety of our team is our first priority."

[21] The witness confirmed that the individual applicants did not during the strike receive this strike brief either. It is common cause that during the period of the strike the employer communicated with non-striking employees on a weekly basis, advising them of the extension of the leave from week to week. The electronic communications were not received by the individual applicants. The text messages though contained a similar message and reached the individual applicants.

[22] It is also further common cause that the individual applicants did not apply for leave during the period of the strike or thereafter. Also that the union and its members never raised any formal objection to the leave regime during the 5 months that the strike was in operation.

[23] According to the witness the individual applicants during the strike discussed the leave regime amongst themselves and with their H0D's as was the usual practice when they were at work. Their HOD's advised them to wait for the strike to end before taking the matter up with senior management.

[24] The witness contacted the union during the strike and received similar advice.

[25] Those are the reasons, according to the witness, why no formal objection to the leave regime was raised during the strike.

[26] During the strike some of the individual applicants were called to the workplace to assist with various functions. The witness was called to the workplace on between 5 to 10 occasions. Some other employees remained at the workplace throughout the strike. They were for instance in the finance

department. According to him the employees (including the individual applicants) had been informed to be available as and when called upon by the employer. It means that during the strike they were not free to use the time to go on holiday or to leave their homes.

[27] The first strike brief stated that adequate notice would be given to them when they were called back from leave so that they could make the necessary plans to return to work. The witness denied that this was conveyed to them during the meeting preceding the issuing of the strike brief that they did not receive.

[28] On 24 June 2014 the employer concluded a wage agreement with AMCU, and operations recommenced the next day. By this time the individual applicants had negative AL balances as a consequence of lent/advanced AL that had yet to accrue to them in future leave cycles.

[29] On 3 July 2014 the employer's operational committee formulated leave rules regulating how negative AL balances would be recovered and it set the following rule ("the default rule"):

> "AL accumulates at approximately 1 day per month. This accumulation will automatically be used to reduce the negative AL balance."

[30] In addition to the application of the default rule, the leave rules set out various options the individual applicants could choose from to accelerate the reduction of the negative AL balances, all of which were optional. If none were chosen, then only the default rule would automatically apply.

[31] The employer issued the employees with leave option forms titled "*Production of negative AL balance*" and recording the amount of AL owing, the default rule and options for accelerated reduction of the negative AL. Amongst the elections that the individual applicants could make were these:

> "1. Transfer the current CL balance to reduce the negative AL balance;

2. Reduce the CL entitlement from 21 to 14 calendar days, automatically transfer the remaining seven days to the negative AL balance and revert to the 21 days CL entitlement once the negative AL balance is cleared;

3. Transfer the long service award leave accrue to the employee to the negative AL balance;

4. Sacrificed the holiday leave allowance payment for an estimated 14 days to reduce the negative AL balance;

5. None of the above, i.e. to make use of unpaid leave as AL will not exist."

[32] The leave option form also included the following acknowledgement:

> "I acknowledge that the following rule will apply to me in terms of the settling of my negative accumulated leave balance until such time as it is cleared and take note of the fact that this default rule will apply even if this form is not completed and submitted."

[33] The witness confirmed receipt of the option form. As the form did not provide for negotiations but a unilaterally imposed compulsory reduction of AL, providing some options as to how it should be done or could be accelerated, and in the absence of a selection, the application of the default rule, the individual applicants did not respond.

[34] The union met with the employer on 11 July 2014. At the time the employer contemplated an application to the Minister for a ministerial determination. The employer contemplated applying for a determination that section 20(2)(a) of the BCEA be varied to permit statutory annual leave (CL) entitlement of twenty-one days to be reduced to 14 days ("the section 50 application"). The union indicated that they were supportive of the section 50 application, but they would canvass the issue with its members and revert to the employer. The following is recorded regarding this meeting:

> "Consistent with its approach dating back to 4 February 2014, UASA did not contest the lawfulness of the leave regime, with the meeting being conducted on the understanding that UASA agreed thereto.

The parties entered into a discussion about whether UASA would support an application for a ministerial determination in terms of section 50 of the BCEA, the fact that section 20 (2) (a) of the BCEA be varied to permit the statutory annual leave entitlement of twenty-one days to be reduced to 14 days ("the section 50 application"). The need for such an application arose so as to regularise the options referred to above, which were aimed at accelerating the recovery of negative AL balances over and above the operation of the default rule.

The UASA representatives indicated that while they were supportive of the section 50 application, they would canvass UASA members and revert as soon as possible."

[35] On 21 July 2014 the union's divisional manager address the following letter to the employer:

"We wish to refer to the above-mentioned matter and the discussion with Messrs Van Heerden and Naude on July 11, 2014.

Subsequent to discussions with our members involved, we hereby wish to inform you that UASA-THEUNION and its members employed at Impala Platinum Rustenburg Operations are in support of your application in order to reduce the accrued negative contractual leave balance of employees. UASA-THE UNION therefore are in support that the Company seeks to reduce the non-striking employees statutory leave entitlement from 21 (twenty-one) days per annum to 14 (fourteen) days per annum until the negative contractual leave balance has been cleared.

Alternatively, these employees can opt to transfer the remaining statutory leave to reduce the contractual leave negative balance acquired.

However, we wish to emphasise that our support in terms of section 20 (2) (a) of the BCEA is subject that (sic) the Company will only implement that (sic) these measures by agreement, i.e. only for those employees who agree thereto.

Should these conditions be changed without prior consultation/negotiation with UASA, the union and its members will be forced (sic) to reconsider our support for the above-mentioned exemption."

[36] On 7 August 2014, the Director General: Labour advised the employer that a determination in terms of section 50 of the BCEA had been granted for the period 21 July 2014 to 20 July 2016 for the reduction of the twenty-one days to 14 days in respect of CL.

[37] The employer, unilaterally, from 25 July 2014, applied the default rule and commenced reducing the negative AL balances of the individual applicants by 1 day per month in accordance with the default rule. The employer reduced the negative AL balances for the others in accordance with the options exercised by them. The reduction still continues in respect of the individual applicants with negative AL balances. The witness, for one, after 5 years is still subject to a reduction in terms of the default rule.

[38] The individual applicants with the shop stewards prepared a memorandum dated 6 March 2015 which was discussed at a D level Forum meeting on 20 March 2015. During a further meeting on 9 June 2015 the union declared a formal internal dispute with the employer.

[39] The union referred 3 disputes for determination prior to the matter having been referred to the Labour Court in this matter.

[40] On 24 November 2015 the union referred a dispute to the Labour Court alleging that the employer breached section 34 of the BCEA, alternatively discriminated against the employees. The union withdrew this referral.

[41] On 21 June 2016 union referred a further dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) alleging that the employer breached the Collective Agreement that came into existence on 21 July 2014. The essence of the dispute was the value of the leave days of the salary adjustments. The dispute was conciliated and on 7 October 2016 the union withdrew the dispute.

[42] On 22 February 2017 the union on behalf of the individual applicants referred a dispute, the third dispute, regarding the implementation and application of a collective agreement that came into existence on 21 July 2014 on the basis

that the employees (the union members) did not consent to either the reduction of leave or the implementation of measures to reduce the negative leave balances. The arbitration was conducted based on submissions and on 11 December 2017 the CCMA issued an award to the effect that the letter of 21 July 2014 did not qualify as a collective agreement.

[43] Thereafter the union approached the Labour Court in this matter.

<u>Leave policy and customary leave arrangements</u>

[44] The contracts of employment regulate annual leave and specify that leave will be regulated by company policy and procedures.

[45] The employer introduced a Leave Policy on 1 September 2012. The policy determines that the CL must be taken in each leave cycle. The balance of the annual leave in the form of AL is not required to be taken in each year or cycle and may be accumulated to be taken as leave, cashed in or be taken together with annual leave but then only at the discretion of the company.

[46] The witness testified that in the past the employer could and did determine when the employees could take compulsory leave. In some instances, compulsory leave was declined for operational reasons and in other cases employees were directed to take compulsory leave for the same reasons. This, however, only applied to the CL and not to the AL.

<u>Analysis</u>

[47] The union and the individual applicants claim that the individual applicants are entitled to all the AL they were entitled to on the date that they were sent home for protection from the strike action together with the AL that accrued to them during the period of the strike. They further claim that the employer is not entitled lawfully to deduct from their AL either the number of AL days that they were compelled to use during the leave regime or the negative balances in respect of AL days as on 24 June 2014 when the strike ended.

In short, they wanted to be credited with all the AL days whether accrued to them or "lend" to them by the employer.

[48] The individual applicants are of the view that both the leave regime and the default rule are unlawful, and that the deduction of AL leave days consequently is also unlawful.

[49] The employer justified the deduction of AL on the basis that it was consistent with the employer's leave policy, section 20 (10) (b) of the BCEA and custom and practice that provides the employer with a discretion to determine the time when leave will be taken by its employees.

[50] The employer further justified the introduction of the leave regime and the default rule on the basis of an agreement with the union binding upon the individual applicants, alternatively an agreement with the individual applicants. The employer submitted that the union had clearly tacitly agreed to the leave regime, alternatively there was an agreement by quasi-mutual consent that binds the individual applicants. The further defence that the conduct of the individual applicants or that of the union led to the employer to believe that they consented to the leave regime constitutes estoppel, was not pursued in argument.

<u>The defence that the employer has a discretion to determine the time when the employees may take leave and that the employer exercised that discretion lawfully.</u>

[51] There can be no doubt that the employer had such a discretion regarding the CL. This discretion derives from section 20 (10) (b) ("the statutory discretion"):

> "If there is no agreement in terms of paragraph (a), at a time determined by the employer in accordance with this section."

[52] It is common cause that this statutory discretion by law only applies to the CL. The employer submitted that consistent thereto was an entitlement to the employer to treat the AL similarly.

[53] The BCEA does not clothe the employer with such a discretion in respect of the AL simply because it does not apply to the AL. Secondly, the leave policy does not clothe the employer with such a discretion. The leave policy provisions entitled the individual applicants to accumulate the AL, to take days as leave or to cash in on accumulated AL. These provisions militate against any discretion on the part of the employer to direct the individual applicants to take some or all of the AL, whether accrued or still to accrue.

[54] The policy therefore does not clothe the employer with a discretion unilaterally to compel the individual applicants to take any of the AL without their consent. The submission that the employer had such a discretion in respect of the AL because it is similar to the statutory discretion is without merit.

[55] The employer's first defence to justify the deduction stands to fail.

[56] In argument it was submitted on behalf of the employer, belatedly, that the leave regime in itself constituted a (new) leave policy introduced by the employer when the non-striking employees were sent on compulsory leave.

[57] This submission is without merit. There was no evidence that the employer had the right to unilaterally and without consultation implement a new leave policy, especially one in conflict with the existing leave policy.

<u>The employer's reliance upon custom and practice</u>

[58] The submission that the employer was entitled through custom and practice to determine the time when its employees should take their leave was based upon the concession of the witness that in the past the employer declined leave for operational reasons or determined the time when employees had to take leave for the same reasons.

[59] The evidence was clear that this custom or practice only applied to CL and not to AL. In addition, this could not have been a custom and practice but only an exercise of the employer's statutory discretion relating to CL. At best it was customary or a practice that the employer exercised its statutory discretion from time to time.

[60] This defence also fails.

<u>The employer's defence that the union has agreed to the leave regime and consequently that the individual applicants consented to the leave regime:</u>

[61] When the leave regime was introduced, it was done unilaterally without the consent of the individual applicants or the union. The employer's case is that through the conduct of the union, agreement was reached in terms whereof the union, on behalf of its members (individual applicants) agreed to the leave regime.

[62] The onus to establish the agreement as a defence rests with the employer. The employer pleaded the agreement as follows:

> "In any event, UASA (and its members) tacitly agreed to the leave regime, with this being established and borne out by the following:
>
> 1. UASA never contested the propriety of the leave regime throughout the 5-month duration thereof (4 February 2014 to 24 June 2014);
> 2. UASA did not advise its members against participating in the leave regime;
> 3. None of the individual applicants tended their services during the course of the operation of the leave regime, on the basis that they were opposed to continuing the accumulated AL;
> 4. Although given an option (on 6 and 13 March 2014) to elect unpaid leave during the strike (which would have interrupted the accumulation of a negative AL balance), none of the individual applicants elected such an option, and choose instead to continue with the leave regime;

5. The knowledge of UASA, the respondent commenced recovering the negative AL balances upon the conclusion of the strike on 24 June 2014, with it not raising any objection at the time;

6. The first time that formal objection was raised about the leave regime having been implemented was in the memorandum from UASA shop stewards received on 6 March 2015, which was discussed at a D level forum meeting on 20 March 2015 – this being more than a year after the leave regime had been implemented; and

7. The first time that a formal dispute was declared over the leave regime (and the recovery of negative AL balances) was on 9 June 2015, at a D level forum meeting".

[63] The further alternative defence of a quasi-mutual consent is based upon the same considerations.

[64] During its submissions the respondent added to those considerations some more seeking to rely upon the fact that the union was the recognised representative of the individual applicants; that the union at the meeting of 11 July 2014 conducted the meeting "*on the basis that you have so agreed to*" and finally that the union in its letter of 21 July 2014 formally agreed thereto.

[65] The respondent never pleaded a formal agreement.

[66] The applicant's representative objected to the respondent relying upon new un-pleaded facts and reasons to establish a tacit agreement. The objection further is on the basis that the respondent never presented any evidence to show that the respondent relied upon the pleaded and/or the un-pleaded reasons that would establish the basis for a tacit agreement.

[67] The Rules of the Labour Court set out what is expected of a litigant. In the case of a statement of claim Rule 6 provides that it must contain:

> "(b)(i) a clear and concise statement of the material facts, in chronological order, on which the body relies, which statement must be sufficiently particular to enable any opposing party to reply to the document;

(b)(ii) a clear and concise statement of the legal issues that arise from the material facts, which statement must be sufficiently particular to enable any opposing party to reply to the document;"

[68] A response must, with the changes required by the context, contain the same information.

[69] The Appellate Division (as it then was) considered Rule 18 (6) of the High Court that regulates pleadings in the High Court. This Rule is very similar to the Labour Court Rule. In *Roberts Construction CO LTD v Dominion Earth-Works (Pty) Ltd and another*[2] the Court considered the duty of a litigant to plead an implied contract:

> "The general principle would require a statement of the facts or circumstances constituting any implied contract relied upon, or, put in another way, the facts or circumstances from which such contract is inferred.
>
> In the past it has been held, in Divisions other than the Transvaal, that the facts, additional to the terms of an express contract, giving rise to an implied term of that contract, should be pleaded. The considerations leading to this requirement apply with even greater force to the case where the whole contract is implied. We have not been referred to any case, even in the Transvaal, that states unequivocally that an implied contract may be pleaded baldly and left, as it were, in the air without any indication from what it is to be inferred. On the contrary, the case of Goodwood Municipality v Joyce and McGregor Ltd., 1945 CPD 424, points the other way. JONES, J., (FAGAN, J., concurring) states (at p. 428):
>
> 'That conduct unaccompanied by writing or the use of words can constitute binding reciprocal obligations admits of no doubt. Several instances are given in Wessels, Law of Contracts, vol. 1, pp. 82 and 83, of contracts being formulated by conduct. But when a pleader wishes to formulate a claim based on such a contract it is not sufficient merely to state that such a contract comes into existence because of the defendant's conduct. He must

[2] 1968 (3) SA 255 at 261F-262A (A)

go further and set out what the conduct was. Let me take one of the examples given by Wessels in order to ascertain what it would be essential for the pleader to set out. The running of a tram or a bus between certain points 'A' and 'B' constitutes a constant offer to carry a member of the public at the usual fare. Entering and remaining on the tram or bus constitutes an acceptance of that offer and involves a liability to pay the fare. In an action to recover the fare it would not be sufficient to allege that defendant's conduct imported a contract involving liability; it must be alleged that defendant's conduct in entering and remaining on the vehicle imported the liability. In other words, the actual conduct must be set out.'

This is in complete conformity with the approach now reflected in the Uniform Rules".

[70] The Court in *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere*[3] referred to the requirement that the conduct relied upon must be "*unequivocal conduct which is capable of no other reasonable interpretation*":

"In order to comply with the requirement of "unequivocal conduct which is capable of no other reasonable interpretation" a catalogue of actions and specific conduct must be averred. Every relevant action or specific conduct must then be proved. It must, furthermore, be averred that the party concerned relies on a thus proven contract from which the remedies which he seeks to enforce flow.

[71] The respondent pleaded the conduct upon which it relied to establish a tacit contract. The respondent did not present any evidence as to these or the other considerations or conduct that would establish a tacit agreement. The fact that the non-pleaded grounds were canvassed with the witness is insufficient for the respondent only to rely upon in making its submissions. It should at least have attempted to amend its pleading to include those non-pleaded grounds to enable the applicant to deal there with.

[3] 1984 2 SA 261 (W)

[72] The applicant's objection against including non-pleaded grounds to establish a tacit agreement is upheld.

[73] The pleaded basis for the alleged tacit agreement must further be assessed against the background that the respondent at all relevant times acted unilaterally by introducing the leave regime and the default rule. The employer never intended the leave regime and the default rule to be an offer of sorts for purposes of consultation or negotiation. The employer clearly did not expect the individual applicants nor the union, or gave them an option, to take up an offer extended to them. The various options to reduce the negative AL balances established a default rule to ensure that the individual employees had no option but to refund the AL. They never had a choice.

[74] The respondent therefore solely relies upon conduct, or the absence thereof, to establish a tacit agreement.

[75] For the duration of the strike the inaction of the individual applicants was due to their HODs advising them to wait for the strike to end. The criticism that they should have approached the information centre or in any event caused the union to protest the compulsory leave is to be rejected. They did what they normally did and that was to discuss matters like this with their respective HODs. In addition, they did not have access to the Strike Briefs drawing their attention to the fact that they might take the matter up with HR.

[76] The fact that the union never contested the propriety of the leave regime throughout the 5 month duration of the strike and that it did not advise its members during that period against participating in the leave regime or that none of the individual applicants tendered their services during the course of the operation of the leave regime, on the basis that they were opposed to continuing to accumulate AL do not constitute the basis to contend that they tacitly agreed there to. The union advised its members to await the outcome of the strike which was not anticipated to endure for 5 months.

[77] Similarly, it cannot be argued that the individual applicants being given an option on 6 and 13 March 2014 to elect to take unpaid leave during the strike

and their failure to do so constituted the basis for the argument that they agreed to the leave regime. The submission is that an election to take unpaid leave during the strike would have interrupted the accumulation of a negative AL balance. The evidence was that this option, contained in a Strike Brief, never reached the individual employees until after the strike.

[78] Their conduct during the strike cannot be relied upon as a basis to establish a tacit agreement consenting to the leave regime. Their conduct from the time that the strike ended until a formal dispute was declared in respect of both the leave regime and the default rule has been explained by the witness. The individual applicants first had to organise themselves into a forum and then to approach their union. Upon returning to work they were involved in activities around an abnormal number of fatalities which also distracted the attention from the leave issue.

[79] The further basis for a tacit agreement is pleaded on the basis that the union knew that the respondent commenced recovering the negative AL balances upon the conclusion of the strike on 24 June 2014 but did not at the time raise any objection. The witness has explained the process they adopted of addressing the leave regime. The delay has also been explained.

[80] The respondent also relies upon the fact that the first time that a formal objection was raised about the leave regime having been implemented was in a memorandum from the union shop stewards received on 6 March 2015 and discussed at a forum meeting on 20 March 2015, being more than a year after the leave regime had been implemented. Again, the witness explained the reasons for the delay and the procedure adopted.

[81] The respondent has not discharged the onus to show that it reached agreement *albeit* a tacit agreement, with the union or the individual applicants whereby they agreed to and accepted the leave regime and the default rule.

<u>The employer's defence that the union concluded an agreement by quasi-mutual consent</u>

[82] The employer relies upon the same facts for the submission that the individual applicants through their union concluded an agreement through quasi-mutual consent.

[83] To establish an agreement having been concluded by quasi-mutual consent the employer must show that the union's conduct, as pleaded, made the company to reasonably assume that the union had agreed to the leave regime and the default rule.

[84] Again, the employer wishes to go much wider than the pleaded grounds for such an agreement. Again, there is an absence of evidence on the part of the employer to show how it regarded the conduct of the individual applicants for the union in respect of those matters the employer relied upon for the submission that an agreement had been concluded by quasi-mutual consent.

[85] A holistic approach on assessing the evidence led in the trial and the documentary evidence makes it clear that the individual applicants, and for that matter the union, never explicitly or tacitly agreed to the leave regime or the default rule. While it took more than a year, the process resulted in litigation where, initially, various individual aspects of the leave regime and the default rule were challenged until eventually both aspects ended up before the Labour Court in this trial.

[86] The conduct relied upon cannot be said to be "*unequivocal conduct which is capable of no other reasonable interpretation*." The respondent has failed to justify the unilateral introduction of the leave regime. That being the case the employer is not entitled to make any deduction of any AL that had accrued when the strike commenced or that accrued during the strike.

[87] Both parties left the question of costs in the hands of the court. The parties remain in an employment relationship. There are no considerations that justify a cost order.

[88] Therefore the following order is made:

Order

1. The respondent is not entitled to deduct any accumulative leave (AL) from the leave entitlement of the applicant's members whose details appear on the revised Annexure "A" next to the statement of claim on the strength of the so-called leave regime and default rule unilaterally implemented by the respondent.
2. The respondent is ordered to forthwith credit the applicant's members on Annexure "A" (as amended) with any leave deducted from them on the strength of the so-called leave regime and default rule unilaterally implemented by the respondent.
3. There is no order as to costs.

F. Coetzee

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Advocate R Grundlingh

Instructed by: Bester & Rhoodie Attorneys

For the Respondent: Advocate A Myburgh SC with R Itzkin

Instructed by: Webber Wentzel Attorneys