

CASE NO : J2401/03

IN THE LABOUR COURT OF SOUTH AFRICA

Held at Johannesburg

In the matter between :

TSI HOLDINGS (PTY) LIMITED	First Applicant
-----------------------------------	------------------------

TSI SCAFFOLDING (PTY) LIMITED	Second Applicant
--------------------------------------	-------------------------

TSI PAINTING (PTY) LIMITED	Third Applicant
-----------------------------------	------------------------

TS INSULATION (PTY) LIMITED	Fourth Applicant
------------------------------------	-------------------------

and

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	First Respondent
---	-------------------------

MAXWELL MASEKO & OTHERS	Second and Further Respondents
------------------------------------	---------------------------------------

JUDGEMENT

FULTON AJ

1.INTRODUCTION

1.1 This matter came before the Labour Court by way of an urgent application by the first applicant seeking an order that a strike embarked upon by the first respondent's members ("the employees") be declared

illegal and that the notice given by the respondents of their intention to strike be declared invalid. Notice of the intended strike was given on 31 October 2003. The employees embarked on a strike on 4 November 2003. On the same day Schoeman AJ granted the first applicant the relief sought on a temporary basis.

1.2The return day was originally 11 November 2003, but the matter was postponed to 21 November 2003 to enable the respondents to file supplementary affidavits. The matter came before me on the return day and the first applicant seeks confirmation of the order granted by Schoeman AJ.

2.JOINDER

2.1The original applicant in these proceedings, TSI Holdings (Pty) Limited, is the holding company of four divisions, each of which operates as a wholly owned subsidiary. The subsidiaries were not cited as applicants in the original application, but TSI Holdings in its founding affidavit did contend that it had four divisions: TSI Insulation, TSI Sandblasting, TSI Scaffolding and TSI Projects. The respondents did not take the point in its opposing papers that TSI Holdings did not have *locus standi* to launch the application or that a pertinent distinction be drawn between the first applicant and its four divisions for the purposes of the application. It is also apparent from the pleadings that the parties acted collectively in the course of the dispute that forms the subject matter of this application.

2.2In its replying affidavit the first applicant explained that it consists of the four divisions referred to below and sought to join these divisions to the application:

2.2.1TSI Scaffolding (Pty) Limited (“TSI Scaffolding”)

2.2.2TSI Painting (Pty) Limited (“TSI Painting”)

2.2.3TS Insulation (Pty) Limited (“TS Insulation”)

2.2.4TSI Projects (Pty) Limited (“TSI Projects”)

2.3The founding affidavit itself did not contain a list of employees alleged to have been on strike, but it was alleged that 146 employees participated in the strike. In its replying affidavit the first applicant explains that the employees that went on strike on 4 November 2003 were not the 146 employees referred to in its founding affidavit but 123 employees made up as follows:

2.3.1 TSI Scaffolding – 2 employees (described in annexure “RA4(a)” to the replying affidavit)

2.3.2 TSI Painting – 15 employees (described in annexure “RA4(b)” to the replying affidavit)

2.3.3 TS Insulation – 62 employees (described in annexure “RA4(c)” to the replying affidavit)

2.3.4 TSI Projects – 44 employees (described in annexure “RA4(d)” to the replying affidavit)

2.4 The first applicant further alleged in its replying affidavit that on 5 November 2003 the balance of the workforce of TSI Scaffolding went on strike for a few hours but returned to work after receiving a final ultimatum. These employees are listed in annexure “RA4(e)” to the replying affidavit.

2.5 The respondents deny that the two employees of TSI Scaffolding referred to above, Mr Nkosi and Mr Baba, went on strike on 4 November 2003. The respondents state that Mr Nkosi was actually at work when he was called into a meeting and suspended. Mr Baba is said not to have been at work on 4 November 2003 and that when he reported for duty on 5 November 2003 he was suspended. The respondents state that Messrs Nkosi and Baba are shop stewards and for this reason are being targeted by the first applicant. These allegations are contained in the respondents’ further answering affidavit. The further answering affidavit, however, does not contain any confirmatory affidavits by Messrs Nkosi and Baba and it is not clear to me how the deponent to the further answering affidavit, Mr E Nhlapo, a local union organiser, would have personal knowledge of the facts alleged in relation to Messrs Nkosi and Baba. In the circumstances I accept the first applicant’s version in relation to Messrs Nkosi and Baba.

2.6 The respondents deny that any strike action took place in TSI Scaffolding on 5 November 2003. The respondents also deny that any employees from TSI Projects participated in the strike. The respondents in their further answering affidavit state that Mr Nhlapo addressed *“a letter stating that the workers from Scaffolding were supposed to join the strike on 6 November 2003.”* There is no such letter in the pleadings. I assume, however, that the respondents are referring to the strike notice of 31 October 2003 in which Mr Nhlapo states that the strike action would commence on 4 November 2003 and would consist of the total withdrawal of labour by the workforce at *“TS Insulation and Sunblasting (Pty) Ltd”* and that the first respondent’s members working for *“TS Scaffolding (Pty) Ltd and TSI Project (Pty) Ltd would follow”* with secondary strike action. In the replying affidavit the deponent, Mr Stopforth, contends that on 5 November 2003 the employees of TSI Scaffolding on strike were given a verbal ultimatum at 07h00 and then a first written ultimatum at 08h00 and a final written ultimatum at approximately 10h30 on 5 November 2003. However, the first written ultimatum is headed **“ULTIMATUM TO STRIKING EMPLOYEES OF TSI**

INSULATION” but the second written ultimatum does refer to the striking employees of TSI Scaffolding. There are no similar allegations in relation to the employees of TSI Projects.

2.7 In the case of disputes of fact in motion proceedings the general rule as accepted in **Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd SA 1984 (3) 623 (AD)** is that relief should only be granted if the facts as stated by the respondent together with the admitted facts in the applicant’s affidavit justify the relief sought. Where it is clear that facts, though not formally admitted, cannot be denied, they should be regarded as admitted. Moreover, in certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. If in such case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination and the court is satisfied as to the inherent credibility of the applicant’s factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to final relief.

2.8 Applying the principles enunciated by **Plascon-Evans**, *supra*, I find that there was strike action by the employees employed by TSI Scaffolding on 5 November 2003. I am, however, unable to make the same finding in relation to the alleged strike in TSI Projects.

2.9 I consequently order the joinder of TSI Scaffolding, TSI Painting and TS Insulation to these proceedings, but deny the application to join TSI Projects.

3. THE FACTS

3.1 On 19 June 2003 two of the union’s members, Mr Elias Mayisela and Mr Albert Moholala were instructed to perform a certain task by Mr Attie Van Zyl. Messrs Mayisela and Moholala commenced the task as instructed but could not complete it without a ladder and they returned to Van Zyl to inform him that they required a ladder to complete the task. Although there are different versions on the papers as to exactly what Van Zyl’s response was, the version contained in the answering affidavit is that Van Zyl responded “*poes kaffirs, ek wil nie met julle praat nie.*” Van Zyl then instructed Mr Mayisela and Mr Moholala to perform another task.

3.2 The two members concerned then approached a shop steward, Mr Maxwell Maseko, who filed a grievance on their behalf. Several grievance hearings were held without a resolution of the grievance. Management appear to have had difficulty determining who was telling the truth: the two members or Mr Van Zyl who admitted swearing at the members but denied using any derogatory racist language. Mr Van

Zyl's version was in one of the hearings corroborated by another employee, Derek Coetzer.

3.3 Mr Jurie Swart, a director of the first applicant, chaired the third and final grievance hearing. Mr Swart explained to the parties that he was facing two mutually destructive versions and that there were only two options available to him namely a polygraph test by the parties, alternatively a hearing to be held by an independent person with legal qualifications such as a lawyer. As a further alternative Mr Swart indicated that a date could be set for such a hearing on 14 October 2003 and that both the aggrieved parties, as well as Mr Van Zyl should in the interim subject themselves to polygraph testing. Mr Swart says that Mr Maseko and the aggrieved parties accepted this proposal. This is denied by the respondents who agree that Mr Swart stated that he wanted to bring in an independent lawyer to chair the process but disagree that any mention was made of polygraph testing and say that the minute reflects that no mention was made of polygraph testing. That is not in fact the case and the minute refers to a *"lie detector test"*. Also the last portion of the minute supports Mr Swart's version as it says *"Postpone until 14 October 2003. Organise a lawyer and prosecute."*

3.4 The day after this grievance hearing Mr Tseane, another director, wrote to the three parties involved advising them that polygraph tests had been arranged. No mention is made in Mr Tseane's letter of an independent enquiry chaired by an independent person. In response Mr Maseko writes to Mr Tseane to inform him that polygraph testing is not the most appropriate step and makes an appeal that the matter be referred to arbitration which Mr Maseko viewed as the most appropriate step. Mr Maseko ends his letter by informing Mr Tseane that the first respondent would assist the employees in referring the matter to the CCMA for *"further corrective actions."* Mr Nhlapo in the answering affidavit denies that Messrs Mayisela and Moholola agreed to the polygraph tests and says that they approached him for advice and he advised them not to take the test. In my view, using the principles enunciated in the **Plascon Evans** case and weighing the probabilities, it is more probable than not that Mr Swart's version is correct and that Messrs Mayisela and Moholola initially agreed to the polygraph testing but on advice retracted such agreement. This is not surprising if one takes into account the legal difficulties surrounding polygraph testing.

3.5 The applicants, with respect, then seem to have thrown the baby out with the bathwater and did not pursue the proposal of an independent enquiry by an independent person. They also appear to have ignored the first respondent's request to refer the matter to arbitration and nothing occurs until the referral to conciliation in September 2003.

3.6 On or about 19 September 2003, the respondents referred a dispute to the CCMA. The nature of the dispute is described as *"Victimisation"*. The respondents did not tick the box labelled *"Mutual Interest"* in the

referral form. In the section of the referral form headed “*Summarise the facts of the dispute you are referring:*” the respondents stated: “*The company site manager have unfairly call our members with names as poeskaffirs (sic).*” The outcome the respondents required was “*We demand the dismissal of the racist manager.*” The referral also states that “*the shop steward launch grievance and the company failed to take the corrective major (sic)...*”. I understand “major” to be “measure”.

3.7A conciliation meeting took place on 28 October 2003. The applicants did not attend as the notice of set down was only received after the meeting. On the same date a certificate of outcome was issued. The certificate states that the dispute concerns a matter of mutual interest.

3.8On 30 October 2003 management wrote to NUMSA to inform the union that they had had heard rumours of planned strike action. Management asked the union whether these rumours were founded or not.

3.9On 31 October 2003 the union gave notice that its members would embark on a strike on 4 November 2003. The notice stated that there would be a total withdrawal of labour at TS Insulation and Sunblasting (Pty) Limited on 4 November 2003 and that employees at TSI Scaffolding (Pty) Ltd and TSI Projects (Pty) Ltd would thereafter embark on a secondary strike. The demand is described as follows: “*We demand that the manager Attie Van Zyl be total dismissed from the company for calling our members with ‘POES, KAFFERS’. The dismissal be with immediately effect.*” (sic)

3.10The applicants then on 3 November 2003 applied to the CCMA to rescind the “*award/ruling*”, meaning the certificate of outcome. As pointed out by the CCMA in a letter to Mr Nhlapo, the CCMA cannot vary or rescind a certificate of outcome once it has been issued and the only avenue open to the applicants was to apply to the Labour Court to set the certificate aside. This they did not do.

3.11The strike commenced on 4 November 2003.

4.THE APPLICANTS’ CONTENTIONS

The applicants contend that the strike is unlawful and unprotected for the following reasons:

4.1The demand throughout was stated to be the immediate dismissal of Mr Van Zyl, i.e. the dismissal of Mr Van Zyl without proper grounds or even a hearing. This is a patently unlawful, unreasonable and irrational demand, for it requires management to act unfairly in violation of the Labour Relations Act No 66

of 1995 (“the Act”). This is not an issue or demand which is capable of legalizing, justifying or affording protection to a strike.

4.2 The employees’ complaint that management had not attended satisfactorily to their grievance is a dispute of right, not one of interest. The dispute is capable of being referred for arbitration by the bargaining council. It accordingly does not constitute an issue which can form the subject matter of a protected strike as defined and is prohibited in terms of section 65(1)(c) of the Act.

4.3 To the extent that the underlying complaint is harassment in the form of racism, this would constitute unfair discrimination against the employees on racial grounds, prohibited under section 6 (3) of the Employment Equity Act. That dispute can be referred to the Labour Court for adjudication. It would be appropriate to add the words “or in terms of the Employment Equity Act” at the end of section 65(1)(c) of the Act and thus the strike is unlawful.

4.4 To the extent that the employees have alleged that the dispute relates to victimization that complaint can be referred for resolution to the Labour Court in terms of section 9(4) of the Act and is therefore unlawful in terms of section 65(1)(c) of the Act.

5. THE LAW

5.1 Section 65 (1) of the Act states as follows:

“(1) No person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or lock-out if-

α) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;

β) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;

χ) 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;

δ)”

5.2 It is self evident that a determination of the “*issue in dispute*” is critical for a proper application of section 65 (1)(c) of the Act. Section 213 of the Act provides that the “*issue in dispute in relation to a strike or lock-*

out, means the demand, the grievance or the dispute that forms the subject-matter of the strike or lock-out.”

5.3 This definition is not without difficulty as, as is the case in this matter, the grievance that forms the subject-matter of the strike differs from the demand thereof. Moreover, as **Brassey** points out in his **Commentary on the Labour Relations Act** a dispute can only exist when one person says ‘yea’ and the other ‘nay’; it requires in other words a clash in the stances adopted by contending parties. In this matter the employer said neither ‘yea’ nor ‘nay’ to the alleged victimisation but it did adopt the stance of ‘nay’ to the demand to dismiss Mr Van Zyl. Consequently, if one adopts a strict interpretation of the definition one must determine where the clash in stances lies. **Brassey** (*supra*) explains that the apparent reason for the strangely worded definition is historical i.e. under the previous Labour Relations Act it was possible to frustrate a strike by showing that, at the time when it commenced, the employer was still considering its response to the demand.

5.4 In **Ceramic Industries Ltd t/a Betta Sanitary Ware v NCBWU (2) (1997) 18 ILJ 671 (LAC)** the Labour Appeal Court’s approach in determining the issue in dispute was to look at the underlying complaint. However, Zondo J, as he then was, in **Adams & Others v Coin Security Group (Pty) Limited (1999) 20 ILJ 1192 (LC)** at 1208 D-F held that the correct approach to the definition is to ask “*What was it that the employer was required to do in order for the strike to be called off or ended?*” In reaching this conclusion Zondo J relied on the Labour Appeal Court decision in **Fidelity Guards Holdings (Pty) Limited v Professional Transport Workers Union & Others (1) (1998) 19 ILJ 260 (LAC)**.

5.5 The most recent Labour Appeal Court case on this issue is **Coin Security Group (Pty) Ltd v Adams & Others (2000) ILJ 925 (LAC)**. There the court referred to the two Labour Appeal Court cases cited above and held as follows:

“It is the court’s duty to ascertain the true or real issue in dispute. In conducting that enquiry a court looks at the substance of the dispute and not at the form in which it is presented. The characterization of a dispute by a party is not necessarily conclusive. There is in my view no difference of approach in these decisions. In each case the court was concerned to establish the substance of the dispute.”

5.6 With respect, it seems to me that the Labour Appeal Court’s approach in the **Ceramic Industries** case (*supra*) was influenced by the facts of that matter (which, though different, are not dissimilar to the facts in this one). The demand in that matter was to dismiss, severely discipline or attend seriously to grievances about three managers. The Labour Appeal Court held that the issue in dispute was the underlying complaint, i.e. the harassment of shop stewards and union members which the court held to amount to

victimization in contravention of section 4 of the Act and justiciable by the Labour Court in terms of section 9(4) of the Act. A demand that a manager be dismissed is neither arbitrable nor justiciable in terms of the Act and therein lies the rub. If the issue in dispute was found to have been the strike demand the strike would have been a protected one. The anomalous result of the **Ceramic Industries** case is that the employees were left without a remedy for their demand because the Act does not provide for the adjudication of a dispute to dismiss or discipline a manager and the employees were not entitled to strike on such a demand. However, as the issue in dispute was held to be victimization in terms of section 4 of the Act the employees were held to have had a remedy in terms of section 9 (4) of the Act.

5.7The court in **Ceramic Industries** refers frequently to section 4 of the Act. In my view the reference should in fact be to section 5(2)(c)(i) of the Act. This section states that no person may prejudice an employee because of trade union membership. Section 9(4) of the Act provides that any dispute about the interpretation or application of section 5 of the Act may be referred to the Labour Court for adjudication.

5.8I have little doubt that the intention behind section 65 (1) of the Act is to deny strikers protection in certain disputes of right. Logically in my view strike action should be prohibited in relation to all disputes of right or, at the very least, employees should have to make an election either to strike or to pursue their right to have a dispute adjudicated. Where employees have a right to have a dispute adjudicated it does not make sense that employees should also have the right to strike on that dispute. Be that as it may, for whatever reason the legislature decided to expressly permit strike action on some disputes of right, for example, retrenchment disputes and disputes about a refusal to bargain, and to deny strikers protection only in respect of the disputes of right listed in section 65 of the Act. Perhaps this was an oversight and an amendment to section 65 is required. I, however, cannot make a decision on speculation and my duty is to interpret the section as it stands.

5.9I am also mindful that the right to strike is constitutionally protected [section 23 (2) of the Constitution] and that that right should not be restricted unless in accordance with section 36 of the Constitution. I consequently believe that section 65 and the definition in section 213 of “*issue in dispute*” ought to be interpreted in the light of the constitutional protection of the right to strike.

5.10Mr Kennedy who appeared on behalf of the applicants in this matter argued that a strike should not be protected when the demand which is the subject matter of the strike is unlawful, unreasonable and irrational. Mr Kennedy relied on the case of **Union Government v Schierhout 1925 AD 322** at 339 and **Steyn Uitleg van Wette 5 ed** p127 in making this submission. He also referred me to **Rand Tyres & Accessories (Pty) Ltd v Industrial Council for the Motor Industry Tvl 1941 TPD 108** . In this case, at

115, the court held that whatever can be “*fairly and reasonably regarded as calculated to promote the well-being of the trade concerned must be of mutual interest to them.*” The case, however, dealt with a clause in an industrial agreement in the motor industry in the then Transvaal and in my view is distinguishable on the facts.

5.11 Furthermore, I have difficulty accepting the proposition that a strike should not be protected when the demand is unreasonable or irrational. There is an element of subjectivity in the terms “unreasonable” and “irrational” that would open the door to abuse. It is not uncommon for employers to contend that a wage demand is unreasonable and irrational and I cannot agree that the right to strike should be limited in these circumstances. Similar views were expressed by Revelas J in **Greater Johannesburg Metropolitan Council v IMATU & Others [2001] 9 BLLR (LC)**. However, I agree with Mr Kennedy’s proposition that a strike should not be protected where the strike demand is unlawful. To give an extreme example, say the strike demand is that the regulations of the Occupational Health and Safety Act be ignored. Should the strikers be afforded protection in these circumstances? I think not. In my view employees cannot hide behind the protection granted to them by the Act to enforce a demand which the employer is not capable of enforcing or would act unlawfully in enforcing. It could not have been the intention of the legislature that the weapon of a strike could be used to enforce an unlawful demand and I believe that such a limitation on the right to strike falls within the ambit of a limitation envisaged in section 36 of the Constitution.

6.THE ISSUE IN DISPUTE

6.1 What is the issue in dispute in this matter? If I were to use the test formulated by the court a quo in the **Coin Security** case I must ask the question: what was it that the employer was required to do in order for the strike to be called off or ended? The outcome required by the employees in the referral to conciliation was the dismissal of the racist manager. The strike notice demands that “*the manager Attie Van Zyl be total dismissed from the company The dismissal be with immediately effect (sic).*” In a letter from the union to the employer on 4 November 2003 the union submits that the union demand is clear – “*We have demanded the immediately dismissal of Attie Van Zyl for his racist remarks he continuously made against our members (sic).*” Thus, on this formulation the issue in dispute was the dismissal of Mr Van Zyl.

6.2 However, if I were to use the test as formulated by the Labour Appeal Court on appeal in the **Coin Security** case, i.e. what is the real or true issue in dispute, I believe that I would arrive at a different conclusion. In my view the real or true issue in dispute was Mr Van Zyl’s alleged use of racially derogative language when speaking to Messrs Mayisela and Moholola. To use the words of Conradie JA in the **Coin Security** case, that was the “true source of the labour turmoil”.

6.3As I am bound by the decision of the Labour Appeal Court in the **Coin Security** case I am obliged to use the test as formulated therein and therefore I find the issue in dispute in this matter to be Mr Van Zyl's alleged use of racially derogative language when speaking to Messrs Mayisela and Moholola. However, as will be seen from what is set out below on either finding on the issue of dispute the applicants' case fails.

7.THE LAWFULNESS OF THE STRIKE

7.1In view of my finding on the issue in dispute I intend dealing with Mr Kennedy's third argument first. The applicants' third argument was that as the underlying complaint was harassment in the form of racism, this constitutes unfair discrimination against the employees on racial grounds which is prohibited under section 6(3) of the Employment Equity Act. That being the case, the applicants argue, the dispute can be referred to the Labour Court for adjudication in terms of the Employment Equity Act and a strike is outlawed in terms of section 65(1)(c) of the Act. Mr Kennedy contended that it would be appropriate to imply "read with the Employment Equity Act" at the end of section 65(1)(c) and if I did not do so the result would be anomalous as section 65(1)(c) seeks to prohibit the right to strike on disputes of right. If the legislature had intended this consequence then why does section 65(1)(c) of the Act not also refer to the Employment Equity Act? To the extent that the issue in dispute is harassment in the form of racism it is not an **issue in dispute** that a party has the right to refer to arbitration or to the Labour Court **in terms of the Act**. I have emphasized these words as it may well be that the respondents could have had their underlying complaint adjudicated in terms of the Employment Equity Act, but the Act itself creates no remedy for such a dispute.

7.2However, even if I am wrong in my finding on the issue in dispute and accept, as was contended for by Mr Kennedy, that the issue in dispute was the dismissal of Mr Van Zyl, I do not believe the outcome would be any different. Consequently in dealing with Mr Kennedy's first and second arguments I accept for the purpose of the arguments that the issue in dispute is the dismissal of Mr Van Zyl.

7.3Mr Kennedy's first argument was that the strike should not be lawful and protected as the strike demand was unlawful. For this argument to succeed I must find that the demand to dismiss Mr Van Zyl was a demand to dismiss Mr Van Zyl without proper grounds and not, as was contended by Mr Ngako for the respondents, a demand to dismiss Mr Van Zyl summarily.

7.4On the one hand there is the actual language used by the respondents, particularly the words "*immediate dismissal*", which tends to support Mr Kennedy's argument. I ask myself, however, whether it can be said without further ado that the words "immediate dismissal" mean "unfair dismissal" and I do not

believe that to be the case. Also favouring the applicants' contention is the fact that the respondents do not demand that a disciplinary hearing be held for Mr Van Zyl. The applicants also refer me to a discussion that the applicants' attorney had with Mr Nhlapo on 3 November 2003 to support their contention that the demand was unlawful. The applicants' attorney of record, Mr Herman Van Rensburg contacted Mr Nhlapo on Monday 3 November 2003 and during that conversation Mr Van Rensburg explained to Mr Nhlapo that to dismiss an employee without proper grounds would result in the applicant contravening the Act and that the employer would be acting contrary to the spirit and purpose of the Act. Mr Nhlapo is alleged to have refused to change his stance on the intended strike and so Mr Van Rensburg made certain suggestions to suspend the strike. The respondents do not dispute these allegations.

7.5 On the other hand, there are several facts that make the respondents' contention more probable. As I have already explained, it seems to me that the respondents agreed to Mr Swart's proposal that the matter be referred to a hearing by an independent person, but that arrangement fell away when Messrs Mayisela and Moholola refused to submit to polygraph testing. Then there is Mr Maseko's appeal in his letter to the applicants on 21 August 2003 to refer the matter to arbitration. This tends to show that what the respondents had in mind was a procedural step where findings would be made by an arbitrator. And then there is the statement in the CCMA referral that the applicants failed to take any corrective measure against Mr Van Zyl. Moreover, although it is the first respondent's version that it did not agree to suspend the strike on 4 November 2003 on the basis of Mr Herman Van Rensburg's suggestion that Mr Van Zyl be suspended and a second investigation be conducted into the grievance against Mr Van Zyl, in my view it is more probable than not that this was indeed the case. The union's version is that on 3 November 2003 Mr Nhlapo during his conversation with Mr Van Rensburg agreed to address employees the following day on the suspension of the strike as the applicants had agreed to meet with the union at 13h00 on 4 November 2003. Even if the union's version is correct, I do not believe that the respondents would have agreed to suspend the strike on this basis alone. It is far more probable that the applicants' offer to suspend Mr Van Zyl and to conduct a second investigation played a critical role in the respondents agreeing to suspend the strike. That being the case I do not think it can be said that the respondents' demand was that Mr Van Zyl be dismissed without proper grounds or without even a hearing being held and in the event that Mr Kennedy is right that the issue in dispute is the demand to dismiss Mr Van Zyl then I do not agree that the demand was to dismiss Mr Van Zyl unfairly. I consequently find that if the issue in dispute was the demand to dismiss Mr Van Zyl then on the facts of this matter that was not an unlawful demand.

7.6 The applicants' second argument is that as the dispute is capable of being referred to arbitration by the bargaining council it cannot constitute an issue which can form the subject of a protected strike as defined. In this regard the applicants in their replying affidavit provided me with a copy of their grievance procedure.

In terms of the document provided the last step in the grievance procedure is the right to refer a grievance to the bargaining council for processing in terms of the council's dispute resolution procedures. In essence, Mr Kennedy argued that as the Act provides for the creation and existence of bargaining councils and bargaining councils acquire their statutory power to arbitrate disputes in terms of the Act I must interpret section 65(1)(c) so as to include those disputes that must be referred to arbitration before a bargaining council. I agree subject to the proviso that the issue in dispute is one that the respondents would be able to refer to arbitration in terms of a bargaining council agreement. It may well be that the issue in dispute may be referred to arbitration or to the Labour Court on some other basis but that is not what is prohibited in terms of section 65(1)(c) of the Act. Had the applicants referred me to a specific provision in a bargaining council agreement which provided for arbitration of the issue in dispute in this matter then I would have accepted their argument. But this they did not do. In my view a provision in an employer's grievance procedure to refer a grievance to the bargaining council for processing in terms of the council's dispute resolution procedures does not qualify as a dispute which is arbitrable or justiciable in terms of the Act. I appreciate that I am interpreting section 65 of the Act literally but to my mind a literal interpretation of section 65 is entirely consistent with the constitutional right to strike and I am therefore constrained to interpret the section in this way.

7.7 The applicants' final argument was that to the extent that the employees have alleged that the issue in dispute relates to victimization that complaint can be referred for resolution to the Labour Court. However, unlike the facts in the **Ceramic Industries** case, there was no suggestion in this matter that Messrs Mayisela and Moholola were being harassed or victimized because they were union members. Consequently, even though the respondents describe the dispute as "*victimisation*" in their referral to conciliation the victimisation alleged is not of the kind contemplated in section 5 of the Act and therefore not justiciable in terms of section 9(4) of the Act. I therefore reject this argument.

8.COSTS

8.1 In terms of the rule nisi the costs of the application were reserved for determination on the return day.

8.2 Neither party addressed me on the issue of costs at the hearing of this matter. The general rule is that costs follow the result and I see no reason to deviate from that principle in this case.

9.ORDER

I accordingly make the following order:

9.1 The rule nisi issued on 4 November 2003 is discharged.

9.2 The applicants are ordered to pay the respondents' costs jointly and severally, the one paying the other to be absolved.

KA FULTON

Acting Judge of the Labour Court

Appearances:

For the applicants: Adv P Kennedy SC instructed by Van Rensburg Malhou Inc

For the respondents: Mr Ngako of Ruth Edmonds Attorneys

Date of hearing: 21 November 2003

Date of Judgement: __ April 2004