THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

CASE NO: C 625/2019

In the matter between:

CITY OF CAPE TOWN	Applicant
and	
SAMWU obo MEMBERS IN 'A'	First Respondent
IMATU obo MEMBERS IN 'B'	Second Respondent
NON-UNIONISED EMPLOYEES IN 'C'	Third Respondent

Heard: 25 February 2020

Judgment delivered: 3 March 2020

JUDGMENT

VAN NIEKERK J

Introduction

[1] The applicant is the City of Cape Town (the City). The City is responsible (indeed, constitutionally obliged) to provide fire-fighting services within its area of jurisdiction and to that end, it operates what is known as the Fire and Rescue Service. Given its nature, the service operates on a 24-hour basis. The first and second respondents (SAMWU and IMATU respectively) are trade unions that represent their members who are employed by the City in the Fire and Rescue Service.

[2] This case concerns a dispute about the firefighters' hours of work. On 8 October 2019, Rabkin-Naiker J granted an interim order, by agreement, to the effect that pending the final determination of the matter, SAMWU and IMATU's members and the third and further respondents (who are not affiliated to any trade union) are required to work in accordance with City's 24-hour shift roster, on the terms contained in what is known as the 'Fire and Rescue Service Collective Agreement: 24 Shift' (the 2007 CA).

[3] The application that served before the court was premised on the City's contention that the failure to work in accordance with the roster contemplated by the 2007 CA constituted a strike, and that the strike was unprotected because the employees concerned are engaged in an essential service.[1]

[4] In these proceedings, the City seeks a final order declaring that the provisions of the 2007 CA are currently valid and binding and will remain so until such time as a new collective agreement regulating hours of work by the City's fire and rescue service has been concluded. The City also seeks a final order declaring that the refusal to work in accordance with the 24-hour shift agreement constitutes a strike, that the strike is unprotected because the affected employees are engaged in an essential service, and consequential interdictory relief.

[1] There is no dispute that the individual respondents are engaged in an essential service. In Government Notice 18276 dated 12 September 1997, notice was given that the essential services committee had designated firefighting as an essential service. In terms of s 65 (1)(d)(i), persons engaged in essential services may not participate in a strike. Section 74 of the LRA requires that a party to a dispute that is precluded from participating in a strike because that party is engaged in an essential service, may refer the dispute to conciliation and if the dispute remains unresolved, to arbitration.

[5] SAMWU has opposed the final relief sought, and filed a counter-application. As will appear from the submissions recorded below, the essential basis to the opposition to the final relief sought by the City is that the 2007 CA is no longer binding and that in the absence of any obligation to work a 24-hour shift system in accordance with the 2007 CA, there is no strike. In the counter-application, SAMWU seeks a declaratory order that all 24 hours worked during its members' 24-hour shift system constitute 'working' hours for the purposes of the Basic Conditions of Employment Act (BCEA) and the City's overtime policy. The City opposes the counter-application.

[6] IMATU supports the granting of that part of the order sought by the City declaring that the 2007 CA is currently valid and binding and remains so until a new working hours agreement has been concluded. IMATU does so because it says it has an interest as a party to that agreement, and in preserving the integrity of the bargaining process in which the 2007 CA was concluded and in which any agreement to replace it will be negotiated. IMATU does not support or endorse any strike, and advised its members against striking. IMATU thus abides by the decision of the court in respect of the balance of the application (i.e. those prayers in the notice of motion that concern the strike and the interdictory relief associated with it), and in respect of SAMWU's counter-application.

[7] The crisp issue for determination then is whether SAMWU's members employed in the City's fire and rescue services are obliged to work in accordance with the City's 24-hour shift system. SAMWU asserts that the 2007 CA is no longer binding on it or its members, either because the agreement has expired or because it has been validly terminated, and that its members are thus required to work only ordinary hours, being a 40-hour week. SAMWU has no objection in principle to its members working in accordance with the 24-hour shift system (indeed, they have tendered to do so), but on the basis that they are paid at overtime rates for work in excess of ordinary hours. The City (and IMATU) contend that the 2007 CA remains in force until a new replacement agreement has been concluded, and that SAMWU's purported termination of the 2007 CA is

invalid. If the 2007 CA is found to remain binding on the parties, there is no serious dispute that a refusal to work 24-hour shifts in accordance with its terms is a strike and that the strike is unprotected, if only because the affected employees (the individual respondents) are engaged in an essential service.[2]

Chronology

[8] The 2007 CA was signed by the City, SAMWU and IMATU on 26 April 2007. The agreement was predated by a series of collective agreements that regulated the hours of work of employees engaged in fire services, all of which establish a 24-hour shift system inclusive of ordinary hours and standby time, and payment of a standby allowance.

[9] The 2007 CA provides that each fire station operates a 24-hour shift system, inclusive of ordinary hours and standby time. The fire and rescue personnel at each fire station are divided into three platoons. The shift roster operates on a 3-weekly basis. The roster sets out when each platoon is to work their 24-hour shifts within each 3-week cycle. Each 24-hour shift commences at 9:00 and continues until 9:00 the next day. Although the duration of the shift is 24 hours, the City avers that employees do not work for this entire period. From Mondays until Fridays, working hours are between 9:00 and 18:00, and on weekends and public holidays working hours are from 9:00 to 13:00. During this scheduled working time, unless the employees are required to attend a fire, they engage in various tasks at the fire station. These activities, which include equipment maintenance and training, take up between 16 and 21 hours per week, depending on the shift roster. For the remainder of the shift, employees are on standby. The City avers that during this period, employees are largely at leisure to do as they please, except if there is an emergency call-out. SAMWU disputes the depiction of activities during the standby time as leisure time, and avers that during this time, its members are required to engage in a broad range of activities, from medical care to animal rescue.

[2] For the purposes of the definition of 'strike' in s 213 of the LRA, in essence, there would be a partial concerted refusal to work, for the purpose of resolving a dispute about payment for standby hours.

[10] The roster ensures, as provided in the 2007 CA, that each platoon receives at least a 24-hour rest period after the end of each shift and a weekly rest period of at least 48 consecutive hours.

[11] Clause 4.1 of the 2007 CA provides for the payment of additional remuneration to all employees who work in accordance with the station shift roster. They are paid a monthly standby allowance of 22.8% of their basic salary, referred to as a 'standby allowance'. This payment is made in respect of standby time i.e. time when employees are present at the fire station and available to respond to fires, and actual work performed after scheduled working hours, e.g. after 18:00 on weekdays.

[12] In addition to the standby allowance, overtime is paid in respect of any hours worked over and above employees' allocated shifts. Payment of overtime is regulated by the City's overtime policy. The effect of the shift system is that employees engaged in fire and rescue are allocated 10 shifts per month. They are 'on duty' for 240 hours a month, or 56 hours a week, on average. This exceeds by some 7½ hours, each month, the working hours of other City employees.

[13] Clause 2.3 of the 2007 CA provides that the agreement is to commence on 1 May 2007, and to remain in force for a period of 36 months thereafter, with nothing to prevent the parties from reviewing the agreement 'should circumstances so warrant'. A review may be initiated by written notice given by any of the parties to the agreement, to be tabled at the bargaining council. All things being equal, the 2007 CA was thus to remain in force until 30 April 2010.

[14] On 19 May 2010, after the expiry of the 2007 CA and after discussions between the parties, the executive committee of the Western Cape Metropolitan Division of the bargaining council unanimously resolved that the 2007 CA be extended 'until negotiations have been finalised at the Local Labour Forums'. SAMWU was a party to that decision.

[15] On 6 November 2014, the executive committee of the Western Cape Metropolitan Division again unanimously resolved that the 2007 CA be extended 'until the new agreement has been concluded'. Again, SAMWU supported that decision.

[16] To date, the parties have failed to conclude a new agreement to replace the 2007 CA.

[17] In June 2018, the parties to the 2007 CA (i.e. the City, SAMWU and IMATU) agreed to a process of facilitation to resolve the dispute about the adequacy of the 22.8% standby allowance. SAMWU sought an increase of the allowance to 79.23%, an amount that accounts for all hours worked over and above the ordinary hours in a shift as overtime, paid at overtime rates. The matter was ultimately referred to advisory arbitration and on 4 September 2018, an advisory arbitration award was issued to the effect that the standby allowance should be increased from 22.8% to 35% for an indefinite period, with effect from 1 August 2018. An offer by the City to increase the allowance to 35% was rejected by the unions. SAMWU's demand remains that the standby allowance be increased to 79.23% of the monthly salary as 'fair remuneration'.

[18] On 4 October 2018, SAMWU gave notice to the City that with effect from 1 October 2018, it 'withdrew' from the 2007 CA and that from 1 October 2019, its members would work a 40-hour week.

[19] On the same day, 4 October 2018, SAMWU referred a dispute to the bargaining council, classifying the dispute as one concerning a matter of mutual interest. In the summary of the facts reflected on the referral form, SAMWU records that the 'firefighters have been attempting to conclude a new Fire Service Agreement since 2009'.[3]

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3 SAMWU records that the dispute was referred to arbitration, but withdrawn on 5 February 2019 on the grounds that SAMWU elected to seek the enforcement of the BCEA and the working hours that it prescribes to its members engaged in the fire service. The notice of withdrawal recorded

[20] On 8 October 2018, after the City complained that the notice to terminate the 2007 CA was invalid (if only because it postdated the cancellation date), SAMWU's attorneys later informed the City's attorneys that its withdrawal as a party to the 2007 CA would be effective from 5 November 2018. SAMWU concedes that this notice was not given to IMATU.

[21] On 15 April 2019, SAMWU lodged a complaint with the bargaining council in which it alleged that the City had failed to comply with clause 7.1 of the bargaining council's main agreement. Clause 7.1 regulates hours of work, and provides that employees, excluding temporary employees and 'those employees referred to in clauses 7.2 and 7.3', are required to work a 40-hour working week. Clause 7.2 provides that the determination of the hours of work for senior management, safety and security personnel, emergency personnel and other are delegated to be dealt with and finalised in the divisions of the council. The basis of SAMWU's complaint appears to be that after having given notice of its withdrawal from the 2007 CA, its members were entitled to be paid in terms of the BCEA or the City's overtime policy, at least until a new collective agreement was concluded. What was sought, however, as indicated above, was compliance with clause 7 of the main agreement.

[22] On 31 May 2019, the bargaining council advised SAMWU that the compliance department had no jurisdiction to consider the complaint. The letter records that it is common cause that the parties to the 2007 CA had reached deadlock on the terms of a new agreement, and that SAMWU wished in those circumstances to have hours of work regulated by the main agreement. The bargaining council advised that the main agreement did not provide that if parties failed to conclude a new divisional agreement to replace an expired agreement, the main agreement was then reinstated.

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that this was not a matter for arbitration by the bargaining council, and that SAMWU may elect to refer it to this court. No such referral was made.

[23] On 28 August 2019, SAMWU informed the City that with effect from 1 October 2019, all fire services members would strictly work 40 hour shifts as per their employment contracts and would no longer work hours in excess of 40 hours per week. This time, SAMWU did not rely on clause 7.1 of the main agreement, but asserted that its members were entitled to be remunerated in terms of the BCEA, alternatively, the City's overtime policies. Correspondence then ensued between the parties' legal representatives, with SAMWU insisting that its members had a right to work a 40-hour week in terms of the employees' individual contracts of employment, the provisions of the City's overtime policies and the BCEA. SAMWU indicated its members' willingness to work 24-hour shifts, but demanded that they be remunerated at overtime rates in terms of the City's overtime policy.

[24] With effect from 1 October 2019, SAMWU members tendered their services in terms of office hours (8:00 to 16:30 on weekdays; no work on weekends). More than half the City's fire stations had to be closed down due to a lack of staffing.

[25] On 7 October 2018, the City filed an application for urgent interim relief, contending that the refusal to work the 24-hour shift constituted a strike, and that the strike was unprotected because the employees concerned were engaged in an essential service. The interim order referred to in paragraph 2 was granted on agreed terms, which included the filing of further affidavits pending the return date.

Analysis

[26] As recorded in the introduction, the City asserts that the 2007 CA remains in force, that SAMWU's members are obliged to work in accordance with the City's 24-shift roster and that their refusal to do constitutes unprotected strike action. The City also contends that the 2007 CA is an agreement entered into for a specified term (i.e. that the agreement is not for an indefinite period), and disputes SAMWU's right unilaterally to withdraw from the agreement. The City further contends that even if the 2007 is no longer binding, the individual respondents are nonetheless bound to work the 24-shift system in terms of their contracts of employment and the City's policies. SAMWU submits that the 2007

CA does not apply, either because the agreement expired in 2010 in circumstances where neither of the 2010 or 2014 extensions to that agreement were valid, and that it was entitled in any event to cancel the agreement on reasonable notice, the 2007 CA being an agreement of indefinite duration. SAMWU contends that its members are consequently not obliged to work in accordance with the 24-shift roster, and that they have a right to work a 40-hour work week like any other of the City's employees. In these circumstances, SAMWU submits, there is no withdrawal of labour and thus no strike.

Jurisdiction

[27] SAMWU raised two points in *limine* in the heads of argument filed on its behalf. First, SAMWU submits that the court has no jurisdiction to grant the declaratory order sought in prayer one of the notice of motion, i.e. declaring that the provisions of the 2007 CA are currently valid and binding and will remain so until such time as a new working hours agreement has been concluded. SAMWU does so on the basis that the true nature of the dispute is one that concerns the application and interpretation of a collective agreement, a matter that it terms of the LRA must be determined by arbitration and over which this court has no jurisdiction, at least not when final relief is sought (see s 24(6) and s 157 (5) of the LRA). In particular, SAMWU contends that the City is asking the court to interpret the 2007 CA, read with the 2010 and 2014 minutes which purport to extend it, to determine whether the agreement remained valid and binding until a new agreement was concluded, and whether the 2007 CA therefore applies to the parties and regulates their relationship.

[28] In support of the submission that the dispute about the 2007 CA is more properly a dispute about the application and interpretation of the agreement, SAMWU relies on *United Association of SA v BHP Billiton Energy Coal SA Ltd & another* (2014) 34 *ILJ* 2118 (LC). In that matter, this court was concerned with the termination by an employer of a collective agreement establishing thresholds for the acquisition of organisational rights. The court said the following:

> [26] Once it is accepted that the settlement agreement constitutes a collective agreement – as Mr Halgryn did – then the main dispute is simply about the lawfulness or otherwise of the termination of or non-compliance with a collective agreement. This is the quintessential 'interpretation or application' dispute in terms of s24, in respect of which the CCMA has jurisdiction.

[29] In support of this conclusion, the court referred to *NUCW v Oranje Mynbou & Vervoer Maatskappy Bpk* [2000] 2 BLLR 196 (LC)). That matter concerned an alleged breach of a settlement agreement and an attempt, on an urgent basis, to have the agreement made an order of court in terms of s 158 (1) (c). The court considered that an alleged breach of a collective agreement was a matter of interpretation or application, which the applicants were required to refer to the CCMA.

[30] To the extent that the court in *Billiton Energy Coal* may have held that a contested termination of a collective agreement always triggers a dispute about the application or interpretation of the agreement for the purposes of s 24, this conclusion runs contrary to at least two decisions by the LAC.[4] In *National Union of Metalworkers of SA & others v Highveld Steel & Vanadium Corporation Ltd* (2002) 23 *ILJ* 895 (LAC), the Labour Appeal Court held that the words '*if there is a dispute about the interpretation and application of a collective agreement…*' required the court to identify the issue in dispute. In circumstances where the appellant had alleged that there was no agreement between the parties, there could be no dispute about the application or interpretation of the agreement. At paragraph 18 of the judgment, Zondo JP (as he then was) said:

> …The context of s 24 (2) indicates, in my view, that what is required for the section to be applicable is a real dispute of the nature set out, not merely an

[4] In any event, the suggestion in *Oranje Mynbou* that a breach of a collective agreement necessarily generates a dispute about the interpretation or application of the agreement cannot be taken literally. In *Health and Other Services Personnel Trade Union of South Africa obo Tshambi v Department of Health, Kwa Zulu Natal* (2016) 37 *ILJ* 1839 (LAC), Sutherland JA referred to the judgment and held that the idea that the breach of a right that derives from a collective agreement is automatically a dispute contemplated by s 24 is wrong. It did not necessarily follow that 'application' for the purposes of s24 includes enforcement - the notion of enforcement articulated in the judgment was of a step that followed on the 'applicability' of the collective agreement being proven, rather than a facet of the notion of 'application'. (See paragraphs 19 to 24 of the judgment.)

> allegation of a dispute of that nature by one party on the one-sided assumption that there is an agreement. There must be common cause that there is an agreement before they can be a dispute (albeit an alleged dispute) about its interpretation or application. This important factor is absent in this case. The court will not interpret or apply an agreement which may not exist.

[31] This principle was later applied by the LAC in *Johannesburg City Parks* v *Mphahlani* [2010] 6 BLLR 585 (LAC). In the judgment, also by Zondo JP, the court said the following:

> [14] There are a number of areas in the LRA with references to dispute or proceedings that are about the interpretation or application of collective agreements, particularly in provisions that deal with dispute resolution. Some of the sections of the LRA which contain such references are ss 22 and 24. In all of those sections the references to disputes about the interpretation or application of a collective agreement are references to the main disputes sought to be resolved and not to issues that need to or may need to be answered in order to resolve the main dispute.

[32] The court went on to give the example of a dismissal for operational requirements (a matter over which this court has jurisdiction) where the fairness of the dismissal is disputed on the basis that the employer failed to follow a procedure established by the terms of a collective agreement. The determination of the 'real dispute', i.e. the fairness of the dismissal, may require the court to interpret and apply the collective agreement, but this is a necessary consequence of the exercise of jurisdiction to determine the real dispute.

[33] More recently, in *Health and Other Services Personnel Trade Union of South Africa obo Tshambi v Department of Health, Kwa Zulu Natal* (2016) 37 *ILJ* 1839 (LAC), the LAC (per Sutherland JA) held in relation to s 24 that it was concerned with what a collective agreement means and the factual circumstances in which it might be applicable. On this analysis, a dispute about the existence or validity of a collective agreement (which necessarily includes a dispute about whether an agreement was validly terminated or extended) falls outside of the ambit of s 24(3):

> '…the phrase 'interpretation and application' are not disjunctive terms, and ought to be read as related; i.e. disputes about what the agreement means and what it is applicable to. This fits appropriately with an understanding of the section as a device which is ancillary to collective bargaining (added emphasis).

[34] As will appear from the analysis below, SAMWU's primary attack is against the extension of the 2007 CA in 2010 and 2014 by way of resolutions adopted by the executive committee of the Cape Metropolitan Division of the bargaining council. SAMWU contends that these resolutions do not meet the requirements of collective agreements within the definition contained in s 213 of the LRA. In other words, what SAMWU contends is that there is no collective agreement.

[35] It is well-established that this court has jurisdiction to determine the existence and validity of a collective agreement (see, for example, *SA Local Government Association v IMATU* (2014) 36 *ILJ* 2811 (LAC), *City of Cape Town v IMATU* (2016) 37 *ILJ* 147 (LC) and *Annandale Building Materials (Pty) Ltd t/a Altocrete Brickworks v NUM* [2002] 11 BLLR 1058 (LC), especially at paragraph 40). There is no reason why it should not exercise that jurisdiction in the present instance.

[36] Even if I am wrong in coming to this conclusion, the decision by the LAC in *Johannesburg City Parks* (supra) establishes that this court is empowered to interpret or apply a collective agreement when this is necessary for or ancillary to the performance of the court's functions. Sometimes referred to as 'incidental jurisdiction', the example cited in *Johannesburg City Parks* of an unfair dismissal dispute where the breach of a collective agreement is relevant to the consideration of fair procedure, is instructive.

[37] In summary: A dispute about the existence or validity of a collective agreement is not a dispute about its application or interpretation, and is a matter over which this court has jurisdiction. In any event, this court has jurisdiction to interpret and apply collective agreements when this is incidental or ancillary to the determination of the primary dispute that serves before the court. In the present instance, the existence and validity of the 2007 CA is in dispute. That is not a dispute about the application or interpretation of the 2007 CA. Even if it is, the

application and interpretation of the 2007 CA is incidental to the determination of the main dispute, i.e. whether the individual respondents are on strike.

[38] I find therefore that the court has jurisdiction to entertain the City's application.

[39] The second point in *limine* is to the effect that the declarator sought by the City is moot, because the only question before the court is whether the conduct of the individual respondents amounts to a 'strike' as defined in circumstances where the City, on its own version, contends that the respondents are bound by their contracts of employment, policy and practice, to work the 24-hour shift system. As I understood the argument, SAMWU contends that the declaratory relief sought is moot because it is ancillary to the main dispute between the parties i.e. whether the strike is protected.

[40] Whether or not the 2007 CA is binding is obviously central to the dispute between the parties, and its validity is very much a live controversy. Indeed, it is SAMWU's insistence that the 2007 CA is not binding on its members that resulted in the strike and in turn, the present application. There is thus no merit in this point in *limine*, which similarly stands to be dismissed.

Is the 2007 CA valid and binding?

(a) The validity of the extensions of the 2007 CA

[41] As I indicated above, SAMWU's primary challenge is to the validity of the parties' agreement to extend the 2007 CA until the conclusion of a new agreement. In particular, SAMWU challenges the extension decisions taken by the parties in 2010 and 2014.

[42] The extension to the 2007 CA is the subject of a resolution adopted by the executive committee of the Western Cape Metropolitan Division on 19 May 2010. The resolutions records that what is referred to as the 'Fire Service Laps Agreement' is extended '*until negotiations have been finalised at the Local Labour Forums*'. SAMWU officials were present at the meeting and were party to the resolution. Similarly, as recorded above, in a meeting of the Division held on

6 November 2014, a resolution was adopted to the effect that the fire service agreement '*has been extended until the new agreement has been concluded'*. Again, SAMWU officials were present at the meeting and party to the resolution. It warrants mention that both resolutions were the subject of unanimous agreement by the parties.

[43] At least two officials who were present at these meetings have deposed to confirmatory affidavits in which they stated that the minutes correctly reflect the resolutions taken and that they were confirmed as correct at the respective executive committee meetings that followed those in which the resolutions were taken. In these circumstances, there can be no dispute that the 2010 and 2014 resolutions are valid decisions, arrived at by unanimous agreement between the parties, including SAMWU, at the meetings in question.

[44] SAMWU submits further that the extension agreements are not valid on account of the fact that the 2007 CA had already expired by the time the 2010 resolution was adopted. While it may be so that the 2007 CA contemplates that it would have a shelf life of 36 months, there is nothing in the agreement to preclude the parties from agreeing to extend that period, on whatever conditions they determine. There is also no principle in law that precludes parties to an agreement that has lapsed in accordance with its own provisions, from resurrecting or reviving that agreement (se *Sewpersadh and another v Dookie* 2009 (6) SA 622 (SCA), where the SCA confirmed that an agreement to revive requires '*a fresh meeting and concurrence of the minds*' of the parties to restore the *status quo ante* (referring to *Desai v Mohammed* 1976 (2) SA 709 (N)). That is precisely what happened in the present instance, where the three parties to the 2007 CA agreed to further extend its duration 'until a new agreement has been concluded'. The unanimous resolution adopted on 19 May 2010 and confirmed by Mr. Barnes, who was in attendance at the meeting, could not be more clear of an intention to revive and extend the 2007 CA.

[45] To the extent that SAMWU contends that the resolutions extending the 2007 CA do not meet the definition of a 'collective agreement' in s 213, it should be

recalled that a 'collective agreement' is defined to include a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions on the one hand and, on the other hand one or more employers or registered employers organisations. But that is not the end of the matter. The bargaining council's constitution contains a discrete definition of 'collective agreement'. That definition extends to 'a collective agreement as defined in the LRA, and shall include any decision on a substantive matter concluded in the manner contemplated in clause 17. Clause 17 of the constitution deals with the procedure for the negotiation of collective agreements. The clause contemplates any party to the council introducing proposals for the conclusion of the collective agreement, at least two thirds of the employer representatives on the one hand and two thirds of the trade union representatives on the other hand voting in favour of a collective agreement, for it to be binding. There can be no dispute that the unanimous decision taken at the meeting on 6 November 2014 to extend the 2007 CA until the new agreement has been concluded, met the requirements of clause 17. That being so, at least as between the parties to the council and their members, who are bound by the provisions of the council's constitution, the resolution constituted a binding collective agreement. This is so regardless of the elements of the definition contained in s 213 of the LRA.[5]

SAMWU's termination of the 2007 CA

[46] SAMWU raises two arguments in support of its contention that the 2007 CA agreement was validly terminated. The first is that the 2007 CA is a collective agreement concluded under s 31 of the LRA, and that its duration was for a limited period of 36 months. Secondly, and in any event, SAMWU contends that it has terminated the 2007 CA by giving reasonable notice of termination in October 2019.

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[5] In any event, what the parties resolved was to continue to be bound by the terms of what was undisputedly a collective agreement as defined in s 213 – the 2007 CA – save for the clause establishing the term of the agreement.

[47] The first submission relies on s 31 of the LRA, which regulates the binding nature of collective agreements concluded in bargaining councils. In broad terms, the section provides that a collective agreement concluded under the auspices of a bargaining council binds the parties to the council who are also parties to the agreement, and the members of any trade union and employers' organisation that are party to the agreement. Section 32 regulates the extension of a collective agreement concluded in a bargaining council to non-parties to the agreement, and the terms on which any extension may be effected. In the present instance, it is not in dispute that the 2007 CA is a collective agreement concluded in a bargaining council, and that the parties were bound by its terms, at least for the period of its agreed duration.[6]

[48] The relevance of s 31 to the present dispute is SAMWU's submission that a collective agreement regulated by s 31 may not be concluded for an indefinite period. SAMWU relies on *City of Cape Town v Independent Municipal & Allied Trade union & others* 92016) 37 *ILJ* 147, where at paragraphs 12 and 13 of the judgment, the court said the following:

> 12. Can a collective agreement entered into by parties to a bargaining council be governed by both ss 31-32 and s 23 of the LRA? Very purpose of the establishment of bargaining councils and the conclusion of collective agreements between them, to regulate sectoral bargaining. For that reason, the binding nature of collective agreements concluded by parties to the council this governed by specific provisions in the LRA...
>
> 13. The use of the words 'subject to ...section 32'in s 31 of the LRA is best understood as meaning: 'except as curtailed by'. In particular, I note that s32(2) of the LRA thus curtails the period of the binding nature of the collective agreement entered into by the parties to a bargaining council to one 'from a specified date and for a specified period'. In contrast, collective agreements governed by s 23 may bind the parties for an indefinite period in terms of s 23(4).

[6] The 2007 CA contains a provision whereby the parties agree to request the minister to extend the agreement to non-parties (see clause 6), but this is not relevant for present purposes.

[49] That case was concerned with the validity of a collective agreement concluded by the parties in a bargaining council in circumstances where it was argued that the agreement was invalid because it did not comply with the council's constitution. What was in issue was whether the collective agreement was nonetheless a valid collective agreement for the purposes of s 23 of the LRA. The court held that the LRA drew a clear distinction between collective agreements concluded with in a bargaining council (which fall to be regulated by s 31) and collective agreements concluded outside of the auspices of a bargaining council (which fall to be regulated by s 23). The implication for present purposes, of course, is that the 2007 CA was concluded for a specified, fixed period and is not valid beyond the expiry of that period.

[50] With respect, the judgment does not make the necessary distinction between the binding effect of collective agreements as between the parties to the agreement on the one hand, and non-parties on the other. There is nothing in s 31 (or s 23 for that matter) that precludes the application of s 23(4) to a collective agreement concluded by parties to a bargaining council.

[51] On the basis that s 24 (4) is found to be applicable to the 2007 CA, SAMWU submits that for the purposes of s 24(4), an agreement for an indefinite period (which may be terminated on reasonable notice) includes a collective agreement for a fixed term, the actual duration of which is unknown. SAMWU was thus entitled to give reasonable notice to terminate the agreement. Section 24 (4) provides:

> (4) Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties (emphasis added).

In support of this submission, SAMWU relies on *SA Federation of Civil Engineering Contractors & another v National Union of Metalworkers of SA & others* (2013) 34 *ILJ* 2084 (LC). In that case, this court was required to determine whether s 23(4) applied to the following clause in a collective agreement:

> This agreement shall come into operation on the date of execution hereof and shall remain in effect for the duration of the construction and commissioning phase of the project which shall mean the period in which all testing and finality quality controls shall take place ensuring that the final product Medupi Power Station is handed over to the client.

[52] The court concluded:

> [20] In my judgment, taking into consideration the textual issues I have referred to, 'indefinite period' in s 23(4) of the LRA cannot simply mean in perpetuity, but its meaning must include a period of a fixed term, the actual duration of which it is unknown. This matter is a clear example of why such a reading is apposite. The PLA [project labour agreement] has already been in existence since 2008. From the papers, it is evident that it is envisaged to continue for some years to come. Where the duration of the collective agreement is tied to an indeterminate period of time, i.e. the time that it takes to complete certain works or a particular project, it would amount to interference in the collective bargaining relationship to deprive a party of the right to withdraw from it in terms of s 23(4).

[53] On this basis, the court held that in spite of the wording of the clause, the agreement was terminable by either party giving reasonable notice of termination. In other words, if the parties agree that the agreement they conclude will apply to them until the happening of a specified event, but it is not known when that event will occur, any party to the agreement is entitled to terminate it on reasonable notice before the happening of the specified event. In coming to this conclusion, the court had regard both to the principle of accountability in terms of which trade unions and employers organisations are accountable to their members for the decisions that they make, and to the principle of voluntarism. The appeal to the latter is premised on an assertion to the effect that where the duration of the collective agreement is tied to an indeterminate period of time, for example, the time it takes to complete a certain work or a particular project, it would then amount to unwarranted interference in the collective

bargaining relationship should a party be deprived of the right to withdraw from the agreement in terms of section 23 (4).

[54] With respect, this cannot be correct. The principles of accountability and of voluntarism requires that the courts respect the autonomy of bargaining partners and give primacy to the agreements that they conclude (see *National Police Services Union & others v The National Negotiating Forum* (1999) 20 *ILJ* 1081 (LC), at paragraph 52. In *Association of Mineworkers and Construction Union (AMCU) and Others v Royal Bafokeng Platinum Ltd and Others*, the LAC said the following about the application of the principle of voluntarism, at paragraph 24 of the judgment:

> The philosophy of the act is in favour of voluntarism and is by and large abstention is in its approach. The regulation of the workplace and employment contracts is left to the parties to agree upon. As part of the trade-off, collective agreements are given priority; this is so because collective bargaining is essentially geared toward concluding a collective agreement. Collective agreements are so important the scheme of the act that they are allowed to trump the provisions of the Act...

And at paragraph 26:

> The voluntary nature of our labour relations system is held together by collective agreements. Collective agreements are part of the package. The gains made by collective bargaining which leads to collective agreement should not be unravelled easily. The risk, of course, being that the unravelling of one thread might lead to the destruction of the entire garment.

[55] In other words, any appeal to voluntarism particularly must necessarily result in a conclusion that is the opposite to the conclusion to which the court came. It follows that where collective bargaining partners have agreed that a collective agreement will endure until the happening of a certain event, the courts must give effect to that agreement. To do otherwise would be to prejudice the promotion of orderly collective bargaining, one of the stated purposes that the of the LRA (see s 1 (d) (i)).

[56] An agreement that provides that it will apply until the happening of the future event, the date of which is not known in advance, is not, on a proper interpretation, an agreement 'concluded for an indefinite period'. It is an agreement concluded for a definite period, although the period is not necessarily known at the outset. It is definite because the period for which the agreement applies is objectively determinable, by reference to a criterion agreed upon by the parties. Section 23 (4) does not override what the parties may have agreed in relation to the duration of any collective agreement.

[57] In the present instance, the intention of the parties was clearly to ensure that there was at all times and agreement in place regulating the conditions of employment of firefighters. The correspondence that preceded the extension of the 2007 CA, and the steps that were taken to ensure that the agreement remained in force, all indicate an intention to continue to regulate firefighters' hours of work by collective agreement. When the parties resolved in 2010 and in 2014 to extend the 2007 CA, their intention could only have been that their agreement would terminate only on being replaced by a new agreement. The text of the resolution dated 6 November 2014 says as much, in the plainest terms. To hold that the agreement can be terminated on reasonable notice in spite of the fact that a new agreement has not yet been concluded would fly in the face of what the parties specifically agreed.

[58] In any event, s 24 (4) does not give rise to an unqualified right to terminate a collective agreement concluded for an indefinite duration. As the preamble to the subsection provides, the right to terminate exists only "Unless the collective agreement provides otherwise…'. In *Edgars Consolidated Stores Ltd v Federal Council of Retail and Allied workers Union* (2004) 25 *ILJ* 1051 (LAC), the LAC said the following, at paragraph 22 of the judgment:

> …This provision only deals with the termination of collective agreements that are concluded for an indefinite period. Obviously, a collective agreement that is concluded for a fixed term will come to an end when its term expires. Section 23 (4) opens with the words "unless the collective agreement provides otherwise…".

These words suggest an exception to the general rule that the balance of the sentence provides for. The balance of the sentence is to the effect that a party to a collective agreement concluded for an indefinite period may terminate that agreement by the giving of reasonable notice in writing to the other party. The exception contemplated is where the collective agreement itself provides otherwise. In other words, a collective agreement cannot be terminated in the manner provided for in section 23 (4) if it itself precludes that.

[59] In the present instance, the parties to the 2007 CA have agreed otherwise. They have agreed that the 2007 CA will continue to remain in force until a new agreement has been concluded. The necessary implication here is that none of the parties may terminate the agreement n notice.

[60] This conclusion is sustained by *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA), where the respondent had concluded an agreement with Transnet to operate a jewellery boutique on the Blue Train. The parties agreed that the continue until the privatisation of the Blue Train was complete, and event that was anticipated to occur in the near future. Like the Medupi Power Station in the *SA Federation of Civil Engineering Contractors* judgment (*supra*), the envisaged period for completion of the project was unduly optimistic. Transnet argued for a tacit term entitling it to terminate the agreement on notice. The SCA rejected this contention, and held that the contract was not silent on duration - it had been agreed that the contract would terminate on the happening of an uncertain future event, and that the agreement remained binding even when unforeseen circumstances had delayed the occurrence of that event.

[61] In summary, the 2007 CA is not an agreement concluded for an indefinite period. The agreement is binding until it is replaced by a new agreement, whether that occurs consequent on agreement reached between the parties or by way of compulsory arbitration. In particular, the fact that it has taken the parties longer than anticipated to conclude a new agreement does not convert the 2007 CA into an agreement of indefinite duration. Section 31 does not assist SAMWU – there is nothing in that section (or any other section in the LRA) to preclude the parties to a collective agreement from agreeing to be bound until the happening of a

specified event. In the present instance, it cannot be said, as SAMWU contends, that the agreement to extend the 2007 CA constituted a *pactum de contrahendo*. It is not a contract to conclude another contract. Rather, it is an agreement by the parties to remain bound by the terms of what they regarded as a binding substantive agreement until a new agreement is concluded. In other words, the parties agreed that the terms of the shift system and the standby allowance payable would endure until a defined future event.

[62] It follows that SAMWU's purported withdrawal from the 2007 CA is of no force and effect, and that the agreement remains binding on SAMWU and its members. Given the conclusion to which I have come, it is not necessary for me to consider the parties' submissions in relation to the questions whether the notice given by SAMWU to the city was reasonable, or whether the failure to give notice to IMATU is fatal. It is also not necessary to consider whether there is any significant distinction between a unilateral withdrawal by a party from a collective agreement as opposed to a termination of that agreement.

[63] The City has made out a clear right to the relief that it seeks. The remaining requirements for interdictory relief have not been seriously disputed. If it is accepted that the individual respondents are obliged to comply with the 24-shift roster, it follows (because they are engaged in an essential service), that their refusal to do so constitutes an unprotected strike. The harm to the City and its residents that would result from the threatened strike are both apparent and egregious. Finally, the City has no alternative remedy available to it.

[64] To be clear, while the 2007 CA is not directly applicable to those individual respondents who are not members of SAMWU or IMATU (who were bound by the by the 2007 CA agreement by virtue of its extension but only for its initial duration of 36 months), they are bound by other sources of obligation, e.g. the express or tacit terms of their contracts of employment. None of the non-union members (cited as the third to further respondents) have opposed the relief sought, and the City is entitled to the relief it seeks against them on the basis of the averments made in the founding and supplementary affidavits.

SAMWU's counter-application

[65] SAMWU seeks an order to the effect that all 24 hours of a shift should be regarded as working hours for the purposes of the BCEA. Specifically, in terms of an amended notice of motion, SAMWU seeks a declaratory order to the effect that when firefighters work 24 shifts, during which they are required to be on the premises and available for immediate response, all 24 hours are working hours for the purposes of employment law, including but not limited to the BCEA, collective agreements and the employer's practices, systems policies and procedures. The counter-application, as originally formulated, proceeds from the premise that the working hours' provisions of the BCEA apply to SAMWU's members who are the subject of the main application. SAMWU admits that its members earn above the ministerial threshold established by the BCEA.[7] It is apparent that none of SAMWU's members are affected by the overtime provisions of the BCEA, the only provisions of the Act that can have any possible bearing on them in this dispute. In response, SAMWU sought to amend its notice of motion. Specifically, SAMWU seeks an order that all 24 hours of a 24-hour shift are working hours for the purposes of employment law (including but limited to the Basic Conditions of Employment Act 75 of 1997, collective agreements, and the employer's practices, systems policies and procedures. The relief sought, so SAMWU submits, will have an impact not only on the parties to this dispute but to 'everybody affected by employment law.' The City filed a notice of objection to the amendment, to the effect that it would render the pleadings exicipiable in that no facts disclosed in SAMWU's founding affidavit are capable of sustaining then cause of action reflected din the amended notice of motion, and that SAMWU was seeking to introduce a new cause of action in reply. The matter was not pursued thereafter, and I need make no decision in respect of the application to amend.

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[7] Certain provisions of the BCEA do not apply to employees earning above a threshold currently fixed at R205 433.30 per annum. Sections 9 (ordinary hours of work), 10 (overtime), 11 (compressed working week), 12 (averaging hours of work), 14 (meal intervals), 15 (daily and weekly rest period), 16 (pay for work on Sundays), 17(2) (night work) and 18(3) (public holidays) are excluded from application.

[66] In regard to the merits of the counter-application in the form in which it was originally filed, it is a well-established principle that it is not the function of courts to provide legal opinion. This was made clear by the Labour Appeal Court in *Minister of Public Service and Administration and others v Solidarity and Others* [2007] ZALAC 28 (29 March 2007) where the LAC dealt with the granting of declaratory relief where no consequential relief is sought. The court referred to *JT Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) SA 514 (CC) where at 525A, the Constitutional Court said:

> I interpose that enquiry because a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer.

[67] Specifically, a dispute is moot and therefore not justiciable if it no longer presents an existing, live controversy (*National Coalition for Gay and Lesbian Equality and others* v *Minister of Home Affairs and others* 2000 (1) BCLR 39 (CC). SAMWU submits in argument that ...'the declarator will be of great assistance to the City, SAMWU and IMATU in resolving the obfuscation, uncertainty and confusion which has characterised the parties' treatment of the hours between 18h00 and 09h00 during which firefighters are on the premises of fire stations so as to enable a quick response to emergencies.' Frankly, the law is clear and there is no obfuscation. If SAMWU is unhappy with the terms of the 2007 CA it is free to demand their review and to negotiate a new agreement, and to refer any dispute to arbitration in terms of s 74 of the LRA. In short: SAMWU's members fall above the threshold applicable to most of the sections of the BCEA that regulate working time, in particular, payment for overtime. The present dispute has nothing to do with working 24-hour shifts. SAMWU's members are happy to work the 24-shift system. What they are unhappy about is the remuneration that they receive for shift work. What the counter-application ultimately seeks to do is to lay the basis for a different cause of action, one that is not rooted in the facts of

this case. There is no good reason why the court should deal with the counter-application, notwithstanding it being moot.[8]

[68] Finally, and following on from the preceding paragraph, SAMWU paints a picture in the papers and its submissions of a party to a system of collective bargaining that has failed. But collective bargaining cannot be said to have failed only because one of the bargaining parties fails to secure what it demands. It is simply not true, as SAMWU submits, that the City, having secured an agreement in 2007, can frustrate the conclusion of another agreement indefinitely, that its members are bound in perpetuity to an agreement to which they no longer consent, or that no dispute resolution mechanisms are available.[9] SAMWU has a remedy at its disposal – compulsory arbitration. SAMWU has invoked all forms of relief other than the obvious – the negotiation of the terms of a new agreement regulating hours of work and failing agreement, submission to arbitration. The resolution of disputes by compulsory arbitration inevitably holds high risk for all the parties concerned, at least in the sense that the exercise of economic power is prohibited and the power of decision-making is assigned to an independent third party. That may explain why SAMWU has been reluctant, as it would seem, to pursue the option of collective bargaining and the determination of the present dispute by compulsory arbitration. No doubt, the advisory award issued in 2018 which recommends a fair allowance in sum equivalent to less than half of SAMWU's demand was sobering. The fact remains that what an acceptable standby allowance should be is a matter best avoided by judges and left to collective bargaining. For these reasons, the counter-claim stands to be dismissed.

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[8] *Karoo Hoogland Municipality v Nothnagel & another* (2015) 36 *ILJ* 2021 (LAC).

[9] SAMWU has variously declared an unfair labour practice dispute contending that it is unfair to treat only 40 hours per week as 'working hours' and the rest as 'standby hours'; submitted to voluntary facilitation referred a mutual interest dispute to the bargaining council; sough the enforcement of the bargaining council main agreement; submitted overtime claims' and tendered to work on the same basis as other City employees.

Costs

[69] Section 162 empowers this court to make orders for costs according to the requirements of the law and fairness. Ordinarily, this court does not make orders for costs in matters where collective bargaining partners are in dispute, especially where the effect of that order might be to prejudice that relationship (see *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* 1992 (1) SA 700 (AD)). That notwithstanding, both SAMWU and the City seek an order that costs should follow the result. IMATU does not seek costs against either of the other parties, and resists any adverse order for costs.

[70] In regard to the main application, in my view, the requirements of the law and fairness are best satisfied by an order that each party pays its own costs. However, in relation to the counter-application, a different order is warranted. For the reasons reflected above, the counter-application was misguided and in respect of that application, SAMWU ought to pay the costs sought by the City, such costs to include the costs of two counsel.

Order

I make the following order:

1. The provisions of the 'Fire and Rescue Service Collective Agreement: 24 Shift' concluded on 26 April 2007 are valid and binding and will remain so until such time as a new working hours collective agreement has been concluded by the parties in respect of the applicant's fire and rescue service.
2. The conduct of the individual respondents, in refusing to work in accordance with the 24-hour shift roster, as provided for in the Fire and Rescue Service Collective Agreement: 24-hour shift, and their contracts of employment, constitutes an unprotected strike.

3. Those individual respondents listed in annexure SA 18 to the amended notice of motion are interdicted and restrained from participating in the unprotected strike.
4. The first respondent's officials are restrained and interdicted from performing any acts or omissions which incite, encourage or support the strike.
5. The employees listed in annexure SA 18 to the amended notice of motion are interdicted and restrained from performing any act or omissions which may incite, encourage, or support the strike.
6. Officials of the first respondent are directed to take such positive steps as may be necessary to ensure compliance with this order by the employees listed in annexure SA 18 to the amended notice of motion.
7. The first respondent's counter-claim is dismissed, with costs, such costs to include the costs of two counsel.

André van Niekerk

Judge of the Labour Court of South Africa

APPEARANCES

For the applicant: Adv. GA Leslie SC, with him Adv. LW Ackermann, instructed by Bradley Conradie Halton Cheadle

For the first respondent: Adv. S Harvey, instructed by Macgregor Erasmus Attorneys

For the second respondent: Adv. AJ Freund SC, instructed by Francois du Plessis Attorneys (Heads of argument drafted by Adv. A Freund SC and Adv. JD Withaar).