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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J483 /20

MACSTEEL SERVICE CENTRES SA (PTY) LTD

Applicant

And

NATIONAL UNION OF METAL WORKERS

First Respondent

OF SOUTH AFRICA

THE PERSONS LISTED IN ANNEXURE "A"

**Second to further
Respondents**

Heard: 29 May 2020

Delivered: 3 June 2020

In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 3 June 2020.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant approached this Court on an urgent basis seeking an order declaring the strike action by the Respondents unprotected.
- [2] The Respondents filed an answering affidavit, to which the Applicant filed a reply. The Applicant seeks an interim order, with a return date. As all the papers are before me, the matter will be finally determined.

The Covid-19 pandemic

- [3] Before I deal with the merits of this application, it is necessary to set out the milieu within which this application came before Court.
- [4] On 15 March 2020, the coronavirus pandemic was declared a national disaster in the Republic of South Africa and the government announced a package of extraordinary measures to combat this grave public health emergency. On 23 March 2020,¹ President Cyril Ramaphosa (the President) announced a nationwide lockdown for 21 days with effect from midnight on 26 March 2020, which was to be enacted in terms of the Disaster Management Act². The three-week lockdown entailed that all South Africans were required to stay at home, except a handful of categories of workers who were regarded as necessary and essential in the response to the pandemic.
- [5] The President made it clear that South Africa found itself confronted not only by a virus that has infected millions of people across the globe, but also by the prospects of a very deep economic recession that will cause businesses to close and that will result in many people losing their jobs. As a first phase of the government's economic response, measures were announced and these interventions included support for persons whose livelihoods would be affected.
- [6] The President announced that there would be a special dispensation for companies that are in distress because of Covid-19 and stated that through this proposal, employees would receive wage payment through the Temporary

¹ Statement by President Cyril Ramaphosa on escalation of measures to combat Covid-19 epidemic, Union Buildings, Tshwane, 23 March 2020.

² Act 57 of 2002.

Employee Relief Scheme (TERS), which would enable companies to pay employees during this period and avoid retrenchments.

- [7] The President called on companies to take care of their workers during this period and called on all South Africans to act in the interest of the nation and not in their own selfish interests. He gave the assurance that lives and livelihoods are prioritised and that the measures he announced would be used to protect people from the economic consequences of this pandemic.
- [8] On 26 March 2020, the Minister of Employment and Labour issued a Directive that set out the requirements for the newly established Covid-19 TERS benefits. These benefits were provisioned to alleviate the economic impact of the national pandemic by assisting employers to pay their employees during the closure of their businesses. The said Minister subsequently published amendments to the Covid-19 TERS directives, of which the latest amendments were effective from 26 May 2020.
- [9] On 9 April 2020,³ the President announced that the National Coronavirus Command Council decided to extend the nationwide lockdown by a further two weeks beyond the initial 21 days and the lockdown measures remained in force until the end of April 2020. The President made it clear that the aim was to prevent massive loss of life as well as to prevent the economy from collapsing and in pursuing a path that both saves lives and protects livelihoods, government adopted a strategy that was made up of three parts, the second of which was a comprehensive package of economic support measures to assist businesses and individuals affected by the pandemic.
- [10] The President announced that additional extraordinary measures would be put in place in the coming weeks and months to absorb the sudden loss of income to both businesses and individuals. He stated that cabinet would be developing a comprehensive package of urgent economic measures to respond to the immediate crisis and to the severe economic challenges that we must confront in the months ahead.

³ Message by President Cyril Ramaphosa on Covid-19 epidemic, 9 April 2020.

- [11] On 21 April 2020,⁴ the President announced economic and social measures in response to the Covid-19 epidemic. He confirmed that the coronavirus pandemic has damaged the economy, it resulted in sudden loss of income for businesses and individuals and that it was to continue in months to come. The President announced the second phase of government's economic response to stabilise the economy, to address the extreme decline in supply and demand and to protect jobs. As part of this phase, the President announced a massive social relief and economic support package of R 500 billion, which included support for companies and workers.
- [12] On 23 April 2020,⁵ the President announced that the nationwide lockdown could not be sustained indefinitely as people need to earn a living, companies need to be able to produce and trade, they need to generate revenue and keep their employees in employment. A gradual and phased recovery of economic activity was announced to commence after 30 April 2020 when the lockdown restrictions were eased gradually. The President announced that as from 1 May 2020 the country would operate on level 4 alert, which allowed some businesses to resume operations under specific conditions, including that they would not be able to return to full production and the workforce would only be able to return in limited batches. The President called upon South Africans to make sacrifices and to endure hardship and difficulty so that we can enjoy freedom and prosperity into the future.
- [13] On 13 May 2020,⁶ the President announced that by the end of May 2020 most of the country would be placed on level 3 alert and this was confirmed on 24 May 2020⁷. South Africa indeed moved to level 3 alert on 1 June 2020, and the restrictions that were in place, were relaxed significantly.

⁴ Statement by President Cyril Ramaphosa on further economic and social in response to the Covid-19 epidemic, Union Buildings, Tshwane, 21 April 2020.

⁵ Statement by President Cyril Ramaphosa on South Africa's response to the Coronavirus pandemic, Union Buildings, Tshwane, 23 April 2020.

⁶ Statement by President Cyril Ramaphosa on South Africa's response to the Coronavirus pandemic, Union Buildings, Tshwane, 13 May 2020.

⁷ Address by President Cyril Ramaphosa on South Africa's response to the Coronavirus pandemic, Union Buildings, Tshwane, 24 May 2020.

- [14] It has been said over and over that the Covid-19 crisis presents an unprecedented challenge, unmatched since the Spanish Flu and the Great Depression. It has depressed global economies and a material shrinkage in global trade is expected. Covid-19 landed on our shores at a time when our economy was already under tremendous strain.
- [15] In this context, the Applicant had to close its operations entirely for the lockdown period from 26 March 2020 until 30 April 2020 and during May 2020 it resumed 50% of its business operations.

Background facts

- [16] The nationwide lockdown commenced at midnight on 26 March 2020 and as the Applicant is not an essential service, it ceased all operations as from 27 March 2020. This caused a serious economic blow for the Applicant as it suffered a total loss of business and turnover.
- [17] During the initial period of the lockdown, the Applicant placed all its employees on special leave and paid the employees their full salaries and benefits for March and April 2020. The Applicant did not require its employees to take their annual leave during this period and their leave credits remain intact, nor did the Applicant apply the principle of 'no work no pay'.
- [18] The Applicant's case is that it did not anticipate that the three-week lockdown period would be extended and when that happened, it sent a communication to its employees on 16 April 2020. The same communication was sent to the First Respondent (NUMSA) on 17 April 2020. In the said communication, the Applicant indicated that the Covid-19 epidemic had a devastating impact in that the Applicant suffered a total loss of business and turnover and that it would suffer substantial losses in 2020. The Applicant stated that its cash reserves and monthly cash flow must be managed carefully as the Applicant expected a substantial cash shortfall at the end of May 2020. As a result, the Applicant announced emergency measures that would come into effect from 1 May 2020 namely:
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- 18.1 All employees will be required to take a 20% reduction in salary, initially for three months (May, June and July 2020) and this will be reviewed on an ongoing basis;
- 18.2 Commission earners will be required to take a 20% reduction on their basic pay, initially for three months (May, June and July 2020) and this will be reviewed on an ongoing basis;
- 18.3 The Applicant will not be in a position to pay any salary increases to employees in July 2020;
- 18.4 No salary increases will be awarded to any employee who is promoted for the remainder of 2020;
- 18.5 Acting allowances will be paid to those qualifying individuals where applicable, but they will be required to take a 20% reduction in salary, initially for three months (May, June and July 2020) and this will be reviewed on an ongoing basis;
- 18.6 The Applicant will not be in a position to pay any bonuses / incentives to non-scheduled employees for the remainder of 2020 and this will be reviewed on an ongoing basis;
- 18.7 The Applicant reserved its rights in relation to the MEIBC's Exemption Policy with regard to the leave enhancement pay in relation to scheduled employees as the Applicant will not be able to afford the December payment.

[19] It was made clear in the letter that these are extreme measures which will have a negative impact on all employees, but that those are measures aimed at preserving jobs and that the unprecedented times require of everyone to make sacrifices that would ensure the sustainability of the Applicant and the protection of livelihoods.

[20] The Applicant was able to resume operations during level 4 alert with effect from 1 May 2020, but its operations could only be scaled up to 50%. This meant

that approximately 1 458 employees could not return to work until such a time as the lockdown was eased further.

- [21] NUMSA has 1 247 members and it represents approximately 41% of the Applicant's workforce. NUMSA's members rejected the proposed emergency measures and on 13 May 2020 a meeting was held between the Applicant and NUMSA. During the meeting, the NUMSA representatives indicated that their members were not in agreement with the 20% salary reduction for all employees and that they did not have a mandate from their members. The Applicant pointed out that the effect and consequence of level 4 alert was that it was impossible for all employees to return to work and to tender their services as the Applicant could only operate at 50%.
- [22] The Applicant's case is that the Covid-19 pandemic is an extraordinary event, which was unforeseen and out of the control of the Applicant or its employees. As part of assisting employees whilst at the same time balancing the responsibility to ensure the continued operation of the Applicant post the lockdown period and the Covid-19 pandemic, the Applicant decided to implement the salary reduction for May, June and July 2020.
- [23] On 18 May 2020, the Applicant sent a communication to its employees, in which it recorded that it would implement the measures set out in the letter of 16 April 2020. It was stated that the Applicant was operating at 50% of normal capacity and it remained impossible for the Applicant to generate the required revenue to cover all the costs of running the business. Rather than not paying employees who are unable to return to work, the Applicant considered how to best assist its employees and at the same time ensure the sustainability and survival of the Applicant post the lockdown and Covid-19 pandemic, until such time it can resume full operations. The intention was to treat all staff the same, notwithstanding the fact that some could not return to work.
- [24] In the aforesaid letter, the Applicant indicated that the Department of Employment and Labour (The Department) recognised that many companies would be in financial distress as a result of the Covid-19 pandemic and that it had made provision for special relief for employers who are unable to pay

salaries. The Applicant gave the undertaking that it has and will continue to apply for the Covid-19 TERS benefits on reduced earnings and as soon as the Applicant received the relief money from the Department, it would be transferred directly to the employees.

- [25] The Applicant recognised the fact that the reduction in salaries will have a serious impact on its employees and their families.
- [26] On 21 May 2020, NUMSA addressed a letter to the Applicant stating that the Applicant's unilateral decision to implement a 20% salary reduction, notwithstanding the fact that NUMSA and other employees objected, was unlawful.
- [27] The Applicant responded to NUMSA on 22 May 2020, confirming that the decision to implement the salary reduction for May, June and July 2020 was taken to balance the interest of employees and ensuring the continued operation of the Applicant post lockdown and the Covid-19 pandemic until such a time that it can resume full operations. The Applicant further undertook to apply monthly for the TERS benefit on reduced earnings.
- [28] The Applicant further invited NUMSA to a meeting to discuss the issues of leave enhancement pay, incentives, bonuses and salary increases.
- [29] Instead of engaging the Applicant further, NUMSA referred a dispute to the MEIBC and the referral was served on the Applicant on 25 May 2020. The nature of the dispute is classified as 'unilateral change to terms and conditions of employment' and the outcome required is for the *status quo* to remain in respect of all the terms and conditions of employment. NUMSA identified four issues in dispute to wit:
- '1. Employer reduced all salaries by 20% for the months of May, June and July 2020;
 2. Intend to suspend the payment of bonuses and incentives to non-scheduled employees;

3. Intend not to make payments for leave enhancement pay during December 2020;
4. Amend the pension / provident fund rules to allow for a contribution holiday. ‘

[30] In argument, Mr Daniels for the Respondents indicated that paragraph 4 of the issues in dispute has been abandoned and is no longer part of the issues in dispute and it is therefore not relevant for purposes of this judgment.

[31] In requiring an outcome for the *status quo* to remain, NUMSA invoked the provisions of section 64(4)(a) and / or 64(4)(b) of the Labour Relations Act⁸ (LRA).

[32] On 25 May 2020, the Applicant's attorneys addressed a letter to NUMSA, stating *inter alia*, that salary reduction for May, June and July 2020 was implemented in order to address the devastating financial impact which the lockdown has had on the Applicant's business and as a means to avoid more drastic measures such as a section 189 of the LRA retrenchment process or temporary layoff or short time in respect of employees who cannot return to work.

[33] It was re-iterated that the Applicant was committed to apply for the Covid-19 TERS benefits but that it could only do so for May 2020 when the application process for May 2020 is open. When the matter was argued, it was confirmed that the Applicant had indeed submitted its application for the TERS benefits. It was stated that as soon as the Applicant receives the Covid-19 TERS benefits, it will top up employees' salaries with the funds it may receive from the Department. This means that employees' salaries would be topped up with the Covid-19 TERS benefit as soon as it is paid and based on the salary scale of the UIF benefits, employees are likely to receive 100% of their full remuneration for May 2020.

[34] On 25 May 2020, NUMSA demanded a written undertaking from the Applicant that it would refrain from unilaterally implementing changes in the terms and

⁸ Act 66 of 1995 as amended.

conditions of employment. Absent such a written undertaking, notice was given in terms of sections 64(4) and (5) of the LRA that NUMSA's members would embark on strike action in support of their demand that the Applicant refrain from unilaterally changing conditions of service.

[35] On 26 May 2020, the Applicant responded to NUMSA and stated that the strike would be unprotected as the Applicant has not failed to comply with section 64(4) and (5) of the LRA and therefore the provisions of section 64(3)(e) of the LRA do not apply and NUMSA has to comply with the provisions of section 64(1). In the same letter NUMSA was given notice of a defensive lock-out in response to the strike action.

[36] In the letter, NUMSA was requested *inter alia*, to agree that the Applicant make payment of 80% of the employees' remuneration for May, June and July 2020 and that the Applicant would apply timeously for the Covid-19 TERS benefits each month in order to top up the employees' remuneration to 100% once the benefits have been paid to the Applicant.

[37] The strike action commenced as per the strike notice and on 29 May 2020 the Applicant approached this Court on an urgent basis for relief.

The relief sought

[38] The Applicant seeks an order declaring the strike action that commenced on 28 May 2020 unprotected and for this Court to order the striking employees to return to work.

[39] This Court is not inclined to order employees to return to work in the event that the strike action is declared unlawful. If the strike action is unlawful, the Applicant has other remedies available to get its employees back to work and a Court order to that effect is not necessary.

[40] Effectively, the only relief sought is for a declarator that the strike action is unprotected.

The Applicant's case

- [41] The Applicant's case is that the strike action is unprotected for the following reasons:
- [42] In the referral to the MEIBC, NUMSA made four demands and in respect of the first issue relating to the 20% reduction of all salaries during May, June and July 2020, the Applicant's case is that no such change is being implemented as the Covid-19 TERS benefit will be applied for. NUMSA's members are not being subjected to a salary reduction, but rather a temporary re-arrangement of how they are paid.
- [43] In respect of the remainder of the demands, the Applicant's case is that they relate to events which have not yet taken place or been decided upon by the Applicant.
- [44] Section 64(3)(e) of the LRA provides that the requirements of section 64(1) do not apply to a strike if the employer fails to comply with the requirements of section 64(4) and (5), but the Applicant has complied with the requirements of section 64(4) of the LRA and thus the strike action, without complying with section 64(1), would be unprotected.
- [45] In short: The Applicant's case is that it has given an undertaking to apply for the Covid-19 TERS benefits for May 2020 and in giving such undertaking, the Applicant has complied with the requirements of section 64(4) of the LRA. There is no change to the terms and conditions of employment and at best for the Respondents there is a dispute about the payment date of employees and that is not a dispute covered by section 64(3) of the LRA.

The Respondents' case

- [46] The Respondent takes issue with the Applicant's undertaking to apply for the Covid-19 TERS benefit for a number of reasons. Firstly, the Applicant vacillates between two scenarios namely:
- i. The employees will receive their full remuneration if and when the TERS benefits are received;

- ii. Based on the salary scale, it was most likely that most of the employees will be paid their full remuneration.

- [47] The Respondents submitted that TERS benefits are calculated on a sliding scale provided by the Unemployment Insurance Fund (UIF) and an employee will receive remuneration up to a maximum amount, determined by the UIF. The Applicant does not guarantee that employees who are working on a full time basis during the months of May, June and July 2020 will receive the full amount of their salary due to them.
- [48] The Applicant's 'undertaking' is that the TERS benefit will probably ensure that employees are paid their full salaries, but the Applicant cannot state that its application would be successful or what amount of monies would be received if the application is successful.
- [49] The Respondent's case is further that the TERS benefits are designed to remunerate employees who are unable to work during the national state of disaster and it does not make provision for employees who work on a full time basis, therefore it is unlikely that the Applicant would receive any monies for employees who are working on a full time basis.
- [50] The Respondents further submitted that the employees' contracts of employment refer to and incorporated the conditions of employment in the MEIBC Main Agreement. The Main Agreement provides for the payment of salaries and the date of payment cannot be unilaterally altered by the Applicant. The Applicant's conduct in changing the payment date to the date when it receives the TERS money, is a unilateral change in terms and conditions of employment.
- [51] In short: The Applicant unilaterally reduced the salaries of all its employees by 20% for May, June and July 2020, it has not paid salary increases to scheduled employees and advised that it would not pay acting allowances or increases to promoted employees, incentive bonuses or leave enhancement pay. According to the Respondents, all of the aforesaid constituted a unilateral change to terms and conditions of employment.

Analysis

- [52] In my view, the crux of this matter is the payment of employees' salaries for May, June and July 2020.
- [53] I accept that the other issues, as set out *supra*, are also issues in dispute and that they form part of the basis or the trigger for the current strike action. I also accept the Applicant's position that incentives, bonuses and leave enhancement pay are not due and payable at this time and would only become due and payable at the end of the year and in the meantime the Applicant is entitled to apply for exemption from these provisions of the Main Agreement.
- [54] However, and for purposes of this judgment I will focus on the main bone of contention namely the payment of the employees' salaries for May, June and July 2020.
- [55] It is common cause that the Applicant has paid its employees their full remuneration for March and April 2020, notwithstanding the fact that the Applicant's operations shut down from 27 March until 30 April 2020. This conduct of the Applicant is commendable and gave effect to the President's plea to employers to look after their employees during the difficult time of the nationwide lockdown and the Covid-19 pandemic.
- [56] The Applicant's employees were fully paid for a period of five weeks when they rendered no services and for which period the Applicant could have implemented the 'no work no pay' principle, but decided not to do so in order to assist its employees.
- [57] It is understandable that the Applicant is facing financial challenges, as are many other employers in this country, who were unable to operate their businesses or produce or sell anything to generate revenue to cover expenses, including salaries of employees for a period of at least five weeks.
- [58] The Covid-19 pandemic has hit the world and South Africa without much warning and there was not much time between the declaration of the state of disaster and the announcement of the lockdown for companies to plan or to

budget for the most unforeseen event, which transpired to hit even harder and with more brutal force than what was initially expected or anticipated.

- [59] As from 1 May 2020, the country moved to level 4 and during the period 1 – 31 May 2020 the Applicant was allowed to operate at 50%. This would have enabled the Applicant to start operations, but with a 50% limitation on operations and half of its workforce still at home, the Applicant would not have been able to do any better than to limp back to business.
- [60] Once again, the Applicant decided to pay its entire workforce, including the employees who had to stay at home due to the level 4 lockdown and not to apply the 'no work no pay' principle to them. This however, went hand in hand with the decision to implement as 20% reduction in salaries for all employees, which triggered the current strike action and caused the parties to end up before this Court.
- [61] A strike initiated in terms of section 64(3)(e) of the LRA can only take place if there is a unilateral change in the terms and conditions of employment rather than a dispute of right and only when the employer has failed to comply with the request not to implement the unilateral change.
- [62] There are two issues that call for consideration. Firstly, whether there was a unilateral change in terms and conditions of employment and secondly whether the Applicant restored the *status quo*.

Was there a change in terms and conditions of employment

- [63] It is evident from the communication sent by the Applicant to its employees during April and May 2020 that the Covid-19 pandemic and lockdown had a devastating impact on the Applicant and due to the difficulties faced by the Applicant, emergency measures would come into effect from 1 May 2020, *inter alia*, that all employees would be required to take a 20% reduction in salary for May, June and July 2020. The intention was clearly to pay all employees, even those who did not return to work and to ensure that the impact of the measures would be the same and that one group of employees was not treated more favourably than any other group.

- [64] Even in the letter written by the Applicant's attorneys it was made clear that a 20% salary reduction for May, June and July 2020 was part of the emergency measures which the Applicant had decided to implement in order to manage its cash reserves and monthly cash flow.
- [65] The Applicant's case is that it has given an undertaking to apply for the Covid-19 TERS benefits for May 2020 and in giving this undertaking, the Applicant has complied with the requirements of section 64(4) of the LRA and there is no change to the terms and conditions of employment.
- [66] The Respondents' answer to this is that the Applicant's undertaking that if and when it received the TERS monies, it would top up the employees' salaries, is not sufficient to stop the strike action as there is no guarantee that the employees would be paid 100% of their salaries, regardless of the outcome of the application for the TERS benefits.
- [67] The Applicant submitted that the question is whether the act of utilising the Covid-19 TERS benefit constitutes a unilateral change to terms and conditions of employment where there is no version proffered by the striking employees that they will not receive their salaries. The Applicant's case is that it is not and as such NUMSA and its members may not embark on strike action.
- [68] The Applicant further submitted that NUMSA's complaint is that it wants to ensure that its members are not short paid and the possibility of short payment is not a unilateral change in terms and conditions of employment. This was confirmed in *Sun International Ltd and Another v South African Commercial Catering and Allied Workers and Others*⁹ where it was held that:

'For the sake of completeness, though the merits on the protected nature of the strike are no longer in issue and even though it may be obiter, I am satisfied that the strike would still not have been protected in any event, because the real reason for the strike concerned alleged short payments arising from the introduction of the new biometric system. Although the union denied that the dispute concerned short payments, the union never disputed the veracity of the

⁹ [2018] 6 BLLR 624 (LC) at para 3.

exchanges between the Group Human Resources officer and the Deputy President of the union which confirmed that rectification of alleged short payments arising from the Kronos system was the reason for the strike.'

[69] In my view the question is whether the 20% salary reduction for May, June and July 2020 implemented by the Applicant constitutes a unilateral change in terms and conditions of employment or whether that is simply an issue of potential short payment of salary.

[70] In *Staff Association of the Motor and Related Industries (SAMRI) v Toyota of SA Motors (Pty) Ltd*¹⁰ the Court held that section 64(4) and (5) of the LRA is aimed at limiting the managerial prerogative to vary terms and conditions of employment and / or policies unilaterally and found that:

'To be successful under s 64(4) the employee has to show firstly unilateral changes were effected to the terms and conditions of the employment contract and secondly that there was no consent to the unilateral changes.'

[71] As to what forms part of the terms and conditions of employment, the Court held that¹¹ any variation to an employee's salary, irrespective of whether it is increased or decreased, amounts to a change in terms and conditions of employment and cannot be effected unilaterally. Salary is a *quid pro quo* for work rendered and any change that has the effect of affecting an employee's salary or remuneration package, constitutes a change to terms and conditions of employment.

[72] *In casu*, the Applicant announced and implemented a 20% reduction in the salaries of its employees. It is undisputed that NUMSA did not agree to this reduction.

[73] I cannot but find that the 20% reduction in the salaries of its employees across the board constitutes a unilateral change to terms and conditions of employment.

¹⁰ (1997) 18 ILJ 374 (LC) at para A-B on p 379.

¹¹ At para A-B on p 378.

- [74] I do not believe that it is for the urgent Court to engage in an investigation or to make a finding as to the reasons why the reduction in the employees' salaries was implemented. The reasons may be well founded and completely reasonable but those would be best aired during conciliation, as the dispute has been referred to the bargaining council and is still pending.

Did the Applicant restore the *status quo*

- [75] The Applicant's case is that it has given an undertaking to apply for the Covid-19 TERS benefits for May 2020 and in giving this undertaking, it has complied with the requirements of section 64(4) of the LRA.
- [76] In my view, the undertaking that the Applicant gave to apply for the TERS benefits is not sufficient to rescue the Applicant in terms of section 64(4) of the LRA. I say so for a number of reasons.
- [77] During argument, it became clear to me that this was the crux of the case and I asked Mr Daniels if the strike action would end in the event that the Applicant was to give an undertaking to the effect that it would pay 80% of the employees' salaries on the due date and that the outstanding 20% would be paid later and as soon as the Applicant received the TERS monies from the Department. In the event that the TERS monies would not cover the full 20%, the Applicant would pay the shortfall to the effect that the employees are paid 100% of their salaries. Mr Daniels indicated that it would satisfy the Respondents and that the strike action would be called off if such an undertaking were to be given.
- [78] I canvassed the same issue with Mr Lennox, who requested an opportunity to obtain an instruction. The matter stood down and Mr Lennox subsequently submitted that his instruction was that the Applicant was unable to give an undertaking as aforesaid and that in the event that the TERS application is not successful or the monies received not sufficient to cover 20% of the employees' salaries, the Applicant would revert to other measures such as short time, layoff or retrenchment.
- [79] This accords with the position that the Applicant adopted in this application namely that based on the employees' salary scale and the sliding scale

provided by UIF, it was most likely that most of the employees will be paid their full remuneration. This is based on an assumption that the Applicant's TERS application would succeed and that it would fully cover the outstanding 20% of the employees' salaries.

[80] In the event that the TERS application does not succeed or if the TERS monies are insufficient to top up the employees' salaries, the Applicant is not prepared to give an undertaking that the employees who worked full time for May, June and July 2020 would be paid 100% of their salaries. Mr Lennox indicated that should the TERS application fail or not cover the outstanding percentage of salaries, the Applicant intends to resort to other measures such as retrenchment, layoff etcetera. In short: the Applicant is prepared to pay 80% of the employees' salaries and if the 20% shortfall is not covered by the TERS benefits it had applied for, the Applicant will resort to other remedies, which do not include payment of the shortfall and the unilateral reduction in the employees' remuneration would be implemented.

[81] Another factor central to the Respondents' case which cannot be ignored, is the fact that the Applicant failed to distinguish between employees who are working and those who are not in applying the salary reduction to all its employees. The Respondent submitted that the employees who are working on a full time basis during May, June and July 2020 are entitled to their full salaries. The salary reduction should have been applied only to the employees who are not working.

[82] In my view, there is merit in this issue. Notwithstanding the Applicant's best intentions not to prejudice any of its employees and to treat them the same, the reality is that they are not in the same position. The reality in law is that the employees who rendered no service, albeit to no fault of their own or due to circumstances outside their employer's control, like the global Covid-19 pandemic and national state of disaster, are not entitled to remuneration and the Applicant could have implemented the principle of 'no work no pay'.

[83] The converse is however also true. Where employees rendered their full time services, they are entitled to their full salaries and any reduction in their salaries,

even for a sound reason to protect the greater good of all employees, would constitute a unilateral change in terms and conditions.

- [84] Insofar as the Applicant is not prepared to guarantee that the employees who worked full time would receive their full salaries, regardless of the outcome of the application for the TERS benefits, the Applicant has not restored the terms and conditions of employment, as contemplated in section 64(4) of the LRA.
- [85] Had the Applicant provided an undertaking that it would pay its employees 80% of their salaries on the due date and that it would top up the shortfall as soon as the TERS monies were received from the Department, but in the event that the TERS monies did not cover the entire salary, the Applicant would cover that shortfall to ensure that employees who worked during the relevant periods, will be paid their full salaries, the outcome of this application would in all probability be different.

Obiter

- [86] The circumstances which employers and employees currently find themselves in are unprecedented, distressing and uncertain. Answers are not to be found in precedents, no map exists to show direction and only time will tell the full extent of the disruption and devastation which the economy and all who play a part in it, will suffer.
- [87] In my view, the best answers and solutions would be found in applying common sense and seeking common ground to find a solution in a time when problems and challenges overshadow answers and solutions. It is unfortunately true that common sense is not a flower that grows in every garden.
- [88] The Applicant conveyed its displeasure about the fact that NUMSA has called out its members on strike, notwithstanding the possibility that their salaries would be fully paid by way of the TERS benefit and it expressed its view that NUMSA has no appreciation for the efforts made by the Applicant to pay its employees in circumstances where there was no obligation to do so. The Applicant's observations in this regard are not without merit. The reality is that

NUMSA's members would, for the duration of the strike, forsake their wages, which the Applicant ironically had been at pains to pay during difficult times.

- [89] *In casu*, the strike action could have been avoided, had the parties applied a pinch of common sense and engaged each other more constructively.

Costs

- [90] The last issue to be decided is the issue of costs.

- [91] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

- [92] In view of the specific facts of this case as well as the ongoing collective bargaining relationship between the Applicant and NUMSA, the interest of justice will be best served by making no order as to costs.

- [93] In the premises I make the following order:

Order:

1. The application is dismissed;
2. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

Applicant: Advocate M Lennox

Instructed by: Fasken Attorneys

Respondents: Mr R Daniels of Cheadle Thompson & Haysom Inc Attorneys

LABOUR COURT