

SOUTH AFRICA / JUDGMENT

Southern Sun Hotels Interests (PTY) LTD v South African Commercial Catering and Allied Workers Union (JA136/2021) [2022] ZALAC 120; (2023) 44 ILJ 505 (LAC) (15 November 2022)

[2022] ZALAC 120**COURT**

Labour Appeal Court

BEFORE

Sutherland, Kathree-Setiloane, Tokota

CASE / FILE NUMBER

JA136/2021

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Source record**IN****THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG****Reportable****Case****No: JA136/2021****In****the matter between:**

SOUTHERN
SUN HOTEL INTERESTS (PTY) LTD
Appellant
And
SOUTH
AFRICAN COMMERCIAL CATERING
&
ALLIED WORKERS UNION
Respondent

Heard: 27 September 2022**Delivered:** 15 November 2022**Coram:** Sutherland JA, Kathree-Setiloane et Tokota AJJA

SUMMARY:

Lock-out to force employees to accept reduction in wages contained in a collective agreement is unprotected in terms of s 65(3)(a)(i) of Labour Relations Act 66 of 1995 (LRA) as issue in dispute, i.e. the wages to be earned for the duration of the collective agreement, is regulated by the latter.

Lock-out also unprotected as issue in dispute can be referred to arbitration or adjudication in terms of s 65(1)(c) of the LRA.

That the Covid-19 lockdown had rendered the increase unaffordable for employer not relevant to the enquiry.

JUDGMENT

KATHREE-SETILOANE AJA

- [1] This is an appeal against the whole of the judgment and order of the Labour Court (Baloyi AJ) in which it inter alia made an order declaring the lock-out of the appellant, Southern Sun Hotel Interests (Pty) Ltd (Southern Sun), unlawful and unprotected in terms of section 65(3)(a)(i) of the Labour Relations Act[1] (LRA).
- [2] The appellant's employees are members of the South African Commercial Catering and Allied Workers Union (SACCAWU); the respondent in the appeal. In this appeal, SACCAWU represents its members whose names are listed in annexure "FA1" to the review application (SACCAWU's members).

Background

- [3] Southern Sun operates in the hospitality industry. It had a collective bargaining relationship with SACCAWU for 28 years. They entered into a Recognition Agreement on 3 November 1993 (Recognition Agreement). Clause 6 of the Recognition Agreement provided for annual negotiations regarding terms and conditions of employment for employees within the defined bargaining unit. Clause 6.4.6 of the Recognition Agreement provided that the duration of a wage agreement concluded between the parties would be for the period 1 April to 31 March.
- [4] On 13 March 2020, shortly before the commencement of the national lockdown in response to the Covid-19 pandemic, Southern Sun and SACCAWU concluded a Collective Agreement (substantive agreement) which dealt with the substantive terms and conditions of employment for the 2020-21 financial period. The substantive agreement provided that all employees of Southern Sun would receive a 5.5% increase from 1 April 2020. However, due to the significant negative impact that the Covid-19 pandemic and the consequent lockdown had on its business, Southern Sun was unable to comply with this obligation. It informed SACCAWU of this and undertook to fully comply when its business recovered.

- [5] On 31 October 2020, Southern Sun notified SACCAWU that it was terminating the Recognition Agreement with effect from 31 January 2021.[2] Consequently, on 1 February 2021, SACCAWU ceased to be recognised as a collective bargaining agent for Southern Sun's employees.
- [6] The substantive agreement expired on 31 March 2021. Since then, Southern Sun and SACCAWU have not concluded any agreements on wages and other terms and conditions of employment for the employees in the bargaining unit.
- [7] During April 2021, Southern Sun sent letters to SACCAWU's members seeking to secure their agreement to a 5.5% reduction in their wages backdated to 1 April 2020. Those who accepted the reduction would forego their entitlement to the 5.5% increase provided for in the substantive agreement and would continue to be paid according to the rate of remuneration before its conclusion. By accepting the reduction, they would have no claim to the 5.5% wage increase that should have been paid to them, in terms of the substantive agreement, from 1 April 2020.
- [8] While some of its members have agreed to the reduction in their remuneration, those of them whom SACCAWU represents in this appeal have refused to do so.[3] Since no agreement was secured from these employees, Southern Sun referred the dispute to the Commission for Conciliation, Mediation

and Arbitration (CCMA) for conciliation in terms of section 134 of the LRA. On 23 July 2021, the CCMA declared that the dispute remained unresolved. On 28 July 2021, Southern Sun issued a notice of lock-out that was to commence on 30 July 2021.

- [9] Southern Sun demanded in the lock-out notice that the employees agree: (a) to forego the 5.5% wage increase that was effective from 1 April 2020; (b) not to be paid an increase for the period from 1 April 2020 to 31 March 2021; and (c) that they would continue to be paid at the rate that applied to them in March 2020.

In the Labour Court

- [10] On 5 August 2021, SACCAWU brought an urgent application in the Labour Court seeking an order, declaring the lock-out to be unlawful and unprotected in terms of section 65(1)(a)(ii) of the LRA and interdicting Southern Sun from implementing the lock-out. On 26 August 2021, the Labour Court granted an order: (a) declaring the lock-out to be unprotected and unlawful in terms of section 65(3)(a)(i) of the LRA and (b) interdicting and restraining Southern Sun from locking-out SACCAWU's members. The Labour Court reasoned as follows:

10.1 Whether a lock-out is lawful and protected is determinable by correctly identifying the issue in dispute. In doing so, the Labour Court must have regard to the true nature of the dispute and the substance of the dispute, rather than the form it takes or the manner in which it has been characterised by the party which has declared the dispute.

10.2 What Southern Sun intended to achieve by making the demands is determinative of what the true nature of the dispute is, and whether or not the dispute is regulated by the collective agreement.

10.3 Since Southern Sun is seeking to avoid an increase which is founded on the substantive agreement, it is difficult to accept that its demand “is new or raises new issues”.

10.4 What Southern Sun terms a “new demand” is in fact a disguise aimed at escaping its obligations under the substantive agreement.

10.5 The subject matter of the lock-out is regulated by the substantive agreement because it was “in place for the period of the increase”. As a result, the lock-out “lost protection pursuant to section 65(3)(a)(i) of the LRA”.

[11] The appeal lies against the judgment and order of the Labour Court with its leave.

The Appeal

What is the issue in dispute?

[12] In terms of sections 65(1)(a) and (c) and 65 (3)(a)(i)[4] of the LRA respectively, a strike or lock-out may be unprotected if the issue in dispute is: (a) prohibited by a collective agreement; or

(b) one that a party has a right to refer to arbitration or to the Labour Court in terms of the LRA or any other employment law; or (c) is regulated by a collective agreement.

[13] Since the substantive agreement does not prohibit a strike or lock-out, section 65(1)(a) does not apply. The issues that remain for determination are: (a) whether the substantive agreement regulates the issue in dispute as contemplated in section 65(3)(a)(i) of the LRA and

(b) whether the issue in dispute is one that a party has a right to refer to arbitration or to the Labour Court in terms of the LRA or any other employment law as contemplated in section 65(1)(c) of the LRA. Integral to the determination of both these issues is this question: What is the issue in dispute?

[14] The Labour Court concluded that the issue in dispute is one regulated by the substantive agreement and that any lock-out on the issue is prohibited by section 65(3)(a)(i) of the LRA. Southern Sun contends that this is a mischaracterization of the issue in dispute, as it is not about the entitlement of SACCAWU’s members to their wages and a 5.5% increase which the substantive agreement unequivocally grants to them, but the issue in dispute is, rather, its demand that employees accept a 5.5% reduction in their remuneration backdated to 1 April 2020. In other words, Southern Sun wants the employees to agree to a variation of the substantive agreement (which, in turn, will vary their contracts of employment)[5] by giving up their right to the 5.5% wage increase. On Southern Sun’s argument, the limitation on the right to a lock-out, as contained in section 65 (3)(a)(i) of the LRA, has no application as the issue in dispute concerns “the waiving or giving up of a portion of their remuneration”, and

neither this issue nor the rights of the parties to negotiate a variation of the terms of the agreement is regulated by the

substantive agreement.

- [15] The alternative argument advanced by Southern Sun is that the substantive agreement (read with the Recognition Agreement) was only valid for one year in respect of wages and it lapsed before the lock-out demands were made. As it no longer regulates what wages SACCAWU's members should earn for the period 1 April 2020 to 31 March 2021, there is no impediment to either SACCAWU negotiating an increase in remuneration or Southern Sun negotiating a decrease in remuneration for that period.
- [16] SACCAWU contended, to the contrary, that Southern Sun is obliged to pay its members the 5.5% increase for the period April 2020 to March 2021 as it is bound by the substantive agreement, and its attempt to change those terms is impermissible and unlawful. It, furthermore, argued that the issue in dispute concerns the question of the wages that its members should receive for the period 1 April 2020 to 31 March 2021 and because that issue is regulated by a collective agreement, the lock-out is unprotected as contemplated in section 65(3)(a)(i) of the LRA.
- [17] Southern Sun's demands are more fully articulated in the pro forma document, entitled "Acceptance Letter of the Company's Demands in Support of the Lock-out in terms of section 64 of the LRA" (letter of acceptance). It required SACCAWU's members to sign this letter in unequivocal acceptance of the demands made in its letter of lock-out dated 28 July 2021. The letter of acceptance reads in the relevant part:

'2. I understand, accept and agree to forego the 5% increase in my remuneration which was to have been effective from 1 April 2020.

3. I also accept and agree to forego my entitlement to the 5.5% increase in my remuneration that was agreed to in terms of the Substantive Agreement and was concluded between SACCAWU and the Company on 13

March 2020.

4. I accept that I will not be paid this increase, for any period from 1 April 2020, and that I will continue to be paid at the rate of remuneration that applied to me in March 2020.
5. I understand that I will not be entitled to be paid/receive any remuneration and/or benefits for the period that I am locked-out.
6. My agreement to and acceptance of the above is in full and final settlement of all and any disputes between me and the Company in respect of the 5.5% increase that was granted in terms of the Substantive Agreement, including but not limited to the dispute referred by the Company to the CCMA under case number HO70 - 21 and any dispute that SACCAWU has referred or may refer to the CCMA on my behalf in this regard, now or in the future, and of all and any claims that I may have against the Company in respect of the terms and

conditions of my employment contained in the Substantive Agreement in respect of the Demands.'

- [18] Despite having a right to the 5.5% wage increase in terms of the substantive agreement, Southern Sun wants SACCAWU's members to receive no increase at all for that period by foregoing the increase and waiving any rights that they may have to enforce the agreement. In terms of paragraph 4 of the letter of acceptance in particular, Southern Sun requires every SACCAWU member to accept that "...I will not be paid this increase, for any period from 1 April 2020 and will continue to be paid at the rate of remuneration that applied to me in March 2020".
- [19] What is clear from the demand itself, is that the underlying dispute concerns the question of the remuneration that SACCAWU's members should receive for the period 1 April 2020 to 31 March 2021. To suggest, as Southern Sun does, that the issue in dispute is not about remuneration which is regulated by the substantive agreement, but is rather about the abandonment of rights is pure sophistry. So too, is its contention that the issue in dispute is not about what SACCAWU's members should be paid for the 2020-21 year, but it is rather the demand that SACCAWU's members give up their contractual entitlement or agree to a variation of their contracts of employment.
- [20] In *Ceramic Industries Ltd t/a Betta Sanitaryware & another v NCBAWU & Others*,^[6] this Court underscored the importance of ascertaining the real dispute underlying a demand or remedy when it held as follows:
- 'Even if the issue in dispute is not articulated as a substantive complaint coupled with a specific demand, but rather in the form of a complaint about the refusal of a specific demand itself, the position would not change. The refusal of a demand, or the failure to remedy a grievance, always needs to be examined in order to ascertain the real dispute underlying the demand or remedy. The demand or remedy will always be sought to rectify the real, underlying, dispute. It is the nature of that dispute that determines whether a strike in relation to it is permissible or not.'
- [21] The objective of Southern Sun's demand is to decrease the remuneration that SACCAWU's members should earn for the period 1 April 2020 to 31 March 2021. Distilled to the essence, the underlying dispute that the demand seeks to resolve is not the demand itself, but rather the issue of the remuneration that SACCAWU's members should earn for the period in question. Although the term 'issue in dispute' in relation to a strike or lock-out is defined in section 213 of the LRA to mean "...the demand, the grievance or the dispute that forms the subject matter of the strike or lock-out", the demand may not necessarily equate to the issue in dispute. The demand must be scrutinized to establish what the real underlying issue in dispute is, and if it is regulated by a collective agreement, the lock-out or strike will be unprotected in terms of section

65(3)(a)(i) of the LRA.

[22] Southern Sun demands that SACCAWU's members forego or abandon their right to a 5.5% wage increase because the lockdown has rendered the increase unaffordable. That this is its justification for seeking a wage reduction, does not detract from the essence of the dispute which concerns the remuneration that SACCAWU's members are entitled to for the period 1 April 2020 to 31 2021. Since the substantive agreement is binding on the parties in terms of section 23[7] of the LRA, any attempt by Southern Sun to vary its obligation to pay that wage increase, whatever the justification and however

characterized, remains an issue that is regulated by that agreement.

[23] The substantive agreement was only valid for one year and expired on 31 March 2021. Since then, no further collective agreement has been concluded between Southern Sun and SACCAWU, as the latter ceased to be recognised as the bargaining agent for its members due to the termination of the Recognition Agreement. Southern Sun argued that there is no impediment to it seeking a variation of the terms of the employee's individual contracts of employment, as the lapse of the substantive agreement meant that it no longer regulated the wages of SACCAWU's members for the period 1 April 2020 to 31 March 2021.

[24] This is an imprudent argument as it would enable SACCAWU, for example, to table a demand at the next MEIBC negotiations for a revision of its members' wages going all the way back to the first collective agreement concluded in the 1980s. Should Southern Sun reject the demand (as it surely must), then SACCAWU's members would be entitled to strike in respect of a demand going back 30 or more years. This state of affairs would be inimical to the promotion of orderly collective bargaining and the effective resolution of labour disputes – two primary objectives of the LRA – as it would result in a wholesale unravelling of rights secured through collective bargaining. As cautioned by this Court in *Association of Mineworkers and Construction Union and others v Royal Bafokeng Platinum Ltd and others*[8], “the voluntary nature of our labour relations system is held together by collective agreements... The gains made by collective bargaining which leads to collective agreements 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”.

[25] Although the lapse of the substantive agreement means that it no longer regulates the wages of SACCAWU's members for the period post-31 March 2021, the substantive agreement continues to regulate their wages for the period 1 April 2020 to 31 March 2021 and remains binding on the parties.[9] It is precisely because Southern Sun remains bound to pay the agreed increase to SACCAWU's members for the duration of the substantive agreement, that it has had to demand, in terms of paragraph 6 of the acceptance letter, that SACCAWU's members waive all rights to enforce the substantive agreement.

[26] Southern Sun contends that the Labour Court's judgment will have profound implications for collective bargaining in South Africa as an employer can never seek to change terms and conditions of employment that came into being as a consequence of a collective agreement through the exercise of power-play and, conversely, if a union wanted to seek an increase in

the level of remuneration of its members as determined in a collective agreement, and the employer did not agree to grant such increase, the union and its members could not embark on a lawful strike in support of the demand for the increase and to compel the employer to grant the increase.

- [27] Properly understood, the judgment of the Labour Court does no more than simply preclude Southern Sun from resorting to power to compel SACCAWU's members to abandon gains already secured through collective bargaining and contained in a collective agreement. This is consistent with the overarching objective of section 65(3)(a)(i) of the LRA which is to ensure that where parties are bound by the terms of a collective agreement, they may not for the period of its operation resort to industrial action in order to either roll back gains made through collective bargaining and contained in a collective agreement or seek greater rights than those originally

agreed upon.[10]

- [28] The judgment of the Labour Court precludes neither employers nor unions from resorting to power in a collective bargaining process in respect of future terms and conditions of employment. A demand by an employer that employees accept a reduction in wages is a legitimate issue of mutual interest that may form the subject of a lock-out, provided that the reduction does not take away any vested rights that employees have to an increase in wages in terms of a collective agreement.
- [29] In the circumstances, Southern Sun was at liberty to demand that SACCAWU's members agree to a reduced salary from 1 April 2021, and to resort to power in the event of failing to reach agreement. SACCAWU accepted in argument, in the appeal (as it did in the Labour Court), that it was open to Southern Sun to follow this course in relation to the wages to be paid to its members post-April 2021, as the substantive agreement did not regulate wages for that period. It, however, elected not to do so.[11]
- [30] For these reasons, I consider there to be no basis in law or fact to interfere with the Labour Court's conclusion that Southern Sun's lock-out is unprotected and in direct contravention of section 65(3)(a)(i) of the LRA, as the substantive agreement which is binding on Southern Sun regulates the issue in dispute.

Does section 65 (1)(c) of the LRA apply?

- [31] The issue of whether section 65(1)(c) of the LRA has application was pleaded in the urgent application and argued in the Labour Court, but the Labour Court did not deal with it. I see no impediment to dealing with this issue on appeal and none was suggested by Southern Sun.
- [32] In terms of section 65(1)(c) of the LRA, a lock-out is unprotected if the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court. Since Southern Sun has not implemented the 5.5% wage increase provided for in the substantive agreement, it is in breach of the substantive agreement and the individual contracts of employment (as

varied by the former) of SACCAWU's members. SACCAWU was, therefore, entitled to refer an interpretation and application dispute to the CCMA which it duly did on 30 September 2021. This referral predated Southern Sun's cancellation of the Recognition Agreement and its demand that SACCAWU's members forfeit the 5.5% increase for the period 1 April 2020 to 31 March 2021.

- [33] SACCAWU would be equally entitled to approach the Labour Court, in terms of section 77(3) of the Basic Conditions of Employment Act,[12] as its members have performed their services for the April 2020 to March 2021 year, but have not received the increased remuneration to which they have an accrued right.
- [34] Paragraph 6 of Southern Sun's acceptance letter requires its employees to explicitly waive their rights to refer the issues in dispute to either arbitration or adjudication. The parties have also agreed to hold the interpretation and application dispute which SACCAWU referred to the CCMA in abeyance, pending the outcome of the appeal. This makes it plain that the lock-out is unprotected for the further reason that the issue in dispute is one which a party can either refer to arbitration or to the Labour Court as contemplated in section 65(1)(c) of the LRA.

[35] The appeal falls to be dismissed for this reason as well.

Costs

[36] I consider it to be fair and just not to make a costs order in the appeal.

Order

[37] In the result, I order that:

1. The appeal is dismissed with no order as to costs.

F Kathree-Setiloane AJA

Sutherland JA and Tokota AJA concur

APPEARANCES:

FOR THE APPELLANT: Mr A Redding SC

Instructed by Edward Nathan Sonnenbergs Inc.

FOR THE RESPONDENT: Mr C Orr SC

Instructed by Haffegge Roskam Savage Attorneys

- [1] Act 66 of 1995, as amended.
- [2] Clause 12.3.2 of the Recognition Agreement.
- [3] The names of SACCAWU's members who have not agreed to Southern Sun's demands are listed in annexure "FA1".

[4] Section 65 of the LRA provides in relevant part: ‘(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if – (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute; (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration; (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law; (d) ...

(2) ...

(3) Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out – (a) if that person is bound by – (i) any arbitration award or collective agreement that regulates the issue in dispute; or (ii) ...’

[4] Section 65 of the LRA provides in relevant part:

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

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

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

(c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law;

(d) ...

(2) ...

(3) Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out –

(a) if that person is bound by –

(i) any arbitration award or collective agreement that regulates the issue in dispute; or

(ii) ...’

[5] Section 23(3) of the LRA provides: ‘Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.’

[5] Section 23(3) of the LRA provides:

‘Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement.’

[6] [1997] 6 BLLR 697 (LAC) at p 703.

[7]Section 23 of the LRA provides: ‘(1) A collective agreement binds – (a) the parties to the collective agreement; (b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them; (c) the members of a registered trade union and the employers who are members of a registered employers’ organisation that are party to the collective agreement if the collective agreement regulates – (i) the terms and conditions of employment; or (ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers; (d) ...’

[7]Section 23 of the LRA provides:

‘(1) A collective agreement binds –

- (a) the parties to the collective agreement;
- (b) each party to the collective agreement and the members of every other party to the collective agreement, in so far as the provisions are applicable between them;
- (c) the members of a registered trade union and the employers who are members of a registered employers’ organisation that are party to the collective agreement if the collective agreement regulates –
 - (i) the terms and conditions of employment; or
 - (ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers;
- (d) ...’

[8] [2018] 11 BLLR 1075 (LAC) at para 26.

[9]Section 23(2) of the LRA provides that a “collective agreement binds for the whole period of the collective agreement every person bound in terms of subsection (1) (c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the trade union or registered employers’ organisation for the duration of the collective agreement”.

[10] South African National Security Employers Association v TGWU & Others

(1) [1998] 4 BLLR 1075 (LAC) at paras 25 - 27 (SANSEA).

[11] SANSEA at para 25.

[12] Act 75 of 1997.

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