

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

SCA CASE NO 298/09
LAC CASE NO JA 49/06
CC CASE NO: _____

In the matter between:

**SOUTH AFRICAN TRANSPORT AND ALLIED
WORKERS UNION (“SATAWU”)**

First Applicant
(First Respondent *a quo*)

PERSONS APPEARING IN ANNEXURE “A” Second and further Applicants
(Second and further Respondents *a quo*)

and

LEBOGANG MICHAEL MOLOTO N.O.

First Respondent
(Appellant *a quo*)

JERRY SEKETE KOKA N.O.

Second Respondent
(Appellant *a quo*)

APPLICANTS' FOUNDING AFFIDAVIT

I, the undersigned,

REYNAUD NEIL DANIELS

state under oath:

- 1 I am an adult male person, an attorney of the High Court, employed as a director by the applicants' attorneys of record, Cheadle Thompson & Haysom Inc with its address at 7th Fl, Braamfontein Centre, 23 Jorissen Street, Braamfontein. The facts contained in this affidavit are, save

where otherwise stated or as appears from the context, within my personal knowledge. The facts to which I depose below are to the best of my knowledge and belief both true and correct. I am duly authorised to depose to this affidavit and to bring this application on behalf of the applicants. A confirmatory affidavit and power of attorney will shortly be filed by the General Secretary of SATAWU.

THE PARTIES

- 2 The first applicant is the South African Transport and Allied Workers Union, a trade union registered in terms of the Labour Relations Act, no. 66 of 1995, ("the LRA"), with its registered address, alternatively principal place of business, situated at sixth floor Marble towers, corner Jeppe and Von Wielligh streets, Johannesburg.
- 3 The second and further applicants are employees as defined in the LRA, whose names and further particulars are contained in a document, annexed hereto and marked annexure "A". The second and further applicants were employed by the respondent until their dismissal on 19 November 2004 for participation in alleged unprotected strike action.
- 4 Prior to the SCA proceedings, the respondent in the proceedings before the Labour Court (though it was appellant in the Labour Appeal Court) was Equity Aviation Services (Pty) Ltd a company duly incorporated according to the Company laws of South Africa and an employer as defined in the LRA, with its registered head office alternatively principal

place of business at Jet Park, Isando. Equity Aviation was placed into liquidation and the joint liquidators were, prior to the SCA hearing, substituted for Equity Aviation as respondents. Accordingly, the first and second respondents are the final liquidators of Equity Aviation and represented in these proceedings by Senekal Simmonds Attorneys.

- 5 For the sake of clarity, I refer to the first applicant as “SATAWU” or “the union” and the individual applicants as “the dismissed employees”. I will refer to Equity Aviation Services, and the final liquidators, as “Equity Aviation” or “the employer”.

THE ISSUE

- 6 The issue in this application for leave to appeal is whether this Court should read into section 64(1)(b) of the Labour Relations Act, no. 66 of 1995 (the LRA) the unexpressed requirement that every employee participating in a strike is obliged to give notice to their employer (or have notice given on their behalf) of their participation in that strike in order to qualify their participation as “protected” strike action.
- 7 This is the central finding made by the Supreme Court of Appeal and against which the applicants seek the Constitutional Court’s leave to appeal to it in terms of the provisions of section 167(6)(b) of the Constitution, read with Rule 19(2) of the Rules of the Constitutional Court.

8 The Supreme Court of Appeal advances two main arguments in support of its interpretation of section 64(1)(b) of the LRA:

8.1 A purposive approach to section 64(1)(b) compels the inclusion of this requirement in the strike notice in order to promote orderly collective bargaining.

8.2 If such a requirement is not read into section 64(1)(b) it leads to absurd results.

9 The union's argument, in summary, is that:

9.1 The employer's approach to section 64(1)(b) is unduly narrow; it ignores the section as a whole; Chapter IV of the LRA; and the definitions of "strike" and "issue in dispute" that underpin this part of the legislation.

9.2 In accordance with the above, the Labour Courts have consistently resisted the temptation to import any limitations into the right to strike, beyond those clearly stated in the legislation itself. The Supreme Court of Appeal's judgment takes the opposite approach.

9.3 The principle of voluntarism that underpins collective bargaining, does not permit interference in the exercise of mutual economic power to resolve collective disputes in the manner suggested by

Equity Aviation.

9.4 The absence of this requirement will not, properly considered and in accordance with the above stated principles, lead to absurd results.

9.5 The Supreme Court of Appeal underestimated the extent to which procedural obstacles can undermine the substantive right itself.

10 It is submitted that this application raises clear constitutional issues relating to the right to strike (section 23(2)(c)) and equality of treatment (section 9) between unionised and non-unionised employees.

CHRONOLOGY

11 The dismissed employees' services with Equity Aviation were terminated on 19 November 2004 for participation in alleged unprotected strike action.

12 On 15 June 2006, the Labour Court (per Ngcamu AJ) held that the termination of the dismissed employees' services was automatically unfair and reinstated them together with other relief. The judgment of the Labour Court is annexed to this affidavit and marked annexure "**SAT1**". It is also reported as *SATAWU & another v Equity Aviation Services (Pty) Ltd* [2006] 11 BLLR 1115 (LC).

- 13 Equity Aviation applied for and was granted leave to appeal against the judgment of the Labour Court. The appeal was heard by the Labour Appeal Court on 18 June 2008. The majority of the Labour Appeal Court (Khampepe ADJP and Davis JA) dismissed the appeal. The then Judge President wrote a dissenting judgment. The judgments of the Labour Appeal Court dated 14 May 2009 are annexed to this affidavit and marked annexure "**SAT2**". They are also reported as *Equity Aviation Services (Pty) Ltd v SATAWU & others* [2009] 10 BLLR 933 (LAC).
- 14 Special leave to appeal against the judgment of the Labour Appeal Court ("the LAC") was granted by the Supreme Court of Appeal on 18 August 2009.
- 15 The appeal was originally scheduled to be heard by the Supreme Court of Appeal on 23 August 2010. Shortly before that date, Equity Aviation removed the matter from the roll on the grounds that it had been placed into provisional liquidation. The matter was thereafter re-enrolled for argument before the Supreme Court of Appeal on 17 November 2011. On 30 November 2011, the Supreme Court of Appeal handed down a unanimous judgment (per Lewis JA) upholding the appeal and replacing the Labour Court's order with one finding that the dismissals were not automatically unfair. A copy of the Supreme Court of Appeal's judgment is annexed and marked "**SAT3**".
- 16 I am advised that the Supreme court of Appeal does not have the power to grant special leave to appeal further to this Court and that this Court

must decide this issue itself.

THE PURPOSE OF SECTION 64(1)(b)

- 17 Section 3 of the LRA states that when interpreting the Act one must not only give effect to its primary objects, the interpretation must be in compliance with the Constitution and the public international law obligations of the Republic. Both of these enshrine the right to strike. The Constitutional Court has emphasised the overall importance of the right to strike and that its existence is required to balance the greater social and economic power enjoyed by employers, over and above their recourse to a lock out.¹
- 18 The starting point is that “[c]onstitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them”. It is the limitations imposed upon constitutional rights that are themselves to be strictly or narrowly construed.²
- 19 The limitations that do exist to the right to strike are contained in chapter IV of the LRA. In order to determine the nature and extent of the permissible limitations therefore involves an examination of this chapter as a whole; the provisions of section 64 in its entirety; as well as the

¹ **Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (1996) 17 ILJ 821 (CC) [para 66]**

² **S v Zuma and others 1995 (2) SA 642 (CC) at 651I [para 15] Ceramic Industries Ltd t/a Betta Sanitaryware and another v NCBAWU and others [1997] 6 BLLR 697 (LAC) at 701**

definitions that underpin it.

- 20 It is submitted that the approach advanced on behalf of the employer (and adopted in the judgment of the Supreme Court of Appeal), is unduly limited and ignores the purpose and context of this provision in the LRA and in particular its place in chapter IV. This produces a distorted effect on the alleged limitation required in section 64(1)(b).
- 21 The employer's approach ignores the cases dealing with the interpretation of the section as a whole, and other sub-sections of section 64(1). These are said to be irrelevant and of no assistance (SCA judgment; paras 19-20). This is submitted to be the antithesis of a contextually informed, purposive approach.
- 22 It is at once apparent from the definitions³ of "strike" and "issue in dispute" contained in the LRA, that they are outlined in wide terms. After an exhaustive analysis of their purpose, context and textual features, the Labour Appeal Court has concluded that in respect of the definition of a "strike":⁴

"It follows that while it is clear that the employees not performing work must all share the purpose of remedying a grievance or

³ Section 213 of the LRA

⁴ **Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Limited [1998] 12 BLLR 1191 (LAC) at 328 A [para 22].**

resolving a dispute, the definition imposes no other requirements of mutuality – whether a shared interest in the grievance or dispute – upon them.”

- 23 In regard to the definition of “issue in dispute” the same Court in the same case said:⁵

“The broad terms of the definition of ‘strike’ corresponds with the definition of ‘issue in dispute’. This offers no identification of the parties to the dispute, and thus imposes no limitation on who they may be. It also corresponds to the scheme of chapter IV. Section 64 regulates strikes and lock-outs by parties to the same employment relationship.” [emphasis added]

- 24 Since then the Labour Appeal Court and the Labour Court have consistently resisted the temptation to read any further limitations into any of the requirements of section 64(1) of the LRA that would have the effect of limiting the ambit of the phrase “every employee’ that introduces it, beyond those in the same (primary) employment relationship.

- 25 Hence in interpreting the limitations contained in section 64(1)(a) of the LRA, the Labour and Labour Appeal Courts have consistently held that the referral of “the issue in dispute” need only be done once and not necessarily by all the participants in the strike, including those who fall

⁵ **Plascon Decorative, at 328 C-D [para 24]**

outside the bargaining unit and are not affected by the product or result of the strike.⁶

- 26 It should be noted that these judgments dealt with cases where the right to strike of only the members of the union which referred the issue in dispute for conciliation was in issue. It is submitted that, as can be seen from the contextual and textual observations of the Labour Appeal Court in **Plascon Decorative** cited above, the underlying principle applies equally to all other employees of the employer facing the strike. Equity Aviation now accepts that once the issue in dispute is referred, it is not necessary for every employee intending to participate in the strike to refer the dispute (or have the dispute referred on their behalf) in order to qualify their participation.
- 27 In **Ceramic Industries (*supra*)** the Labour Appeal Court was enjoined to explore the extent of the limitations in section 64(1) (b) of the LRA. It could find only three, all of which are expressly stated in the text itself. These are that the notice must warn that talk has turned to action; specify the time for the commencement of the strike; and that 48 hours notice prior to the commencement of the strike is given (**at 701-702**). Nothing in the language used by the Legislature suggests that the

⁶ **Afrox Ltd v SA Chemical Workers Union and Others (1) [1997] 4 BLLR 375 (LC) esp. at 379H-I; Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Limited [1998] 12 BLLR 1191 (LAC), paras 21, 24, 27, 28 and 29; SACTWU v Free State and Northern Cape Clothing Manufacturers Association [2002] 1 BLLR 27 (LAC) paras 24 – 26 and 32 - 33; Early Bird Farm (Pty) Ltd v FAWU and Others [2004] 7 BLLR 628 (LAC), para 42 and 45 – 47**

employer is entitled to know the identity of every employee intending to participate in the strike when the strike commences.

- 28 Similarly, the Labour Court has been invited, for reasons similar to those advanced by the employer in this case, to impose further limitations on the right to strike when notice is given in terms of s.64(1)(d) of the LRA. These included setting out the demand or the issue in dispute in the strike notice; the nature of the strike action to be embarked upon; and the intended duration of the strike. The Court held none of these to be warranted in the context of the section in the LRA as a whole; nor the injunction to orderly collective bargaining.⁷

ORDERLY COLLECTIVE BARGAINING

- 29 In **SANDU v Minister of Defence and others [2006] 11 BLLR 1043 (SCA) at 1050-1052 [paras 11-18]**, this Court emphasised that the LRA provides a framework within which collective bargaining is to take place, but that the process, with the right to strike as its enforcement mechanism, is essentially voluntary in nature. This is in accordance with the Collective Bargaining Convention of 1981 (**SANDU at 1049 [para 10]**).⁸

⁷ **Public Service Association of SA v Minister of Justice and Constitutional Development and Others (2001) 22 ILJ 2303 (LC) paras 64 -71**

⁸ Article 5(2)(d) of that Convention provides for example that “collective bargaining should not be hampered ... by the inadequacy or

- 30 Seen in this context, “orderly” collective bargaining (or bargaining within a basic statutory framework) requires no more than that the opportunity for conciliation of the dispute must occur (s 64(1) (a); a cooling off period of 30 days must have elapsed (s64 (1) (a) (ii); and notice of the commencement of the strike must be given to the employer (s64 (1) (b). Thereafter the result is determined by the parties themselves, through the inherently disruptive means of resort to their respective economic power. Zondo J (as he then was) had occasion to point out that “the Legislature did not want to interfere in the power play once power play has begun because to do so may well unduly interfere with or influence the result of the power play instead of leaving power play to determine its own result.”⁹
- 31 If orderly collective bargaining does not require that the issue in dispute affect all the participants in the strike in any direct way, beyond their communality of employment; and not all participants in strike action need have referred or participated in the conciliation of that dispute; it is more difficult to see why all the participants need to give notice of their participation, once notice of the commencement of the strike has been given.
- 32 The Legislature articulated the two requirements in exactly the same grammatical form (the use of the passive voice without linking the referring of the issue in dispute or the giving of notice to “every

⁹ inappropriateness of such rules”.
Transportation Motor Spares v National Union of Metalworkers of SA and others (1999) 20 ILJ 690 (LC) at [para 40]

employee” who has the right to strike). If the legislature wanted to differentiate between the two requirements, it could easily have used express language to do so.

33 It speaks for itself that the construction advanced by the union is not at variance with the purposes of the notice requirement as articulated by Seady and Thompson and the **Ceramic industries** case cited in paragraphs 14 and 15 of the SCA judgment.

34 Moreover, as has been pointed out by the Labour Court, the strike notice is not issued in a vacuum, but in a specific context that will have given shape to and information about the pending strike, including how deeply the issue is felt and who the likely participants will be. Hence each strike notice will have been preceded by:¹⁰

34.1 Negotiations preceding the invocation of the procedures of the LRA;

34.2 The statutory referral of the issue in dispute to conciliation;

34.3 The conciliation meeting or meetings.

¹⁰ **Public Service Association of SA v Minister of Justice and Constitutional Development and Others (2001) 22 ILJ 2303 (LC) at 2321 [para 68]**

- 35 So too in the present case, the employer was not caught by surprise by the commencement of the strike (Du Preez, vol 2; p 104; lines 15-25). As far as the extent of the strike was concerned, it also knew that all the employees in the bargaining unit were directly affected by the strike, regardless of their trade union membership (vol 2; p 119; lines 5-24; p 121 lines 13-26). Despite therefore being of the avowed view that the strike notice applied to SATAWU's members only (vol 2; p 108; lines 1-10), Mr du Preez still thought it prudent to canvass the views of other unions regarding their participation (vol 2; p 106, line19- p 107 line 4).
- 36 It is submitted that the above is the proper place for an employer to obtain information about the extent of the strike and that there is no principled or contextual reason why this need be part of the limitations imposed by the LRA. Should the employer wish to strengthen its position by obtaining undertakings or waivers of their right to strike from certain of the prospective participants, (which is not averred in the present case), then, it is submitted, it is free to do so.

ABSURD RESULTS

- 37 It is not every anomaly or absurdity that leads to the inference that the results are so striking or at variance with the statute as a whole, that the interpretation is one which the legislature could not have intended. Much less that such absurdity is then able to be used as a means of divining what the legislature did intend. For as Schutz JA expressed the

attendant difficulty:¹¹

“[9] The difficulty, which faces any argument which claims better knowledge of what the legislature intended than what the legislature itself appears to have had in mind when it expressed itself as it did, is to establish with reasonable precision what the unexpressed intention contended for, was: cf *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000 (2) SA 797 (SCA) at 812G – H.”

38 In the present matter, much is made in the minority judgment of the LAC and in the Supreme Court of Appeal’s judgment (para 22) of the alleged absurdity and repugnance that is said to arise if the union’s interpretation regarding the import of section 64(1) (b) is adopted. Where the extent of the absurd result is exaggerated or fanciful, as here, it loses its force as a compulsive aid to the interpretation of a statute.

39 But in any event, the examples do not really support the interpretation contended for. Similar consequences can result even if Equity’s interpretation is accepted. Take for example the facts of the Afrox case referred to above. The union gives notice of the commencement of a strike by its members to an employer operating at many premises right through the country. The issue in dispute only concerns a small number

¹¹ **Poswa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape 2001 (3) SA 582 (SCA) at 586-7 [para 9]**

of members located at one branch. When the strike commences, only those involved in the dispute participate in the strike. The fact that the strike notice was given on behalf of all members does not assist the employer in establishing which union members will in fact participate in the strike when it commences. Nor does it assist the employer in establishing when the other members of the union will join the strike. (In the Afrox case, the strike started on 11 January, the other members only joined on 17 February). Yet the strike was protected.

40 It is submitted that strike action is inherently disruptive and some uncertainty as to exactly who is going to participate in strike action does not make the strike disorderly.

41 It is respectfully submitted that the primary issue addressed in the minority judgment of the LAC concerns the situation where a strike notice is deliberately used to mislead an employer. The present matter does not involve such conduct. Moreover, that problem can be addressed, without importing a further limitation of general application into the LRA, in the manner proposed by the author Brassey: if the notice is vitiated by fraud, it will be null and void and there will be no compliance with the section.¹²

CONCLUSION

42 For the reasons given above, it is submitted that this Court should not

¹² See judgment of Zondo JP, vol 3, p253, para 103.

read into section 64(1)(b) the unexpressed requirement that every employee participating in a strike is obliged to give notice to their employer (or have notice given on their behalf) of their participation in that strike in order to qualify their participation as “protected” strike action.

43 It is accordingly submitted that leave to appeal ought to be granted to the Constitutional Court against the whole of the judgment and order of the Supreme Court of Appeal dated 30 November 2011 in this matter (annexure “SAT3”).

44 I therefore pray that it may please the honourable Chief Justice and justices of the Constitutional Court to grant the relief sought in the notice of motion to which this affidavit is attached with costs, including the costs of two counsel.

DEPONENT

THUS SIGNED and SWORN to before me at JOHANNESBURG on this the _____ day of DECEMBER 2011, by the deponent who has acknowledged that she knows and understands the contents of this affidavit; and that it is true and correct; and after taking the oath administered by me in the manner prescribed by Regulation.

COMMISSIONER OF OATHS
Designation: