

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 128/11

In the matter between:

**SOUTH AFRICAN TRANSPORT AND ALLIED  
WORKERS UNION**

First Applicant

**D JAMA AND 62 OTHERS**

Second to Sixty-Fourth Applicants

and

**LEBOGANG MICHAEL MOLOTO N.O.**

First Respondent

**JERRY SEKETI KOKA N.O.**

Second Respondent

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**RESPONDENTS' WRITTEN ARGUMENT**

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**INTRODUCTION**

1. The respondents abide the Court's ruling regarding the applicants' application for leave to appeal, and confine their submissions to the merits of the appeal.
2. The relevant background facts, which are common cause, are as follows:
  - 2.1. The respondents are the liquidators of Equity Aviation Services (Pty) Ltd ("Equity") which was the employer of the second to sixty-fourth applicants ("the dismissed applicants") at the time of their dismissals.
  - 2.2. Equity formerly provided apron services on the ramps and runways of South Africa's six major airports. For this it employed 1157 permanent employees, of whom 725 were members of the first applicant ("the union").
  - 2.3. On 13 November 2003 the union referred a wage dispute to conciliation by the Commission for Conciliation, Mediation and Arbitration ("the CCMA").
  - 2.4. Conciliation was unsuccessful. On 15 December 2003 the CCMA certified that the dispute remained unresolved.

2.5. The union issued a strike notice to Equity on the same day, stating that:

*“We intend to embark on strike action on 18 December 2003 at 08h00.”*

2.6. The “we” in the strike notice referred only to the union’s members and not to any of the dismissed applicants.

2.7. Neither the dismissed applicants, nor anyone acting on their behalf, issued a strike notice to Equity.

2.8. A strike commenced on 18 December 2003, enduring for approximately four months until 15 April 2004. The dismissed applicants participated in the strike.

2.9. Equity dismissed the dismissed applicants for unauthorised absenteeism arising from their participation in the strike.

2.10. The applicants thereafter referred an unfair dismissal dispute to the Labour Court, alleging that their dismissals were automatically

unfair within the meaning of section 187(1)(a)<sup>1</sup> of the Labour Relations Act 66 of 1995 (“the LRA”).

3. The Labour Court found in the applicants’ favour. On appeal the majority in the Labour Appeal Court (per Khampepe ADJP and Davis JA) found the dismissed employees’ participation in the strike to have been lawful. Consequently the dismissals were declared automatically unfair. In a dissenting judgment Zondo JP held the contrary.
4. Equity appealed to the Supreme Court of Appeal. The SCA upheld the appeal and made an order that the dismissals were not automatically unfair.<sup>2</sup> It is this decision which forms the subject matter of the present application and putative appeal.

### **INTERPRETATION OF SECTION 64(1)(b) OF THE LRA**

5. The crux of the appeal concerns the correct interpretation of section 64(1)(b)<sup>3</sup> of the LRA. The Court is required to determine whether the

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<sup>1</sup> This provides that a dismissal is automatically unfair if the reason for the dismissal is that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV of the LRA.

<sup>2</sup> SCA judgment vol 4 p 278 para 30. Now reported at 2012 (2) SA 177 (SCA) 186C.

<sup>3</sup> Section 64(1)(b) of the LRA provides that “*every employee has the right to strike ... if ... (b) in the case of a proposed strike, at least 48 hours’ notice of the commencement of the strike, in writing, has been given to the employer, ....*”

dismissed employees had complied with the strike notice requirement in circumstances where:

5.1. the only strike notice received by Equity merely stated that the union's members would strike; and

5.2. the dismissed employees were not members of the union; and

5.3. *ipso facto* Equity had not received any notice that the dismissed employees would strike.

6. In *Chirwa v Transnet Limited*<sup>4</sup> at para 110, Ngcobo J held that:

*“The objects of the LRA are not just textual aids to be employed where the language is ambiguous. This is apparent from the interpretive injunction in s 3<sup>5</sup> of the LRA which requires anyone applying the LRA to give effect to its primary objects and the Constitution. The primary objects of the LRA must inform the interpretive process and the provisions of the LRA must be read in the light of its objects. Thus where a provision of the LRA is capable of more than one plausible interpretation, one which advances the objects of the LRA and the other which does not, a court must prefer the one which will effectuate the primary objects of the LRA.”*

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<sup>4</sup> 2008 (4) SA 367 (CC)

<sup>5</sup> Section 3 of the LRA provides that:

*“Any person applying this Act must interpret its provisions –*

*(a) to give effect to its primary objects;*

*(b) in compliance with the Constitution; and*

*(c) in compliance with the public international law obligations of the Republic.”*

7. It was similarly held, in *Ceramic Industries Ltd t/a Betta Sanitaryware v NCBAWU & Others*<sup>6</sup> (“*Ceramic Industries*”) that:

*“In determining whether there has been compliance with section 64(1)(b) of the Act an interpretation must be sought, as stated earlier, which best gives effect to the broader purpose of the Act and the specific section itself.”*<sup>7</sup>

8. This principle was expanded upon in *Business SA v COSATU*<sup>8</sup>, in the following terms:

*“The exhortation to interpret the section in a purposive manner cannot be faulted. But a purposive approach is not synonymous with a liberal or extensive interpretation of the Act (see: S v Makwanyane 1995 (3) SA 391 (CC) at para 325).*

*Depending on the proper purpose of the Act, a particular section may have to be interpreted restrictively rather than extensively.”*

9. The primary objects of the LRA are: to give effect to and regulate fundamental rights; to give effect to International Labour Organisation obligations; to provide a framework for and to promote orderly collective bargaining; to promote employee participation in decision-making at the workplace and to promote the effective resolution of labour disputes. The overriding purpose of the Act is to advance economic development,

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<sup>6</sup> [1997] 6 BLLR 697 (LAC) 701H.

<sup>7</sup> See also *NUMSA v CCMA* [2000] 11 BLLR 1330 (LC) 1339B-C.

<sup>8</sup> [1997] 5 BLLR 511 (LAC) 516A-B.

social justice, labour peace and the democratisation of the workplace.<sup>9</sup> It is trite that the right to strike is an extension of the bargaining process.

10. Seady and Thompson<sup>10</sup> describe the purpose of section 64(1)(b) as follows:

*“The purpose of the notice would seem to be fourfold:*

- *settlement brinkmanship. The notice tells the other party that words are about to escalate into deeds, and by that token offers a last-gasp and pressure-cooker invitation to settle;*
- *more orderly industrial action. Industrial action is inherently volatile. A lead-in notice affords some opportunity to regulate the event, for instance through agreed or imposed picket rules;*
- *damage limitation. Strikes (in particular) are intended to cause financial loss, but a notice requirement checks some of the more gratuitous associated damage. For instance, an employer working with perishable goods can take steps to protect stock once it knows that action is imminent;*
- *health and safety considerations. In the case of certain operations, an orderly wind-down of production might prevent or limit health and safety risks to employees and the public.”*

11. To this, Lewis JA added an additional purpose: that of protecting employees by clothing a strike with legality.<sup>11</sup>

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<sup>9</sup> Section 1

<sup>10</sup> “*Labour Relations Act 66 of 1995: Strikes and Lock-Outs*” in Thompson & Benjamin *South African Labour Law* (AA1-314 (footnotes omitted)).

<sup>11</sup> SCA judgment vol 4 p 273 para 15; 2012 (2) SA 177 (SCA) 182C-D.

12. In *Ceramic Industries (supra)*, the purpose of section 64(1)(b) was described as follows:<sup>12</sup>

*“Section 64(1)(b) sets out the next requirement: notice of the proposed strike to the employer. Its purpose is to warn the employer of collective action, in the form of a strike, and when it is going to happen, so that the employer may deal with that situation. By their very nature strikes are disruptive, primarily to the employer, but also to employees and, sometimes, to the public at large. One of the primary objects of the Act is to promote orderly collective bargaining. Section 64(1)(b) assists in that orderly process. A failure to give proper warning of the impending strike may undermine that orderliness. This might, in turn, frustrate labour peace and economic development, other important aspects of the Act. Compliance with the provisions of the section is thus called for.*”

*The specific purpose of warning employers of a proposed strike may have at least two consequences for the employer. The employer may either decide to prevent the intended power-play by giving in to the employee demands, or may take other steps to protect the business when the strike starts.”*

13. Section 64(1)(b) is silent as to who must issue the notice and who must be “covered” by the notice. These are accordingly issues that must be determined by the court, with reference to the purpose of the LRA and section 64(1).<sup>13</sup>

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<sup>12</sup> 701H-702B.

<sup>13</sup> The Labour Court adopted a purposive approach to interpreting section 64(1)(b) in two recent cases. In *SA Airways (Pty) Ltd v SA Transport & Allied Workers Union* (2010) 31 ILJ 1219 (LC), Van Niekerk J applied this approach and found that a strike notice “should sufficiently clearly articulate a union’s demand so as to place the employer in a position where it can take an informed decision to resist or accede to those demands” (para 27, our emphasis). In *Transnet Ltd v SA Transport & Allied Workers Union* (2011) 32 ILJ 2269 (LC), Molahlehi J found a strike notice to be defective since it did not indicate in clear terms whether the strike was to be

14. On the union's version, the question of who issues the notice is irrelevant, as is the question of who is "covered" by the notice. As long as a notice is given, the requirements of the LRA are met.
15. With respect, this submission is untenable. To serve any purpose at all, a notice cannot merely be given in the abstract. Notice of an intended course of conduct only acquires meaning if it is issued by, or on behalf of, the parties who intend to act pursuant thereto. The identity of the parties (and by deduction the scale, intensity and focus of the strike) is an essential ingredient of the statutory requirement of notice.
16. This becomes apparent when regard is had to the specific purpose of section 64(1)(b), read with the primary objects of the LRA.
17. If, despite having received a notice, the employer cannot reasonably determine which employees (or even which trade unions) will participate in the impending strike, the employer will be hamstrung in:

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confined to a certain depot or whether it would take place in the whole area of the employer's operation (paras 14-15). It emerges from these authorities that section 64(1)(b) is not merely a mechanical pre-strike requirement. In order for notice to be meaningful, it must place the employer in a position where settlement of the dispute can be plausibly considered and, failing settlement, where adequate contingency measures can be put in place to provide reasonable protection for the employer's business, its suppliers, customers and the public at large.

- 17.1. arriving at an informed decision as to whether to accede to the employees' demands or withstand the strike;
  - 17.2. implementing health and safety measures to protect its employees and the public at large;
  - 17.3. taking adequate steps to protect its business;
  - 17.4. making the necessary arrangements with its suppliers and customers; and
  - 17.5. meaningfully participating in any pre-strike regulatory negotiations, for example, aimed at agreeing picketing rules.
18. The potential consequences of the interpretation contended for by the union are best illustrated by way of the following examples:
- 18.1. An employer employs 10000 workers at numerous sites across the country. Two non-unionised employees are dissatisfied with conditions unique to them at their workplace in the town of Springbok. The majority union - with approximately 6000 members – shows no inclination to support them in this stance.

The two individuals refer a dispute to the CCMA, which issues a certificate of non-resolution. Thereafter one of the two issues a written notice to the employer informing it that “We intend to embark on strike action on [time] and [date]”, thereby giving the requisite 48 hours’ notice. The employer does not consider this threat of action sufficiently serious to accede to the employees’ demands, and puts in place minor measures that will enable it to cope with the two employees’ absence during their strike. On the day of the strike, all of the employer’s 10,000 employees, unionised and non-unionised, across the country stay away from work in support of the two employees. Had the employer known of the scale of the strike it may well have acceded to the two employees’ demands. The result is chaos at the workplace, and hence also for the public, as the employer has made no contingency arrangements to protect its business.<sup>14</sup>

18.2. An employer has workplaces of equivalent size in Johannesburg, Cape Town and Durban. Union A is the majority trade union in Johannesburg; Union B in Cape Town and Union C in Durban. A dispute arises between Union A and the employer. Union A follows the pre-strike procedures and notifies the employer that:

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<sup>14</sup> This illustrative example was cited by Lewis JA in the SCA judgment (vol 4 pp 275-6 para 22; 2012 (2) SA 177 (SCA) 183I-4B).

“We intend to embark on strike action on [time and date]”, giving the required 48 hours’ notice. The employer telephones Unions B and C and receives their assurance that their members will not participate in the strike. The employer weighs up the potential cost of the strike at its Johannesburg site and decides not to accede to Union A’s demands. The employer then makes contingency plans to protect its business at the Johannesburg site. On the day of the strike, all of the employer’s workers, at all three sites, stay away from work. The result is, again, chaos and severe financial damage to the employer, and disruption for the wider community.

18.3. In an extreme example, an employer could receive an anonymous message via email with no mention being made as to the persons on whose behalf the notice is given. That employer would then have to consider making contingency plans in case the entire workforce went out on strike.

19. In all these scenarios, what can only be described as a “wildcat” strike would be afforded protection under the LRA, if the interpretation of section 64(1) contended for by the union is accepted. On the union’s version, provided any person has issued a strike notice, all of an employer’s workers may lawfully strike. A strike notice issued to the

employer under these circumstances is, to all intents and purposes, meaningless. It does not matter that the person complying with the pre-strike procedures does not act on behalf of those who subsequently participate in the strike, and enjoyed absolutely no mandate to do so. With respect, such a reading of the LRA is absurd.

20. The additional examples set out by Zondo JP in his judgment in the court *a quo*<sup>15</sup> reinforce the far-reaching negative consequences of the interpretation contended for by the union.
21. It bears emphasis that the right to strike is inextricably bound up with the right of both employees and employers to engage in collective bargaining.<sup>16</sup> As was held by Van Niekerk J in *SA Airways (Pty) Ltd v SA Transport & Allied Workers Union*:<sup>17</sup>

*“The structure of the Act is one in which the right to strike is drawn from the institution of collective bargaining. The right to strike, fundamental as it is, is thus not an end in itself – the resolution of disputes through collective bargaining remains the ultimate objective.”*

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<sup>15</sup> Vol 3 pp 204-7 paras 87-90; p 208 para 92; pp 211-12 paras 98-99.

<sup>16</sup> Section 23(5) of the Constitution.

<sup>17</sup> (2010) 31 ILJ 1219 (LC) para 22.

22. As this Court emphasised in *NEHAWU v UCT*<sup>18</sup>, the LRA protects and balances the rights of employers as well as employees.
23. The interpretation contended for by the union seeks to elevate the right to strike to an end in itself. On this view, the right to strike is isolated from the broader collective bargaining process and the fundamental objects of the LRA. The dangers of this approach have been highlighted hereinabove.
24. In their heads of argument, the applicants suggest that the employer is not entitled to know which of its employees intend to strike.<sup>19</sup> The employer should, it is asserted, prepare for the strike based on “*its own knowledge gained from the history and nature of the dispute ... and its interaction with its workforce*”. With respect, this stance makes a mockery of the notice requirement contained in the LRA<sup>20</sup>, and raises the question: why require employees to give any notice of a strike at all?
25. For a strike notice to be meaningful an employer must be able to determine with reasonable certainty which of its employees may potentially strike. There is no functional reason why an employer should

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<sup>18</sup> (2003) 24 ILJ 95 (CC) para 40.

<sup>19</sup> Applicants’ Heads pp 15-6 para 32.

<sup>20</sup> This is starkly illustrated by the facts of this matter, where Equity had been assured by other trade unions that their members would not participate in the strike – a commitment that was not honoured (Du Preez vol 2 page 87 line 19 to p 88 line 10; LAC judgment (Zondo JP) vol 3 p 208 para 92).

be kept in the dark as to which of its employees might potentially strike. How does society benefit from that? What balance between the rights and interests of employer and employee does that strike?

26. These considerations illustrate the pernicious effects of the union's interpretation on orderly collective bargaining, effective dispute resolution, labour peace and economic development. The union's version is incompatible with the primary objects of the LRA, long-established tenets of the law of agency, and the specific purpose of section 64(1).
  
27. The requirement that notice be given on behalf of those workers who intend striking is not unduly onerous, or "too technical". It is not necessary that each individual must issue a separate notice. Any person acting on behalf of those who intend to strike could comply with the notice requirement. As Zondo JP held in his dissenting judgment, the employer need not be furnished with a list of names. However, the strike notice must be sufficiently clear to enable the employer to know which employees are covered.<sup>21</sup>

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<sup>21</sup> LAC judgment vol 3 p 217 para 105.

28. Support for the respondents' interpretation of the section is found in Du Toit et al<sup>22</sup>, which contends that, once a strike notice has been issued by a trade union:<sup>23</sup>

*“Employees who are not union members may also join the strike, provided that they give separate notice of their intention to strike.”*

29. It is difficult to see how the respondents' interpretation would result in the employer party having an unfair advantage in industrial action, as alleged.<sup>24</sup> On the contrary, fairness surely dictates that an employer should be aware of which employees intend to strike. Moreover it bears emphasis that the interpretation given to section 64(1)(b) would apply equally to section 64(1)(c). This provides 48 hours' notice of an impending lock-out must be given. On the union's version, notionally any number of employers engaged in a dispute could lock out their employees on the back of a notice issued by a single employer. Despite never having issued a lock-out notice themselves, the employers “piggy-backing” on a single employer's notice would be afforded the protection of the LRA. And notice of a lock-out to one union would operate against others – and even against non-unionised employees of the same employer. If that in

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<sup>22</sup> *“Labour Relations Law: A Comprehensive Guide”* (4ed LexisNexis Butterworths) 286

<sup>23</sup> Referred to with approval in the SCA judgment vol 4 p 277 para 27; 2012 (2) SA 177 (SCA) 185C-D.

<sup>24</sup> Applicants' Heads p 19 para 35.

principle is not tenable as regards a lock-out, how can it be tenable as regards a strike?

30. In the present matter, Equity was entitled to assume that only members of the union which gave notice would participate in the strike. This knowledge would have informed Equity's decision not to accede to the union's demands, and determined the nature of the contingency measures put in place. No one had followed any pre-strike procedures in respect of the individual employees. Indeed, assurances had in fact been given by their respective trade unions that they would not embark on industrial action.
31. Under these circumstances, the dismissed employees' participation in the strike was unlawful.

## **CONCLUSION**

32. The SCA found that the logical, purposive interpretation of section 64(1)(b) required that all employees be covered by a strike notice before embarking on industrial action. This was necessary to give effect to the

section's purpose of warning of the power play to follow in such a way that the employer can make informed decisions.<sup>25</sup>

33. Notice may be given through a representative or personally, provided that the notice alerts the employer to the extent of the strike and allows it to make the necessary arrangements. To hold otherwise would promote disorderly collective bargaining and invite chaos.<sup>26</sup>
34. For the reasons set out above the SCA with respect clearly arrived at the correct interpretation of section 64(1)(b). The appeal should accordingly be dismissed with costs, including costs of two counsel.

**J J GAUNTLETT SC**

**G A LESLIE**

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March 2012

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<sup>25</sup> Vol 4 p 277 para 26; 2012 (2) SA 177 (SCA) 185A-B.

<sup>26</sup> Vol 4 pp 277-8 para 28; 2012 (2) SA 177 (SCA) 185E-F.

**AUTHORITIES**

1. *Chirwa v Transnet Limited* 2008 (4) SA 367 (CC) (cited on p 5 of the Heads)
2. *Ceramic Industries Ltd t/a Betta Sanitaryware v NCBAWU* [1997] 6 BLLR 697 (LAC) (Heads pp 6 and 8)
3. *NUMSA v CCMA* [2000] 11 BLLR 1330 (LC) (Heads p 6)
4. *Business SA v COSATU* [1997] 5 BLLR 511 (LAC) (Heads p 6)
5. Seady and Thompson “*Labour Relations Act 66 of 1995: Strikes and Lock-Outs*” in Thompson & Benjamin *South African Labour Law* (Juta) (Heads p 7)
6. *SA Airways (Pty) Ltd v SA Transport & Allied Workers Union* (2010) 31 ILJ 1219 (LC) (Heads p 8 footnote 13 and p 13)
7. *Transnet Ltd v SA Transport & Allied Workers Union* (2011) 32 ILJ 2269 (LC) (Heads pp 8-9 footnote 13)
8. *NEHAWU v UCT* (2003) 24 ILJ 95 (CC) (Heads p 14)
9. Du Toit et al “*Labour Relations Law: A Comprehensive Guide*” (4ed LexisNexis Butterworths 2003) (Heads page 17).