

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' PRACTICE NOTE**

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**(a) The names of the parties and the case number**

This is set out above.

**(b) Nature of the proceedings**

Application for leave to appeal and appeal against the judgment of the Supreme Court of Appeal, handed down on 30 November 2011.

**(c) The issues that will be argued**

The merits of the appeal only. The respondents abide the Court's ruling regarding the application for leave to appeal.

The appeal concerns the correct interpretation of section 64(1)(b) of the LRA. In particular:

- whether all of an employer's employees acquire the right to strike once any person has issued a strike notice to the employer (as contended by the appellants);
- alternatively, whether a strike notice must be issued by, or on behalf of, those employees who intend to strike, in order for their

participation in the strike to be lawful (as contended by the respondents).

**(d) Relevant portions of the record**

In the opinion of counsel, the following portions of the record are necessary for the determination of this application:

- Labour Court judgment (Vol 2 pp 121-138)
- Labour Appeal Court judgment (Vol 3 pp 152-256)
- Supreme Court of Appeal judgment (Vol 4 pp 268-280)
- Evidence of Du Preez (Vol 2 page 87 line 19 to page 88 line 10)

**(e) Estimated duration of the argument**

Argument for the respondents will take approximately 1 hour.

**(f) Summary of the respondents' argument**

1. The second to sixty-fourth applicants (“the dismissed applicants”) were dismissed pursuant to their participation in a strike. If their participation in the strike was lawful, as contended by applicants, their dismissals were automatically unfair in terms of section 187(1)(a) of the LRA. If their participation in the strike was unlawful, as contended by the respondents, their dismissals were not automatically unfair.
2. Whether or not the dismissed applicants’ participation in the strike was lawful depends upon the interpretation of section 64(1)(b) of the LRA, which requires 48 hours’ written notice of an impending strike to be given to the employer.
3. The LRA does not specify who must issue a strike notice, nor does it specify on whose behalf a strike notice must be issued, in order for employees’ participation in a strike to be lawful. The answers to these questions must be arrived at through a process of statutory interpretation.
4. It is appropriate to apply a purposive approach to interpreting section 64(1)(b). This entails preferring an interpretation which is consonant with the specific purpose of the section, as well as the primary objects of the LRA, to one that is not.

5. On a correct application of the purposive approach, section 64(1)(b) requires that, before employees may lawfully strike, they or someone acting on their behalf must have given the requisite notice to their employer.
  
6. As correctly held by the Supreme Court of Appeal, the interpretation contended for by the applicants, namely that employees may lawfully strike notwithstanding that their employer has never received notice of their intention to strike, is at odds with the purpose of the section and the primary objects of the LRA. Properly construed, section 64(1)(b) requires that, before employees may lawfully strike, they or someone acting on their behalf must have served a strike notice on the employer.

**(g) Authorities**

The respondents' counsel will make particular reference to the following authorities:

*Chirwa v Transnet Limited* 2008 (4) SA 367 (CC)

*Ceramic Industries Ltd t/a Betta Sanitaryware v*

*NCBAWU* [1997] 6 BLLR 697 (LAC)

*Business SA v COSATU* [1997] 5 BLLR 511 (LAC);

Du Toit et al “*Labour Relations Law: A Comprehensive Guide*”

(4ed) LexisNexis Butterworths 2003;

*Afrox Ltd v SA Chemical Workers Union (1)* (1997) 18 ILJ 399

(LC)

*CWIU v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 ILJ

321 (LAC)

*SA Airways (Pty) Ltd v SA Transport & Allied Workers Union*

(2010) 31 ILJ 1219 (LC)