

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 128/11

In the matter between:

**SOUTH AFRICAN TRANSPORT AND ALLIED
WORKERS UNION AND OTHERS ("SATAWU")** 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

APPLICANTS' WRITTEN ARGUMENT

INTRODUCTION

1. This is an application for leave to appeal against the judgment of the Supreme Court of Appeal handed down on 30 November 2011.¹

¹ SCA Judgment: Vol 4, pp268-280. The respondents cited are the liquidators appointed for Equity Aviation Services (Pty) Ltd (the employer of the second to sixty-fourth applicants when they were dismissed) after it was placed in liquidation – see vol 4, pp281-282.

2. The matter before the Supreme Court of Appeal involved the interpretation of section 64(1)(b) of the Labour Relations Act, No. 66 of 1995 as amended ("the LRA").

3. Section 64(1)(a) and (b) of the LRA provides as follows:

"(1) Every employee has the right to strike and every employer has recourse to lock-out if –

(a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and –

(i) a certificate stating that the dispute remains unresolved has been issued; or

(ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that –

(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, unless –

(i) the issue in dispute relates to a collective agreement to be concluded in a council, in which

case, notice must have been given to that council;
or

(ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation;..."

4. The issue before the Supreme Court of Appeal was whether the dismissal of the individual applicants (the second and further applicants) was automatically unfair. This turned on the answer to the question whether every employee who intends to participate in protected strike action must personally (or through a representative) give notice of the commencement of the intended strike as contemplated in section 64(1)(b) of the LRA.
5. The Supreme Court of Appeal found that every employee - through her representative or personally - must give notice of her intention to strike.²

² SCA Judgment: Vol 4, p 277 (para 28)

6. The Supreme Court of Appeal accordingly upheld the appeal and replaced the order of the Labour Appeal Court with an order that the appeal against the order of the Labour Court is upheld. The order of the Labour Court was replaced with an order that the dismissal of the second and further applicants was not automatically unfair.³

7. The Chief Justice has directed the parties to this application for leave to appeal to lodge written argument which includes argument on the merits of the matter.

8. The applicants' written argument contains submissions on three issues, namely:
 - 8.1. whether the matter concerns a constitutional matter within the contemplation of section 167(3)(b) of the Constitution;

 - 8.2. whether leave to appeal should be granted;

³ SCA Judgment: Vol 4 pp 278-9 (para 30).

8.3. the merits of the appeal.

DOES THE CASE CONCERN A CONSTITUTIONAL MATTER?

9. Section 167(3)(b) provides that the Constitutional Court "may decide only constitutional matters, and issues connected with decisions on constitutional matters".

10. As indicated above, this matter involves the interpretation of section 64(1)(b) of the LRA.

11. This Court had held that the proper interpretation and application of the LRA raises a constitutional issue.⁴

12. It is accordingly respectfully submitted that this Court may decide this matter.

LEAVE TO APPEAL

13. Leave to appeal will only be granted if it is in the interests of justice to do so. It has been held by this Court that an

⁴ *NEHAWU v University of Cape Town* 2003 (3) SA 1 (CC); (2003) 24 ILJ 95 (CC) at para 14

important consideration relevant to the interests of justice is the nature and importance of the constitutional issue at stake.⁵

14. It is respectfully submitted that the correct interpretation of the provisions determining the procedural and substantive limitations on the constitutional right to strike contained in the LRA is an important constitutional issue. It is now accepted law (the respondent finally accepted this during the hearing before the Labour Appeal Court) that not every employee who intends to engage in protected strike action must be a party to the referral in terms of section 64(1)(a) of the issue in dispute to conciliation. Once a dispute has been referred to conciliation, every employee employed by the employer concerned - given that the other requirements

⁵ *NUMSA and Others v Bader Bop (Pty) Ltd and Another* [2003] 2 BLLR 103 (CC), 2003 (2) BCLR 182 (CC), 2003 (3) SA 513 (CC) at para 16; *SAPS v POPCRU* [2011] 9 BLLR 831 (CC) at para 16; *Aviation Union of SA and Another v SA Airways (Pty) Ltd and Others* (2011) 32 ILJ 2861 (CC) at para 29

stipulated in section 64(1) have been complied with – is entitled to strike.⁶

15. The question decided by the Supreme Court of Appeal accordingly affects virtually every strike where the dispute has been referred to conciliation and where not all the employees employed by the employer involved in the dispute belong to the trade union who referred the dispute to conciliation.
16. It is further respectfully submitted that the prospects of success also favour the granting of leave to appeal. The prospects of success are inextricably bound up with the merits of the appeal. In order to avoid unnecessary repetition, we do not deal separately with the prospects of success. The bases on which we submit the Supreme

⁶ *Afrox Ltd v SA Chemical Workers Union and Others* (1) [1997] 4 BLLR 375 (LC), especially at 379H-I; *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty)Ltd* [1998] 12 BLLR 1191 (LAC), especially 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] 6 BLLR 628 (LAC) paras 42 and 45-47

Court of Appeal erred are set out in detail below. It is respectfully submitted that the appellants have reasonable prospects of success in their appeal.

17. It is accordingly respectfully submitted that leave to appeal should be granted.

THE MERITS OF THE DISPUTE

The relevant facts

18. As appears from the judgment of the Supreme Court of Appeal⁷, the material facts are now largely common cause.
19. On 13 November 2003 the first applicant (SATAWU) referred a wage dispute to the CCMA. Conciliation did not succeed and on 15 December 2003 the CCMA issued a certificate that the dispute remained unresolved. SATAWU issued a strike notice to the employer on the same day. It read: "we intend to embark on strike action on 18 December 2003 at 08:00."
20. Not only SATAWU members participated in the strike. Other employees who did not belong to SATAWU also participated in the strike.⁸ The employer took the view that

⁷ SCA judgment: vol 4 p270 (paras 4-6).

⁸ Before the Labour Court and the Labour Appeal Court, it was still in dispute whether or not these employees (the individual applicants) were members of SATAWU

their participation was not protected as they had not personally or through a representative given the requisite notice. On 19 November 2004, the employer dismissed them for unauthorised absenteeism during the strike.

The judgment of the Supreme Court of Appeal

21. When the matter reached the Supreme Court of Appeal, the only issue to be decided was whether the dismissed employees (i.e. the individual applicants) had to give notice personally or through a representative.⁹
22. In essence, the Supreme Court of Appeal based its finding that every employee must personally (or through a representative) give notice of his or her intention to strike on the finding that the purpose of a strike notice in terms of section 64(1)(b) is that the employer must be informed by

⁹ As indicated in paragraph 14 above, the employer had abandoned the point advanced in its heads of argument that every employee who intends to participate in protected strike action must personally or through her representative refer the dispute to conciliation. At the hearing of the matter before the LAC, the respondent indicated that it accepts the correctness of the cases referred to in footnote 6 above.

the notice what the extent of the strike is going to be so that the employer can prepare for the power-play to follow. In this regard much reliance was placed on the fact that one of the primary objects of the LRA is to promote orderly collective bargaining. The Court, after finding that the notice requirement is not a limitation of the right to strike, concluded that the “logical interpretation of the section” requires this purpose to be given effect.¹⁰

The applicants’ submissions

23. 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.¹¹

¹⁰ SCA Judgment: vol 4 pp 275-278 (paragraphs 19-22, 26 and 28)

¹¹ See Section 23 of the Constitution. For the international law obligations of the Republic regarding the right to strike, see the judgment of this Court in *SAPS v Popcru* (2011) 9 BLLR 831 (CC), para [19] footnote 28

24. The Constitutional Court has emphasised the overall importance of the right to strike¹² and that its existence is required to balance the greater social and economic power enjoyed by employers.¹³
25. It is respectfully submitted that the main difficulty with the construction placed on section 64(1)(b) by the Supreme Court of Appeal is that there is no textual support for the proposition that the purpose of a notice in terms of section 64(1)(b) is to inform the employer of the extent of the strike so that the employer can prepare for the power-play.
26. The language of the section simply requires "notice of the commencement of the strike" to be given to the employer and does not require "every employee" to give notice of the commencement of the strike before the employees concerned acquire the right to strike.

¹² *NUMSA v Bader Bop (Pty) Ltd and Another* [2003] 2 BLLR 103 (CC), 2003 (2) BCLR 182 (CC), 2003 (3) SA 513 (CC) paras [13] and [67]; *SAPS v Popcru supra* paras [19] and [20]

¹³ *Ex parte Chairperson of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa* (1996) 17 ILJ 821 (CC), para [66]

27. As Schutz JA pointed out in *POSWA v MEC for Economic Affairs, Environment and Tourism Eastern Cape*,¹⁴ "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."
28. It is submitted that resorting to the promotion of orderly collective bargaining does not warrant a construction of section 64(1)(b) that limits the right to strike if the language used by the Legislator does not justify such a construction.
29. As Cameron JA (as he then was) held, when interpreting section 64(1)(a) of the LRA in the *Plascon Decorative case*¹⁵, "there is no justification for importing into the LRA, without any visible textual support, limitations on the right

¹⁴ 2001 (3) SA 581 (SCA) at 586-7 (para 9)

¹⁵ Referred to in fn 6 above

to strike which are additional to those the Legislature has chosen clearly to express."¹⁶

30. It is respectfully submitted that it does not take the matter any further to state that the notice requirement in section 64(1)(b) is not a limitation on the right to strike.¹⁷ The fact that employees have to give notice before they exercise their right to strike, makes it more difficult to strike. And if every employee must personally given notice (or must be able to show that he or she authorised someone to give notice on his or her behalf), it becomes more difficult to exercise the right to strike.¹⁸ But in any event, the requirement that each employee must personally give notice where notice of the commencement of the strike has already been given by other employees employed by the

¹⁶ *Plascon Decorative, supra*, para 28. See also in this regard the judgment of this Court in *S v Zuma and Others* 1995 (2) SA 642 (CC) where Kentridge AJ, writing for an unanimous Constitutional Court, stated in paragraph 15 that "*Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them.*" See also the judgment in the *Popcru* case, *supra*, paras [29] and [30].

¹⁷ As the Supreme Court of Appeal had done in para 26 of its judgment in this matter, Vol 4, p 277

¹⁸ See in this regard, the LAC judgment in *Plascon Decorative*, para 21

employer, places a substantive limitation – as the facts of this case illustrates – on the right to strike of those employees not included in the notice already given.¹⁹

31. It is further submitted that the construction of section 64(1)(b) that allows all employees of the employer involved in the strike to strike, once notice of the commencement of the strike is given, is consistent with the definition of "strike" and "the issue in dispute" contained in the LRA.²⁰

32. But, in any event, it is respectfully submitted that it is not correct to suggest that strike action following on a notice where the employer is not informed as to the extent of the strike, will lead to disorderly collective bargaining. Strike

¹⁹ In the Fifth Digest (revised edition) of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (2006), the Committee stated that the conditions that have to be fulfilled under law in order to render a strike lawful should be reasonable and in any event not be such as to place a substantive limitation on the means of action open to trade union organizations (par 547). It stated further that “the legal procedures for declaring a strike should not be so complicated as to make it practically impossible to declare a legal strike” (par 548).

²⁰ See the analysis of the similarly worded section 64(1)(a) of the LRA in the *Plascon Decorative* matter, *supra*, paras 22-24

action is, by its very nature, disruptive.²¹ Moreover, even if notice is given on behalf of every employee employed by an employer (for example where all the employees are members of the Trade Union which has given notice) the employer will still not know who exactly is going to strike and at what stage of the strike they will do so.²² The employer will still have to base its preparation for the strike on its own knowledge gained from the history and nature of the dispute, the negotiations that ended in deadlock and its interaction with its workforce.

33. The Supreme Court of Appeal placed considerable reliance for its central finding on the example referred to in paragraph 22 of its judgment. If, in the example relied on by the Supreme Court of Appeal, the two employees involved in the dispute were like all the other 10 000

²¹ *Transportation Motor Spares v National Union of Metalworkers of South Africa and Others* (1999) 20 ILJ 690 (LC) at para 39; *Ceramic Industries Ltd t/a Better Sanitaryware and Another v NCBAWU and Others* [1997] 6 BLLR 697 (LAC) at 7011; *Swissport (SA) (Pty) Ltd v SA Transport & Allied Workers Union & Others* (2011) 32 ILJ 1256 (LC) at 1261 par 20

²² See, for example, the facts in the Afrox case: *Afrox Ltd v SA Chemical Workers Union and Others* (1) [1997] 4 BLLR 375 (LC)

employees employed by the employer, Union members and the Union gave notice of the strike, the employer would still not know if all 10 000 Union members are likely to strike at the commencement of the strike. The employer will have to base its preparation on its own assessment of who is likely to strike and when they are likely to join the strike. The strike notice by the Union will only make it clear to the employer that it is possible that all union members (on the facts of the hypothetical example, they are all the employees employed by the employer) will join the strike at the commencement of the strike but it will not inform the employer what is likely to happen. If section 64(1)(b) means what the majority of the Labour Appeal Court and the Labour Court found it means, and only the two employees involved in the dispute gave notice, the employer will be in exactly the same position as the employer in a situation where the construction of the SCA is the correct construction of section 64(1)(b) and all 10 000 are members of the Union who gave notice of the

strike: in both cases it would be legally permissible for all 10 000 to join the strike, but that in itself will not assist the employer in knowing which employees are likely to support the two employees involved in the dispute by engaging in strike action at the commencement of the strike.

34. It is respectfully submitted that if the Legislature wanted a strike notice to indicate to the employer the likely extent of the strike so that the employer could base its preparation for the strike on that information, the Legislature would have chosen language to give expression to that intention. It has not done so. In fact, it has done just the opposite. The language chosen by the Legislature does not require every employee to give notice of the commencement of a strike, it simply requires notice of the commencement to be given. The Legislative purpose is simply that the employee party to the dispute must inform the employer party that talk will come to an end within forty-eight hours and that the power-play will thereafter determine the outcome.

35. It is respectfully submitted that if the Legislature did in fact require the employee party to inform the employer party of the likely extent of the strike in its strike notice so that the employer party can prepare for the power play, it is not at all clear that such a requirement would pass constitutional scrutiny. It is obvious that in those circumstances, it would be possible to argue that such a provision would give the employer party an unfair advantage in the power-play where the economic power of the employee party is - all other things being equal - not an equal match for the economic power of the employer and that in the circumstances, such a requirement will undermine the right to strike and effective resolution of labour disputes as contemplated in section 1 of the LRA.
36. It is accordingly respectfully submitted that effect should be given to the language chosen by the Legislature in section 64(1)(b) of the LRA and that the construction placed on the section by the Supreme Court of Appeal is not correct.

37. In the circumstances, the application for leave to appeal should succeed and the appeal should be upheld. The order of the majority of the Labour Appeal Court should be confirmed and the order of the Labour Court should be substituted with an order declaring that the dismissal of the individual applicants on 18 November 2004 by the respondent was automatically unfair in terms of section 187(1)(a) of the LRA.

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