CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 128/11
[2012] ZACC 19

In the matter between:

SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION (SATAWU)	First Applicant
DUMISANI JAMA AND 62 OTHERS	Second to Sixty-Fourth Applicants
and	
LEBOGANG MICHAEL MOLOTO N.O.	First Respondent
JERRY SEKETE KOKA N.O.	Second Respondent

Heard on : 10 May 2012

Decided on : 21 September 2012

JUDGMENT

MAYA AJ (Mogoeng CJ, Jafta J and Skweyiya J concurring):

Introduction

[1] This application mainly concerns the interpretation of section 64(1)(b) of the Labour Relations Act 66 of 1995 (Act).[1] The applicants seek leave to appeal against the judgment of the Supreme Court of Appeal in *Equity Aviation Services (Pty) Ltd v South African Transport and Allied Workers Union and Others*,[2] which construed the provisions of section 64(1)(b) of the Act as obliging every employee who intends to embark on a strike to notify his or her employer of that intention personally or through a representative for the strike action to be protected.[3] This interpretation founded the Court's conclusion that the dismissal of the second to sixty-fourth applicants (dismissed strikers) from employment, consequent upon their participation in a strike in respect of which only the first applicant (SATAWU) had given notice on behalf of its members, was lawful.

Background

[2] The facts are simple and largely undisputed. The dismissed strikers are former employees of Equity Aviation Services (Pty) Ltd (Equity), an aviation logistics company which is under liquidation. The respondents are Equity's liquidators. At the material time, Equity provided services on the ramps and runways of the country's six major airports. Of its 1157 permanent employees, 725 were members of SATAWU, a

[1] The provision is set out in [15] below.

[2] 2012 (2) SA 177 (SCA).

[3] Section 67(1) of the Act defines a "protected strike" as one that complies with the provisions of Chapter IV of the Act.

registered trade union. Thus, SATAWU was the recognised majority union at Equity's workplace. The dismissed strikers were not SATAWU members.

[3] On 13 November 2003, SATAWU referred a wage dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. Conciliation failed. On 15 December 2003, the CCMA issued a certificate to that effect. On the same day SATAWU issued a terse strike notice to Equity. It is common cause that the notice which was written on SATAWU's letterhead referred only to the union's members, which read:

> "We intend to embark on strike action on 18 December 2003 at 08H00. Please confirm that we will meet to discuss a Picketing Agreement on the 17 December 2003."

None of the dismissed strikers, or anyone acting on their behalf, issued a separate strike notice to Equity. Equity had been assured by minority trade unions at its workplace that they, the minority unions, were not party to the dispute.

[4] SATAWU members commenced the strike as planned. It lasted until 15 April 2004. Equity accepted that their strike action was "protected" because SATAWU had given the requisite notice on their behalf. The dismissed strikers also partook in the strike despite Equity's repeated warnings to them to return to work as it considered their participation in the strike action unlawful for lack of a strike action

notice. As a result, on 19 November 2004 Equity dismissed them for unauthorised absence from work during the strike.

Litigation history

[5] The dismissed strikers referred a dispute to the CCMA challenging the lawfulness of their dismissal. When conciliation did not succeed, they took the dispute to the Labour Court on the basis that their dismissal was automatically unfair in terms of section 187(1)(a) of the Act.[4] On 15 June 2006, Ngcamu AJ decided the matter in favour of the dismissed strikers.[5] He found that they were covered by SATAWU's strike notice as they were its affiliates[6] and that, in any event, non-membership would not have excluded them from its protection. The Court then declared the termination of their employment automatically unfair and ordered their reinstatement and ancillary relief.

[4] Section 187(1)(a) of the Act reads:

> "(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 [which confers protections relating to the right to freedom of association] or, if the reason for the dismissal is—
>
> (a) 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 [which deals with industrial action and conduct in support of industrial action]". (Footnote omitted.)

[5] The judgment is reported as *SATAWU and Another v Equity Aviation Services (Pty) Ltd* [2006] 11 BLLR 1115 (LC).

[6] One of the issues before the Labour Court concerned a claim made by the dismissed strikers that they were SATAWU members. The question was whether their submission of stop-order forms to the union to facilitate payment of their membership dues after SATAWU had issued the strike notice resulted in their recognition as members of the union. The Labour Court found that it did. This finding was held to be incorrect on appeal to the Labour Appeal Court. It was not challenged before the Supreme Court of Appeal and is not in issue in these proceedings.

[6] Equity's appeal against this decision was dismissed by a split Labour Appeal Court.[7] The majority held that section 64 of the Act entitles all employees in a bargaining unit, whether unionised or non-unionised, lawfully to participate in strike action if the majority union has referred the dispute for conciliation in terms of subsection (1)(a) and subsequently issued a strike notice in terms of subsection (1)(b). According to the majority, it was unnecessary for the dismissed strikers to issue a strike notice when SATAWU had done so. The majority, therefore, concluded that the dismissed strikers' participation in the strike was lawful and their dismissal automatically unfair.

[7] The minority took a different view and found merit in the appeal. It reasoned that an employer relies largely on the contents of the strike notice to decide whether to resist or yield to the employees' demands and to make the necessary arrangements to minimise the impact of the strike on its business should the strike go ahead. This, therefore, makes it essential for employees who are not members of a trade union, which has given the strike notice, to issue a separate notice to strike lawfully. The minority concluded that the majority's interpretation of section 64(1)(b), which renders it impossible for an employer to identify the employees who may strike, conflicts with the injunction in section 3 of the Act as it would promote disorderly collective bargaining.

[7] *Equity Aviation Services (Pty) Ltd v SATAWU* [2009] 10 BLLR 933 (LAC) (Khampepe ADJP; Davis J concurring separately; and Zondo JP dissenting).

[8] Equity's further appeal to the Supreme Court of Appeal, brought with that Court's special leave, was successful.[8] Lewis JA, writing for a unanimous Court, agreed with the Labour Appeal Court minority's interpretation of section 64(1)(b). The Court held that the purpose of the strike notice is to warn an employer of the impending power play to enable it to make informed decisions. The Court reckoned that in light of the Act's aim, amongst others, to promote orderly collective bargaining, a logical, purposive interpretation of the section required the dismissed strikers to notify Equity of their intention to strike personally or through their representative to give effect to that objective. Thus, the dismissed strikers could not rely on SATAWU's notice because it covered only the union's members. The Court concluded that the dismissed strikers' participation in the strike was not protected under the Act and that their dismissal was not automatically unfair.

Leave to appeal

[9] The respondents oppose the merits of the appeal only and abide this Court's decision with regard to the application for leave to appeal. But to succeed, the applicants must still show that the application raises a constitutional matter and that it is in the interests of justice to grant leave to appeal.

[10] The main contention against the decision of the Supreme Court of Appeal is that the meaning it ascribed to section 64(1)(b) is wrong as it conflicts with the express

[8] Above n 2.

language used by the Legislature and unjustifiably curtails the constitutional right to strike conferred on all workers by section 23 of the Constitution.[9] This argument undoubtedly raises a constitutional question as it relates to the proper interpretation and application of the provisions of the Act which was enacted to give effect to the fundamental right to strike, among other objects.[10] This Court may thus adjudicate the application in terms of section 167(3)(b) of the Constitution.[11]

[11] It must next be determined whether it is in the interests of justice that leave to appeal be granted. Some of the factors that are important in deciding this question are the importance of the constitutional issues raised and the prospects of success of the appeal. The central issue raised here, as indicated, relates to the meaning and effect of the procedural requirements contained in section 64(1)(b) on the constitutional right to strike. Its importance is unquestionable. This is especially so in view of the fact that the decision of the Supreme Court of Appeal will affect every strike arising where strike notice following unsuccessful conciliation is given to the employer by a trade union to which not all the striking employees are affiliated. Regarding the prospects of success on appeal, the fact that this is an interpretive enquiry involving statutory provisions, which do not, on the face of it, specify who must issue the strike notice, and the Labour Appeal

[9] Section 23(2)(c) of the Constitution grants every worker the fundamental right to strike.

[10] *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU v UCT*) at para 14 and *NUMSA and Others v Bader Bop (Pty) Ltd and Another* [2002] ZACC 30; 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC) at para 15.

[11] In terms of section 167(3)(b) of the Constitution, this Court "may decide only constitutional matters, and issues connected with decisions on constitutional matters".

Court's disagreement on the proper construction of these provisions, suggest that there may be prospects of success.

[12] I am satisfied in the circumstances that it is in the interests of justice to grant leave to appeal.

Appeal

[13] The fundamental question in the appeal is whether the dismissed strikers met the provisions of section 64(1)(b) of the Act by engaging in a strike when only SATAWU issued a strike notice on behalf of its members.

Applicable law

[14] The relevant provision of the Constitution is section 23(2)(c) which, as mentioned earlier, grants every employee the right to strike. The right, which is granted without any express limitation in the Constitution, is given content and regulated by the Act in fulfilment of one of its primary objects.[12] To that end, the Act provides[13] substantive limitations[14] and procedural pre-conditions for the exercise of the right to strike and the employer's corresponding recourse to lock-out.

[12] Set out in section 1.

[13] Sections 64 to 77.

[14] Section 65 sets out the substantive limitations and forbids any person from participating in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if the person is bound to a collective agreement that prohibits it, or to an agreement that requires the issue in dispute to be referred to arbitration, or, subject to exceptions, the person is engaged in an essential or maintenance service.

[15] Section 64 reads in relevant part:

> "(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; or
>
> (c) in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless 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
>
> (d) in the case of a proposed strike or lock-out where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c)." (Emphasis omitted.)

[16] Other relevant provisions are found in section 67 of the Act which, in addition to defining "protected strike" and "protected lock-out", provides various forms of immunity for participation in these actions where the relevant requirements have been met. Protection for strikers cuts across a wide spectrum and ranges from delictual and contractual immunity to protection from dismissal, barring fair dismissal for misconduct or operational reasons, and immunity from criminal prosecution for contravention of the Basic Conditions of Employment Act[15] or the Wage Act.[16] The consequences of non-compliance with the requirements of "protected" industrial action, which include the grant of an interdict against the action and payment of compensation for loss attributable to the action, are contained in section 68 of the Act.

The submissions

[17] The essence of the applicants' case is that the language used by the Legislature expressly requires only notice of the commencement of the strike to be given to the employer by "anyone involved in the dispute", and does not oblige every participating employee to issue the notice to exercise the right to strike. This construction, they argued, is consistent with the Constitution and the purpose of the Act. Requiring more would give the employer an unfair advantage in the power-play and undermine the right to strike and effective resolution of labour disputes contemplated by the Act.

[15] 75 of 1997.

[16] 5 of 1957.

[18] The respondents, on the other hand, contended for a purposive interpretation of the provisions. They argued that in order to serve any purpose at all, the notice must be issued by, or on behalf of, the parties who intend to strike. This approach, they submitted, promotes orderly collective bargaining, one of the Act's key objects, as it enables the employer to reasonably determine the extent of and properly prepare for the looming strike.

Approach to interpretation

[19] The approach to be adopted in determining the meaning of these provisions, and indeed the whole statute, is stipulated by the Act itself. In section 3, the Act expressly enjoins any person applying its provisions to interpret them in a manner that gives effect to its primary objects, in compliance with the Constitution and the public international law obligations of the Republic.[17] This Court highlighted the significance of the Act's primary objects in *Chirwa v Transnet Limited and Others*.[18] The Court remarked that the injunction in section 3 indicates that they are not just textual aids to be employed where the language used by the Legislature is ambiguous. Rather, the objects of the Act—

> "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

[17] This injunction conforms to the purposes of the Act which include giving effect to and regulating the right to strike (and recourse to lock-out) in a manner that is consonant with the Constitution. Section 39(1) of the Constitution requires a court interpreting constitutional rights to consider international law. South Africa is a member of the International Labour Organisation, which recognises the right to strike as a fundamental right essential to a successful collective bargaining system, and whose conventions and recommendations have been recognised by this Court (in *South African National Defence Union v Minister of Defence and Another* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC)) as an important source of international law.

[18] [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at para 110.

> 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."

[20] Thus, the provisions of the Act must be interpreted purposively so as to give effect to the Constitution,[19] the objects of the Act itself and the purpose of the provisions in issue.[20] But, this approach does not necessarily equate to an expansive construction of the provisions of the Act. This is so because the purpose of the Act may well require a restrictive interpretation of the particular provisions[21] so that the exercise of a protected right is not unduly limited. Therefore, due regard must be had to the express language used in the provisions under consideration. Furthermore, care must be taken against unduly limiting a fundamental right which has been conferred (as in this case) without express limitation by reading implied restrictions into it.[22]

[21] The Act sets out its primary objects and overall purpose in section 1 which reads:

> "The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act which are—
>
> (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;

[19] *NEHAWU v UCT* above n 10 at paras 16 and 41.

[20] *Ceramic Industries Ltd t/a Betta Sanitaryware and Another v NCBAWU and Others* [1997] 6 BLLR 697 (LAC) (*Ceramic Industries*) at 701H. See also *Fidelity Guards Holdings (Pty) Ltd v PTWU and Others* [1997] 9 BLLR 1125 (LAC).

[21] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 325 and *Business SA v COSATU and Another* [1997] 5 BLLR 511 (LAC) at 516A-B.

[22] *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at paras 15-8 and *CWIU v Plascon Decorative (Inland) (Pty) Ltd* [1998] BLLR 1191 (LAC) at 1199D-E.

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;

(c) to provide a framework within which employees and their trade unions, employers and employers' organisations can—

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

(ii) formulate industrial policy; and

(d) to promote—

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the workplace; and

(iv) the effective resolution of labour disputes."[23]

[22] The primary task in this case, then, is to interpret section 64(1)(b) within the objects of the statute as a whole, having regard to the express wording of the provision and its specific purpose, bearing in mind that it regulates a fundamental right.

Purpose of the strike notice

[23] Our courts have considered the meaning of section 64(1)(b), albeit in different contexts, and defined it by adopting a purposive approach towards its interpretation. One of the relevant cases is *Ceramic Industries*[24] upon which the Supreme Court of Appeal relied significantly for its decision. There, the Labour Appeal Court dealt with the provisions in the context of a strike notice which did not state the exact time of commencement of the proposed strike. The Court exhorted an interpretation of section

[23] The reference to section 27 in section 1(a) was previously directed at the interim Constitution and must now be regarded as reference to section 23 of the Constitution.

[24] Above n 20 at 701H-702G-H (per Froneman DJP, Myburgh JP and Nicholson JA).

64(1)(b) that "gives best effect to the primary objects of the Act and its own specific purpose . . . within the constraints of the language used in the section", reasoning thus:

> "Section 64(1)(a) sets out the first requirement to be met before embarking on a protected strike viz an attempted conciliation of the issue in dispute before collective action is taken. 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 purposes of the Act . . . .
>
> 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. . . . [A] minimum period of 48 hours is given to deliberate on whether to accede to the demands or not. . . . The language and purpose of section 64(1)(b) require that a specific time for the commencement of the proposed strike be set out in the written notice."

[24] Subsequently, the Labour Appeal Court reiterated that courts should not employ a technical approach in determining non-compliance with section 64(1)(b).[25] The approach has since been expanded beyond the time provision,[26] to establish generally, as did the

[25] *Fidelity Guards Holdings (Pty) Ltd v PTWU and Others* [1997] 9 BLLR 1125 (LAC) at 1134C. See also *SA Airways (Pty) Ltd v SATAWU* (2010) 3 BLLR 321 (LC) at para 22.

[26] In *Transnet Ltd v SATAWU and Another* [2011] 11 BLLR 1123 (LC) the underlying ratio in *Ceramic Industries Ltd* was used to determine the meaning of section 64(1)(b) in the context of a strike notice that did not clearly identify the location of the intended strike.

judgment of the Supreme Court of Appeal, that the strike notice is more than a mere trigger for the 48-hour window period that precedes the commencement of a strike, but rather a mechanism meant to enable an employer to prepare properly for the impending power play.

[25] This view seems harmonious with the description of the notice's purpose advanced by authors Helen Seady and Clive Thompson,[27] who explain it as follows:

> "The purpose of the [strike] notice would seem to be four-fold:
>
> - settlement brinksmanship. 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."

The Supreme Court of Appeal accepted this description and correctly added another purpose to the list – the protection of the striking employees whose conduct is rendered lawful by a proper strike notice.

[27] Helen Seady and Clive Thompson in their chapter "Strikes and Lockouts" (in Thompson and Benjamin *South African Labour Law* (loose-leaf) Vol 1 AA1-314 (Juta)).

[26] The wording of section 64(1)(b) is clear enough about what the strike notice should contain. But the provisions say nothing about who must issue the notice of the commencement of the strike and who it must cover. According to the applicants, this reinforces their literal interpretation of the provisions that once a notice has been issued it is not necessary for every striking employee to have given it to strike lawfully. Who issues the notice is therefore not important and who is covered need not be specified.

[27] I find difficulty with this proposition. To my mind, the absence of an identified subject in this regard creates ambiguity that cannot be cured by a literal approach to the wording of the section. And, in my view, the purpose of the section and the Act's primary objects negate the applicants' contentions. As the Supreme Court of Appeal found, if a notice gives an employer no indication of which of its employees might strike, it is nigh impossible to conceive how the employer will prepare properly for the impending power play. How will it make an informed decision as to whether or not to yield to the employees' demands? And, if it resists, how will it take proper steps to protect its business, the employees and the public and engage meaningfully in pre-strike regulatory discussions regarding issues such as picketing rules?

[28] In support of the interpretation the applicants ascribed to section 64(1)(b), namely that the notice has no use other than to inform the employer that the strike is going ahead, their counsel postulated problems that could arise for non-unionised employees, in

connection with the notice's validity, if a literal approach is not applied. These included a difficult employer demanding proof of authorisation and the identity of those represented from an agent issuing a strike notice on the employees' behalf, which could spawn its own complications, and the potential difficulties with which illiterate employees, unable to read and write, would have to contend to comply with the notice requirement. It was argued that these possible hurdles would render the lawfulness of a strike uncertain. This, in addition to arming employers with the certainty that would flow from knowing the extent of a strike, would erode the employees' bargaining position and make it difficult to exercise the right to strike.

[29] This argument is quite seductive at first blush. This is particularly so having regard to the importance of the right to strike as a critical bargaining weapon used by employees in the exercise of collective power against employers who enjoy greater social and economic power[28] and the likely vulnerability of non-unionised employees in the power play. But the spectre of debilitating problems may be more apparent than real. Problems need not arise on a proper, non-technical and sensible reading of the relevant words, taking into account the primary objects and overall purpose of the Act which, incidentally, seeks to protect and balance the interests of both employees and employers.[29]

[28] See for example *South African Police Service v Police and Prisons Civil Rights Union and Another* [2011] ZACC 21; 2011 (6) SA 1 (CC); 2011 (9) BCLR 992 (CC) at para 19 and *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 66.

[29] *NEHAWU v UCT* above n 10 at paras 39 and 40.

[30] The Supreme Court of Appeal found that chaos might result should the notice not be required from every employee intending to strike. To illustrate this point, the Court used one of a number of examples postulated in the Labour Appeal Court dissent. The example assumes an employer with 10 000 employees at various sites across the country. Two non-unionised employees stationed in a small town are dissatisfied with their particular work conditions. The majority union at the workplace has no interest in their cause. They refer a dispute to the CCMA which subsequently issues a certificate of non-resolution. One of them issues a notice that they both intend to strike. The employer does not consider the threat sufficiently serious to warrant yielding to their demands and implements minimal measures to deal with their absence. On the day of the strike, most of the workforce across the country participates in the strike in support of the two employees. Had the employer known that the majority of its employees would strike it would have acceded to the demands of the two employees or taken contingency measures to prevent the chaos which results in the workplace.

[31] The applicants dismissed this example as fanciful. It was argued further that strikes are, in any event, inherently disruptive and that uncertainty as to the extent of a strike is part of the strikers' arsenal in the power play and does not necessarily result in disorderly collective bargaining. Even if all employees gave notice, so continued the contention, the employer still would not know who would strike with any certainty. It

would base its contingency preparations on its knowledge of the history and the nature of the dispute, the failed negotiations and its interaction with the workforce.

[32] Despite the applicants' contentions, I find the example plausible and instructive. In my view, it starkly shows the absurdity that may result from the interpretation the applicants advance; an interpretation that renders lawful even the unheralded participation in a strike by a workforce where only two persons, acting solely in their own interests, without any mandate from their co-employees, have issued a strike notice. It shows clearly the disorder that may result where the employer has no idea who of its employees may strike. It does not help to argue that the employer invariably relies on the history of dealings between the parties to determine who may potentially strike, as this may not be as useful a gauge as was contended by the applicants. The number of employees willing to carry on with the dispute after a failed conciliation may well change for any number of reasons, including simply balking at the prospect once faced with the stark reality of a strike.

[33] It is so that industrial action is, by its very nature, disruptive. However, although strikes are generally intended to impose a punitive cost on an employer in order to force its hand and achieve a desired goal, the striking employees themselves and the public too suffer the brunt of the disruption. The volatility of industrial action must, therefore, rank highly among the issues that the Act's primary objects, of promoting orderly collective bargaining and effective resolution of labour disputes, seek to address. It is as well to

remember the Act's purposes, amongst others, to achieve peaceful labour relations in an orderly, democratic workplace and a thriving economy and that the right to strike is also an extension of the collective bargaining process. An interpretation that results in chaos and disturbs the desired balance of labour relations that is fair to both employees and employers is untenable.

[34] Furthermore, the applicants' stance overlooks the inherent character of the right to strike. The fact that it is effectively exercised collectively does not change its true nature. It remains an individual right exercised by individual choice as is evident from the wording of both the Constitution and the Act. To have any worth, it must be connected to the person who intends to exercise it. It must follow that notice of that intention, which, significantly, protects the employee as well, must be given by or on behalf of all those intending to exercise the right. And on that score, non-unionised employees have relatively simple options available to them which make it unnecessary that each employee must individually issue a separate notice. They may compile a record of their particulars or seek inclusion in the notice of the trade union if there is one at their workplace. What is ultimately required is a notice that makes it possible for the employer to reasonably identify the employees that may strike. And whilst this requirement may well place a burden on the exercise of the right to strike, the constitutionality of the provisions is not in the balance and it is therefore unnecessary to resolve the question.

[35] I remain unconvinced that the applicants' construction of section 64(1)(b), which as I have mentioned provides protection for the employees as well, gives employers an unreasonable upper hand and weakens the employees' bargaining position in industrial action. It is necessary in this regard to consider the provisions of section 64(1)(c) which set out the employers' corresponding recourse to lock-out. The section is worded slightly differently to section 64(1)(b) and seems to draw a distinction between unionised and non-unionised employees. It requires "at least 48 hours' notice of the commencement of the lock-out, in writing . . . to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees".

[36] As I understood the applicants' counsel, a lock-out notice need be given only to a trade union in the workplace, to the exclusion of non-unionised employees if there are any. Such an interpretation is clearly untenable. Similarly unacceptable, as in the case of a strike notice, would be any possibility that a group of employers involved in a dispute could rely on a notice issued only by one of them to lawfully lock-out their employees. By parity of reasoning, the recourse to lock-out must, necessarily, be approached in the same manner as its counterpart. In that case, the provisions must mean that notice is given to a trade union where there is one and separately to non-unionised employees as well. Then the parties' respective positions would be evenly balanced. But, perhaps, this seeming difference should not matter because the focus of the enquiry, in any event, concerns who must give notice, not who must receive it and there is no difficulty in that regard.

[37] The applicants' attempt to rely on the legal position relating to section 64(1)(a),[30] that it is not necessary for every employee who intends to strike to be party to the conciliation referral and that this reasoning should equally apply to the giving of the notice, cannot succeed. The two subsections serve different purposes in different scenarios. Subsection (1)(a) allows the parties room to negotiate a settlement of their dispute through conciliation before the employees exercise their right to strike, whereas subsection 1(b) requires a warning to the employer of an imminent strike in the event that conciliation fails. As I see it, it would make no practical sense to require employees who were affected by an issue in dispute to undertake the same process in respect of the same dispute when conciliation had already failed. In any event, "issue in dispute" in relation to a strike or a lock-out is defined in the Act – it means "the demand, the grievance, or the dispute that forms the subject matter of the strike or lock-out" – whereas the definition of strike is couched in wide, non-specific terms.[31] Therefore, the fact that anyone may legitimately refer the issue in dispute to conciliation does not mean that, by

[30] Section 64(1)(a) of the Act sets out one of the preconditions for the exercise of the right to strike and provides that every employee has the right to strike if—

> "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".

[31] Section 213 defines "strike" as follows:

> "'strike' means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory". (Emphasis omitted.)

the same token, anyone may issue a strike notice that covers all employees who may wish to strike.

Conclusion

[38] It is ultimately essential to determine who a strike notice covers once issued and this can be done only with reference to the overriding purpose of the Act. The provisions of section 64(1)(b) would indeed be an empty husk with no bearing at all to the objects and purposes of the Act if the notice it requires were of the technical, formal nature contended for by the applicants. There is no reason to interfere with the decision of the Supreme Court of Appeal. The dismissed strikers' participation in the strike was unlawful and their dismissal was not automatically unfair. The appeal must accordingly fail.

Costs

[39] The parties' counsel agreed that costs should follow the result. I find this approach sensible especially in view of the fact that Equity is in final liquidation and the respondents' legal representatives have been acting on a contingent basis.

Order

[40] In the result, I would have granted leave but dismissed the appeal with costs, including the costs of two counsel.

YACOOB ADCJ, FRONEMAN AND NKABINDE JJ (Cameron and Van der Westhuizen JJ concurring):

Introduction

[41] This case concerns the proper interpretation of section 64(1)(b) of the Labour Relations Act[32] (Act). The section provides that in the case of a proposed strike "at least 48 hours' notice [in writing] of the commencement of the strike" must be given to the employer.[33]

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[32] 66 of 1995.

[33] Section 64 provides, in relevant part:

> "**64 Right to strike and recourse to lock-out**
>
> (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*; or
>
> *(c)* in the case of a proposed *lock-out*, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any *trade union* that is a party to the *dispute*, or, if there is no such *trade union*, to the *employees*, unless 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
>
> *(d)* in the case of a proposed *strike* or *lock-out* where the State is the employer, at least seven days' notice of the commencement of the *strike* or *lock-out* has been given to the parties contemplated in paragraphs *(b)* and *(c)*." (Emphasis in original.)

[42] The Supreme Court of Appeal construed this provision as requiring every employee who intends to embark on a strike to notify the employer of that intention personally, or through a representative, for the strike action to be protected. In her judgment Maya AJ comes to the conclusion that it is essential to determine who a strike notice covers and that there is no reason to interfere with the decision of the Supreme Court of Appeal.[34] We disagree.

[43] The right to strike is protected as a fundamental right in the Constitution without any express limitation.[35] Constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them[36] and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least restrictive of the right if the text is reasonably capable of bearing that meaning.[37] The procedural pre-conditions and substantive limitations[38] of the right to strike in the Act contain no express requirement that every employee who intends to participate in a

[34] Above at [38].

[35] Section 23(2)(c) of the Constitution provides that "[e]very worker has the right to strike."

[36] *South African Police Service v Police and Prisons Civil Rights Union and Another* [2011] ZACC 21; 2011 (6) SA 1 (CC); 2011 (9) BCLR 992 (CC) (*Popcru*) at paras 29-30; *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* [2002] ZACC 30; 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC); [2003] 2 BLLR 103 (CC) (*Bader Bop*) at paras 13 and 67; and *National Education Health & Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 39.

[37] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at paras 22-3. See also *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) (*Wary Holdings*) at paras 46-7 and *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 85.

[38] Compare *CWIU v Plascon Decorative (Inland) (Pty) Ltd* [1998] 12 BLLR 1191 (LAC) at para 21.

protected strike must personally or through a representative give notice of the commencement of the intended strike, nor that the notice must indicate who will take part in the strike.

[44] In our view the factual context of this case, the fundamental importance of the right to strike, the general purpose of the Act, the specific purpose of section 64(1)(b) and the lack of any express provision requiring more than mere notice of the time when a strike will commence, all weigh against reading implied requirements into section 64(1)(b). We are thus unable to agree with the reasoning and conclusion that the second to sixty-fourth applicants (dismissed strikers) were required to give strike notices in addition to that given by the first applicant (union) before joining in the strike, or that the strike notice had to indicate the number of employees who were going to participate in the strike.

[45] We agree that the application raises a constitutional issue and that leave to appeal should be granted. The appeal should, however, succeed.

Factual context and its significance

[46] In her judgment Maya AJ has set out the facts that are common cause and we do not repeat them here. But there are other facts, also common cause, that have a significant role to play as contextual background for the determination of the matter.

[47] It is common cause that the union and Equity Aviation Services (Pty) Ltd (Equity Aviation) entered into a recognition agreement in terms of which the union was the recognised bargaining agent of all the workers employed by Equity Aviation. The union and Equity Aviation also entered into an agency shop agreement, the effect of which was that all employees who were not union members had agency fees deducted from their wages every month, equal to the union membership fees, and which were paid to the union.

[48] The breakdown in negotiations that led to the referral of the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) concerned wages.

[49] The recognition agreement meant that for the purposes of the wage negotiations the union represented not only its own members but also the dismissed strikers. Equity Aviation knew this. The Act recognises collective agreements of this kind. A collective agreement also binds employees who are not members of the union if they are identified in the agreement, if it expressly binds them and if the union has majority support in the workplace.[39]

[39] Section 23(1)(d) of the Act provides:

> "A collective agreement binds *employees* who are not members of the registered *trade union* or *trade unions* party to the agreement if—
>
> (i) the employees are identified in the agreement;
>
> (ii) the agreement expressly binds the employees; and
>
> (iii) the *trade union* or those *trade unions* have as their members the majority of the *employees* employed by the employer in the *workplace*."

[50] The consequence of this is that the dismissed strikers and other employees were part of the collective bargaining process, through the union, right from the outset. All these employees themselves had no right to bargain in respect of their wages with Equity Aviation. Accordingly the issue in dispute that was referred to the CCMA concerned not only union employees, but also them. It follows that had the initial negotiations or CCMA conciliation resulted in a wage agreement, the agreement would also have been binding on them. It is common cause, by now,[40] that the union's referral of the dispute for conciliation was sufficient for the purposes of section 64(1)(a) and that the dismissed strikers did not need to refer it again before resorting to strike action.

[51] It is within this context that the strike notice issued on the union's letterhead on 15 December 2003 must be read. It was a notice that followed upon a process of collective bargaining where the union represented not only its own members but also minority union and non-unionised members in the same wage dispute. The strike notice merely stated that:

> "We intend to embark on strike action on 18 December 2003 at 08H00. Please confirm that we will meet to discuss a Picketing Agreement on the 17 December 2003."

Equity Aviation could, in this context, hardly have been under the impression that the notice had been sent only on behalf of the union's members and nobody else. Be that as

[40] The employer only conceded this before the hearing in the Labour Appeal Court.

it may, we proceed to interpret the provision to determine whether the law required the notice to spell out anything more.

Interpretative approach

[52] As mentioned earlier,[41] the right to strike is protected in the Constitution as a fundamental right without express limitation. Also, constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least intrusive of the right, if the text is reasonably capable of bearing that meaning. These are general interpretative principles that are also applicable to the interpretation of provisions of the Act,[42] as explicitly affirmed in section 1(a) of the Act.[43]

[53] In *Popcru*[44] this approach was formulated as follows:

> "Section 39(2) of the Constitution enjoins every court, tribunal or forum, when interpreting any legislation, to 'promote the spirit, purport and objects of the Bill of

[41] Above at [43].

[42] See cases referred to in n 36 above.

[43] Section 1(a) provides:

> "The purpose of *this Act* is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of *this Act*, which are to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution" (footnote omitted).

"[T]he Constitution" referred to is the Interim Constitution, which was repealed by the Constitution. Therefore, although the Act refers to section 27 of the Interim Constitution, for the purposes of interpretation of the Act, that should be read to refer to section 23 of the Constitution. See *Bader Bop* above n 36 at 19, fn 20.

[44] Above n 36.

> Rights.' The interpretive process in conformity with the Constitution is limited to what the texts of the provisions in question are reasonably capable of meaning. . . . In order to ascertain the meaning of essential service [in the Act], regard must be had to the purpose of the legislation and the context in which the phrase appears. An important purpose of the LRA is to give effect to the right to strike entrenched in s 23(2)(*c*) of the Constitution. The interpretative process must give effect to this purpose within the other purposes of the LRA as set out in s 1(*a*). The provisions in question must thus not be construed in isolation, but in the context of the other provisions in the LRA and the SAPS Act. For this reason, a restrictive interpretation of essential service must, if possible, be adopted so as to avoid impermissibly limiting the right to strike. Were legislation to define essential service too broadly, this would impermissibly limit the right to strike."[45] (Footnotes omitted.)

[54] The point of departure in interpreting section 64(1) is that we should not restrict[46] the right to strike more than is expressly required by the language of the provision, unless the purposes of the Act and the section on "a proper interpretation of the statute . . . imports them."[47] The relevance of a restrictive approach is to raise a cautionary flag against restricting the right more than is expressly provided for. Intrusion into the right should only be as much as is necessary to achieve the purpose of the provision and this requires sensitivity to the constraints of the language used.

[55] With this in mind, the importance of the constitutionally protected right to strike, the purpose of section 64(1) and its language must be examined.

[45] Id at paras 29-30.

[46] Whether the restriction amounts to a limitation of the right or not: see [81] below.

[47] Above n 38 at para 21.

Right to strike

[56] In the *First Certification case*,[48] this Court stated that:

> "A related argument was that the principle of equality requires that, if the right to strike is included in the NT, so should the right to lock out be included. This argument is based on the proposition that the right of employers to lock out is the necessary equivalent of the right of workers to strike and that therefore, in order to treat workers and employers equally, both should be recognised in the NT. That proposition cannot be accepted. Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lockout). The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out. The argument that it is necessary in order to maintain equality to entrench the right to lock out once the right to strike has been included, cannot be sustained, because the right to strike and the right to lock out are not always and *necessarily equivalent*." (Emphasis added and footnote omitted.)

[57] It is thus important to recognise that the right to strike protected in the Constitution must be interpreted in the general context that it is a right that is based on the recognition of disparities in the social and economic power held by employers and employees.

[48] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*First Certification case*) at para 66.

[58] But its importance does not only lie in that. It is also an aspect of associational freedom, as recognised in International Labour Organisation (ILO) jurisprudence and by this Court in *Bader Bop,*[49] and may reinforce other social and political rights as well.[50] It is significantly more than merely a means to an end.

[59] Another feature of the right to strike is that it is an integral part of the collective bargaining process. As noted in *Bader Bop*, the committees engaged with the supervision of the ILO Conventions have asserted that the right to strike is essential to collective bargaining.[51] This was also recognised in the *First Certification case*.[52]

[60] The regulatory scheme for the exercise of the right to strike under the Act also places it squarely within the context of collective bargaining. Section 213 of the Act defines a strike as the "partial or complete *concerted* refusal to work . . . by *persons*"[53] (emphasis added). This means that a single worker's stoppage of work cannot amount to

[49] *Bader Bop* above n 36 at para 34. Compare also the Universal Declaration of Human Rights, G.A. Res. 217A(III), UN. Doc. A/810 (1948). It guarantees every person the right "to freedom of . . . association" (article 20(1)) and "to form and join trade unions for the protection of [their] interests" (article 23(4)).

[50] Compare Novitz *International and European Protection of the Right to Strike – A Comparative Study of Standards Set by the International Labour Organization, the Council of Europe and the European Union* (Oxford University Press, Oxford 2003) at 49-73.

[51] *Bader Bop* above n 36 at paras 32 and 34.

[52] Above at [56] n 48.

[53] The definition reads as follows:

> "'**strike**' means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a *dispute* in respect of any matter of mutual interest between employer and *employee*, and every reference to 'work' in this definition includes overtime work, whether it is voluntary or compulsory".

a strike under the Act.[54] In *Bader Bop* the right to strike was described as a "component of a successful collective bargaining system."[55]

[61] In summary then, the right to strike must be seen in the context of a right protected in order to redress the inequality in social and economic power in employer/employee relations. It also has associational aspects to it which enhance and reinforce other social and political rights in the Constitution, particularly freedom of association. It is an integral part of collective bargaining and can be exercised only collectively, not individually.

Language

[62] It bears repeating that section 64(1)(b) of the Act contains only one express requirement as far as the content of the notice is concerned, namely, that it must give "at least 48 hours' notice of the commencement of the strike".

[63] Strikes and lock-outs are dealt with in Chapter IV of the Act. The scheme provided for in this chapter was succinctly summarised by the Labour Appeal Court in *CWIU*:[56]

[54] Compare *Schoeman & Another v Samsung Electronics SA (Pty) Ltd* (1997) 18 ILJ 1098 (LC).

[55] Above n 36 at para 13.

[56] Above n 38 at para 17.

> "Strikes and lock-outs are regulated by Chapter IV (sections 64 to 77) of the LRA. Section 64(1) provides in general terms that 'every employee has the right to strike and every employer has the right to lock-out', subject to certain conditions. These are set out in sub-paragraphs (a) to (d), read with subsections (2) and (3). They comprise an attempt at conciliation in regard to 'the issue in dispute' (sub-paragraph (a)), and notice (sub-paragraphs (b), (c) and (d)). Section 65 is headed 'Limitations on right to strike or recourse to lock-out'. It provides that 'no person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or lock-out' if (in summary terms) a collective agreement prohibits it, the issue in dispute is arbitrable or justiciable or (subject to exceptions) the person is engaged in an essential or a maintenance service. Secondary strikes are dealt with in section 66. In terms of section 66(1), in section 66, 'secondary strike' 'means a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer, but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees . . . have a material interest in that demand'. Section 66(2) prohibits participation in a secondary strike unless the strike that is to be supported complies with the provisions of sections 64 and 65 (sub-paragraph (a)); notice has been given (sub-paragraph (b)) and the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer (sub-paragraph (c))."

[64] The regulatory scheme of the Act and the provisions of section 64 envisage only one strike in respect of one "issue in dispute" or "dispute". The definite article, "the", before the words "issue in dispute" and "dispute" in section 64(1)(a) and before the second use of the word "strike" in section 64(1)(b) makes this clear. "[T]he strike" in section 64(1)(b) can only be in relation to "the [unresolved] dispute" of section 64(1)(a). And if there can only be one strike in relation to one dispute, there seems to be little in language or logic to suggest that more than one notice in relation to the single strike is necessary.

[65] All this suggests that nothing more should be read into section 64(1)(b) than what is expressly there. And the general and specific purposes of the Act and the section are well served by this minimal reading.

Purpose

[66] The Supreme Court of Appeal held that the requirement of notice in section 64(1)(b) was not a limitation of the right to strike.[57]

[67] In *Bader Bop*[58] this Court was called upon to decide whether a minority union and its members were entitled to strike in support of organisational demands expressly granted to majority unions in the Act, but not expressly to minority unions.[59] In the course of her majority judgment O'Regan J stated:

> "Prohibiting the right to strike in relation to a demand that itself relates to a fundamental right otherwise not protected as a matter of right in the legislation would constitute a limitation of the right to strike in s 23."[60]

[68] In *CWIU*, the issue before the Labour Appeal Court was whether the right to strike in the Act was limited only to those employees who are directly affected by the strike

[57] *Equity Aviation Services (Pty) Ltd v South African Transport and Allied Workers Union and Others* 2012 (2) SA 177 (SCA) at para 26.

[58] Above n 36.

[59] Id at paras 1 and 25.

[60] Id at para 35.

demand, again a limitation not expressed in the Act. Although not strictly part of the ratio of that decision, the procedural pre-conditions contained in section 64 of the Act were correctly regarded as limitations of the right to strike:[61]

> "*It is plain that the right to strike, conferred without express limitation in the Constitution, is subjected to a number of significant, expressly stated, limitations in the LRA. The statute not only sets formal preconditions for the exercise of the right to strike, but imposes material limitations on who may strike.* Strikers or those acting in contemplation or furtherance of a strike whose conduct falls outside the statute's limitations are deprived of the protections section 67 provides, and are accordingly vulnerable (if employees) to dismissal and (in any event) to suit for delict or breach of contract. The constitutional validity of none of these express limitations is in issue before us. The issue is whether the right to strike as embodied in the statute contains the limitation for which Plascon originally contended, namely that only those employees of an employer who are directly affected by the strike demand may embark on a protected strike. *That limitation is not expressed in the statute.* The question is whether a proper interpretation of the provisions of the statute, against the background sketched above, imports them."[62] (Emphasis added.)

[69] This Court, in *New National Party*,[63] held that where legislative provisions facilitate the exercise of a constitutional right it cannot be said that they are limitations of that right that need justification under section 36 of the Constitution. Workers, however, can go on strike in the sense of withholding work without needing section 64 to enable them to do it.

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[61] Above n 38.

[62] Id at para 21.

[63] *New National Party v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at para 123.

[70] From this it can be seen that procedural pre-conditions for the exercise of a constitutional right place some limit on that right.[64] This limitation would then have to be justified under section 36 of the Constitution. One of the considerations in the justification analysis is whether less restrictive means could achieve the same purpose.[65]

[71] But even if the matter is viewed from the perspective that the procedural pre-conditions do not amount to limitations that need constitutional justification, the result will not be any different. It is also an accepted interpretative principle in our constitutional jurisprudence that if there is more than one interpretation of a statutory provision that is constitutionally compliant, the interpretation that best conforms with the spirit, purport and objects of the Bill of Rights should be preferred.[66]

[72] Approaching the matter from that perspective, one then needs to compare an interpretation of section 64(1)(b), which does not seek to extend the requirements of the content of the notice beyond the simple and express requirement of when the strike will start, to an interpretation that requires fuller disclosure. If both are constitutionally compliant, one would then have to prefer the interpretation that conforms better with the spirit, purport and objects of the Bill of Rights.

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[64] See *South African Transport and Allied Workers Union and Another v Garvas and Others* [2012] ZACC 13 at para 69.

[65] Section 36(1)(e).

[66] *Wary Holdings* above n 37 at paras 46 and 47 and *Hyundai* above n 37 at paras 21-6.

[73] It has rightly not been suggested that interpreting section 64(1)(b) as requiring only one notice rather than separate notices by or on behalf of each employee intending to strike, is unconstitutional. We assume, for present purposes, that the interpretation requiring more information than that is also constitutionally permissible. Which interpretation then, sits better with the spirit, purport and objects of the Bill of Rights?

[74] In our view there really is no contest. Interpreting the section to mean what it expressly says is less intrusive of the right to strike; creates greater certainty than an interpretation that requires more information in the notice; serves the purpose of the Act – specifically that of orderly collective bargaining – better; and gives proper expression to the underlying rationale of the right to strike, namely, the balancing of social and economic power.

[75] In *CWIU*[67] the purpose of the procedural requirements in section 64(1)(a) were dealt with in the following manner:

> "The arguments . . . proceeded, also in my view correctly, on the premise that a proper appreciation of the statutory provisions concerning strikes depends on their purpose. Mr van der Riet contended that the purpose of section 64(1)'s procedural requirements is to compel employees to explore the possible resolution of their dispute through negotiations before exercising their right to strike. The concept of a protected strike presupposes such negotiations. Once that purpose has been fulfilled, no further statutory object would be served by limiting the right to strike only to employees directly affected by the demand. Instead, the restriction envisaged would place a substantive limitation on

[67] Above n 38 at paras 27-8.

the right of non-bargaining unit union members to strike for which the provisions of the statute offer no explicit or implicit support. I agree with this submission.

The Constitutional Court has itself emphasised the general importance of the right to strike:

> 'Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers enjoy collective power primarily through the mechanism of strike action.'

The Court went [on] to point out that the importance of the right to strike for workers has led to its being entrenched far more frequently as a fundamental right in constitutions than is the right to lock out and that the two rights 'are not always and necessarily equivalent' (*In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) at 1284–1285 (paragraph 66)). This is of course not to say that striking should be encouraged or unprocedural strikes condoned: but only that there is no justification for importing into the LRA, *without any visible textual support, limitations on the right to strike which are additional to those the legislature has chosen clearly to express*." (Emphasis added.)

We agree.

[76] The specific purpose of the notice requirement under section 64(1)(b) was dealt with by the Labour Appeal Court in *Ceramic Industries*:[68]

[68] *Ceramic Industries Ltd t/a Betta Sanitaryware and Another v NCBAWU and Others* [1997] 6 BLLR 697 (LAC) (*Ceramic Industries*).

> "In summary: The provisions of section 64(1)(b) need to be interpreted and applied in a manner which gives best effect to the primary objects of the Act and its own specific purpose. *That needs to be done within the constraints of the language used in the section.* One of the primary objects of the Act is to promote orderly collective bargaining. Section 64(1)(b) gives expression to this object by requiring written notice of the commencement of the proposed strike. The section's specific purpose is to give an employer advance warning of the proposed strike so that an employer may prepare for the power play that will follow. That specific purpose is defeated if the employer is not informed in the written notice in exact terms when the proposed strike will commence. In the present case the notice is defective for that reason. The provisions of section 64(1)(b) were not complied with."[69] (Emphasis added.)

[77] Both these cases emphasise the importance of founding the purpose of restrictions on the right to strike in the express language of the Act. Their correctness was not challenged before us. Instead, certain parts of *Ceramic Industries* were relied upon for a purposive argument that takes one beyond the express language of the Act. In our view this reliance on an extended purpose is both unnecessary and misplaced.

[78] It is unnecessary because the purpose of, amongst others, labour peace, through the fulfilment of one of the primary objects of the Act, namely orderly collective bargaining,[70] can be attained without stretching the language of the Act or reading implied limitations of the right to strike into its provisions.

[69] Id at 702F-I.
[70] Section 1.

[79] Also, the purposive argument, partially drawing on *Ceramic Industries*,[71] is misplaced.

[80] First, it ignores the fact that the actual decision in *Ceramic Industries* was anchored in the express wording of section 64(1)(b).[72] The employer's argument in the present case is not. What was at issue in *Ceramic Industries* was whether the explicit requirement in section 64(1)(b), that notice of the commencement of the strike had to be given, served a proper purpose under the Act.[73] It was found that this express requirement fulfilled the purposes of the Act.[74]

[81] Second, the requirement that the notice must contain information beyond the time of commencement of the strike, undoubtedly restricts the right to strike more than an interpretation requiring only notice of the time of commencement of the strike. And it leads to greater uncertainty than the latter interpretation does.

[82] Where does the purpose of full disclosure of information lead? Does it require stating the location of the strike? Or for how long it will last? Or more than one notice where, as here, the dismissed strikers did not belong to the majority union? Or whether

[71] The purported purposes of the strike notice are elaborated on by Helen Seady and Clive Thompson in their chapter "Strikes and Lockouts" (in Thompson and Benjamin *South African Labour Law* (loose-leaf) Vol 1 AA1-314), which is also relied upon in the judgment of the Supreme Court of Appeal (above n 57) at para 15.

[72] The italicised portion in the passage quoted in [76] above clearly shows this.

[73] *Ceramic Industries*, above n 68, at 699 and 701-2.

[74] Id at 702.

there may be more than one strike at different times and places in relation to the same dispute referred to conciliation? The difficulty, as Schutz JA observed in *Poswa*—[75]

> "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".[76]

[83] The contrast with the minimal express requirements of section 64(1)(b) is stark. All that is expressly required in terms of section 64(1)(b) is a single notice stating when the strike will start.

[84] That requiring more than this will lead to uncertainty and a further chilling effect on workers' reliance on their right to strike is illustrated by the facts of this case. The employer initially contested the dismissed strikers' right to participate in the strike on the basis that they were not included in the dispute referred for conciliation under section 64(1)(a). That stance has now been abandoned in favour of the present ground based on the ambit of the notice. It requires little imagination to see that the opportunity for objection to the validity of strike notices will be greatly increased if fuller information is required in the notice on the basis that it allows employers to prepare for the power play of the strike.

[75] *Poswa v Member of the Executive Council Responsible for Economic Affairs Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA).

[76] Id at para 9.

[85] We have already seen[77] that the right to strike, rooted in collective bargaining, is premised on the need to introduce greater balance in the relations between employers and employees, where employers have the greater social and economic power. The fact that the Act, in section 64, expressly requires minimal procedural pre-conditions for the statutorily protected exercise of that right is consistent with this. It does not ask for the exclusion of uncertainty in strike action, except for certainty when the strike will start.

[86] To require more information than the time of its commencement in the strike notice from employees, in order to strengthen the position of the employer, would run counter to the underlying purpose of the right to strike in our Constitution – to level the playing fields of economic and social power already generally tilted in favour of employers.

[87] The applicants accepted that, in relation to lock-outs, the express provisions of section 64(1)(c)[78] of the Act require notice only to a trade union, if there is one at the workplace, and not to non-unionised employees as well. To hold otherwise would, in relation to section 64(1)(c), mean that the express wording would have to be disregarded. There is no need to do that either to fulfil the purposes of the Act.

[77] In [56] above, quoting para 66 of the *First Certification case*.

[78] See above n 33.

Existing case law

[88] The argument that it is crucial for the employer to glean from the strike notice how many employees may be involved in the strike is discounted by the decision in *CWIU*,[79] where the Labour Appeal Court held that a single strike notice by a union, in respect of a dispute that affected only certain of its members, was nevertheless sufficient to allow other members of the union, not so affected, to join the strike. The Labour Appeal Court again confirmed this in *Early Bird Farm*.[80] We agree with these decisions.

[89] That section 64(1)(b) does not go beyond the requirement of giving notice of commencement of the strike has been accepted and followed in many Labour Court cases, often in a generous manner. The notice need not specify the precise time of the day when the strike will start.[81] Employees are not obliged to commence striking at the time indicated in the notice.[82] If employees who have already commenced striking temporarily suspend the strike, they need not issue a fresh notice to strike or refer the dispute for conciliation again.[83] Where strikers have given insufficient time in their original notice, but cured that in a later notice, the time given in the two notices is taken

[79] Above n 38 at paras 21, 24 and 27.

[80] *Early Bird Farm (Pty) Ltd v Food and Allied Workers Union and Others* (2004) 25 ILJ 2135 (LAC) (*Early Bird Farm*) at para 48.

[81] *County Fair Foods (A Division of Astral Operations Ltd) v Hotel Liquor Catering Commercial and Allied Workers Union and Others* (2006) 27 ILJ 348 (LC).

[82] *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v National Union of Metalworkers of SA and Others* (1999) 20 ILJ 677 (LC) and *Public Servants Association of SA v Minister of Justice and Constitutional Development and Others* (2001) 22 ILJ 2303 (LC).

[83] *Transportation Motor Spares v National Union of Metalworkers of SA and Others* (1999) 20 ILJ 690 (LC) (*Transportation*).

cumulatively.[84] So-called "grasshopper" strikes – brief repetitive work stoppages – do not require fresh notices.[85]

[90] Provided that the strike notice sets out the issue over which the employees will go on strike with reasonable clarity,[86] these cases show that orderly collective bargaining and the right to strike, in its proper sense as a counter-balance to the greater social and economic power of employers, has been considered to be well served by the acceptance of a single strike notice.[87]

[91] It has not been suggested, nor could it be, that the construction preferred in this judgment is anything but reasonable.

Conclusion

[92] In the context of this case this means that the union, which represented the dismissed strikers in the wage negotiations and in the referral for attempted conciliation under section 64(1)(a) before embarking on strike action, was competent also to give the single notice required under section 64(1)(b). Our concluding observation is this: to hold otherwise would place a greater restriction on the right to strike of non-unionised

[84] *SA Clothing and Textile Workers Union v Stuttafords Department Stores Ltd* (1999) 20 ILJ 2692 (LC).

[85] Compare *Afrox Limited v SA Chemical Workers Union and Others (1)* (1997) 18 ILJ 399 (LC) and *Transportation* above n 83.

[86] Grogan *Collective Labour Law* (Juta, 2010) at 169-71.

[87] The requirement has been extended beyond the time provision in the Labour Court by relying on the same wrong application of *Ceramic Industries* above n 68: see *Transnet Ltd v SA Transport & Allied Workers Union* (2011) 32 ILJ 2269 (LC).

employees and minority union employees than on majority union employees. It is these employees, much more than those who are unionised or represented by a majority union, who will feel the lash of a more onerous requirement. There is no warrant for that where they were already denied the right to bargain collectively on their own behalf in the preceding process.

Order

[93] The following order is made:

1. Leave to appeal is granted.
2. The appeal succeeds with costs, including the costs of two counsel.
3. It is declared 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 Labour Relations Act.

For the Applicants:	Advocate JG Van der Riet SC and Advocate TMG Euijen instructed by Cheadle Thompson & Haysom Inc.
For the Respondents:	Advocate JJ Gauntlett SC and Advocate GA Leslie and Advocate H Cronje instructed by Senekal Simmonds Inc.