IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT94/15

LABOUR COURT CASE NO: J837/13

LABOUR APPEAL COURT CASE NO: JA 106/13

In the matter between:

TRANSPORT AND ALLIED WORKERS UNION OF SOUTH AFRICA
(On behalf of its members) Appellant

and

PUTCO (PTY) LIMITED First Respondent

APPELLANT'S HEADS OF ARGUMENT

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INTRODUCTION

1 The real dispute between the parties is the legal question whether PUTCO was entitled to lock out members of TAWUSA when it locked out members of trade unions who had given notice to strike even if members of TAWUSA did not intend to join the strike.

2 It is common cause between the parties that this Court is seized only with this legal question and that the factual dispute between the parties as to whether members of TAWUSA were in fact on strike is to be

remitted to the Labour Court in the event where the legal question is determined in favour of the appellant.

FACTS

3 Prior to the events that gave rise to the strike action and consequent lock-out of April 2013, negotiations on wages and other collective bargaining issues had taken place at the South African Passenger Bargaining Council (SARPBAC).[1]

4 In April 2012, a collective agreement negotiated and concluded at SARPBAC addressed itself to wages and other terms and conditions of employment.[2]

5 Although TAWUSA was a member of SARPBAC at the time of conclusion of the 2012 collective agreement it did not sign the agreement.[3]

6 However, by virtue of an agreement entered into between PUTCO and TAWUSA on 30 July 2002, which agreement is still in force, it was agreed that the minimum terms and conditions of employment in the industry were to be negotiated and regulated at bargaining council level, in this context by SARPBAC.[4]

7 Further, collective agreements concluded by a majority of trade union parties to SARPBAC and a majority of employer's associations to SARPBAC, having been extended by the Minister in terms of section 32

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1 Ramela AA para 19 record pp 106
2 Ramela AA para 19 record pp 106
3 Ramela AA para 19 record pp 106
4 Ramela AA para 19 record pp 106, read with Annexure R2 record pp 155ff, viz. clause 9 at pp 169

of the Labour Relations Act 66 of 1995 (the "LRA"), bind all parties to the council and their members as well as *all* employers and employees bound law by such collective agreements.[5] The extension of the 2012 agreement came to an end on 31 July 2013.[6]

8 In August 2012 TAWUSA's membership of SARPBAC terminated at its request.[7] As a consequence, TAWUSA did not participate in the 2013 wage negotiations under the auspices of SARPBAC.[8]

9 On 13 February 2013 TAWUSA addressed a letter to SARPBAC in which it sought to have its membership in SARPBAC reinstated.[9] SARPBAC responded on 14 February 2013 by indicating that its Central Committee would consider the question of TAWUSA's membership at a meeting to be held on 17 April 2013.[10]

10 On 7 March 2013, TAWUSA addressed a further letter to SARPBAC in which it stated, *inter alia*, that SARPBAC should attend to the issues raised in its letter of 13 February 2013 as a matter of urgency to ensure that TAWUSA participates in the *"current negotiation process, taking into account that the implementation of the industry's wage terms and conditions of employment takes effect on 1st April 2013*

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5 Ramela AA para 20 record pp 106 to 107, read with Annexures 3 and 3A record pp 178 to 181
6 Ramela AA para 20 record pp 106 to 107, read with Annexure 3A record pp 181
7 Ramela AA para 21 record pp 106 to 107
8 Ramela AA para 21 record pp 106 to 107; Mankge FA para 9 record pp 8
9 This letter is not included in the record, but its contents can easily be ascertained from contemporaneous correspondence.
10 Ramela AA para 28.1 record pp 109; Mankge FA para 9 record 8; read with Annexure R5 record pp 183

11 Industry wage negotiations for 2013 at SARPBAC reached deadlock, and on 17 April 2013 SATAWU and TOWU,[11] gave notice that a protected strike would commence on 19 April 2013.[12]

12 The following day, in a letter addressed to PUTCO's IR Executive,[13] Mr Ramela, TAWUSA advised that:

12.1 *"all our members will not partake in any purported action of the alleged strike"*;

12.2 *"our members will report for duty as normal and expect [PUTCO] to ensure their safety"*; and that

12.3 TAWUSA *"intends to engage with the Employers Organization represented at SARPBAC to better the conditions of our members in the bus passenger industry"*.

13 On 19 April 2013, PUTCO gave notice to recognised trade unions with members in PUTCO's employ of its intention to lock-out all employees in the bargaining unit with effect from 09h00 on Sunday, 21 April 2013.[14] The notice was addressed to SARPBAC and TAWUSA. Non-union employees were similarly informed of the intention to lock-out all employees.[15]

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[11] Ramela AA para 17 record pp 105 to 106
[12] Ramela AA para 22 record pp 107; Mankge FA para 8 record pp 7 to 8
[13] Annexure R7 record pp 185, read with Ramela AA para 28.3 record pp 109
[14] Ramela AA para 23 record pp 107; Mankge FA para 10 record pp 8, read with Annexure B ("the lock out notice") record pp 84
[15] Ramela AA para 23 record pp 107

14 The day the lock-out notice was issued, TAWUSA, through its General Secretary, Mr Mankge, sought to inquire about the applicability of the lock-out notice to its members via telephone with one Mr Malherbe, PUTCO's Senior Executive for Corporate Services. Following their conversation, Mr Malherbe confirmed in an email to Mr Mankge that the lock-out notice was issued in response *to "a strike notice received from SARPBAC and Unions representing labour at SARPBAC".*[16]

15 TAWUSA replied via email later that same day indicating that it was *"not currently a member of [SARPBAC]"* and that *"its members are therefore not party to the dispute that gave rise to the lock out."* TAWUSA stated further that, *"in the circumstances, [TAWUSA] members are not on strike".*[17]

16 Mr Malherbe thereafter replied to Mr Mankge advising that the lock out notice compiled with the LRA, and that *"as per the SARPBAC Constitution and the SARPBAC Main Agreement which is extended to non-members no employer shall be compelled to negotiate at any other level."*[18]

17 Finally, on or about the same day, SARPBAC addressed a letter to TAWUSA confirming that its Central Committee had debated its request of February 2013, and inviting TAWUSA to apply in accordance with the SARPBAC Constitution for readmission as a member union.[19]

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[16] Ramela AA para 28.5 record pp 110; read with Annexure R8 record pp 186
[17] Annexure R8 record pp 186
[18] Ramela AA para 28.5 record pp 110, read with Annexure D record pp 86
[19] Ramela AA para 28.4 record pp 109 to 110

SUBMISSIONS

18 During the earlier stages of this case, PUTCO has proceeded from the premise that in *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another*[20] this Court held that workers who have not given a notice to strike may ride on a strike notice which was given by their colleagues who are in the same bargaining unit as the workers who have not given strike notice. It follows, the argument proceeds, that *"in the absence of specific regulation, a strike and lock-out are birds of a feather and should be treated the same where it comes to their purpose"*[21]

19 However, this Court's decisions show that whenever a right which is entrenched in the Constitution competes with another right which is not entrenched the entrenched right prevails.[22]

20 Since the right to strike is entrenched, while the right to lock out is not, the right to lock out is a significantly weaker right than the right to strike. Thus, they are not *birds of a feather when it comes to their purpose.* Snyman AJ's view is also diametrically opposed to the following *dictum* of this Court in the *First Certification Case*:[23]

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[20] [2012] 12 BLLR 1193.

[21] UTATU and Others v Autopax Passenger Service (SOC) Limited and Others Case No J1931/2013 (17 September 2013)

[22] *Japhta v Schoeman and Others* [22] 2005 (2) SA 140 CC, *Gundwana v Steko Development and Others* 2011 (3) SA 608 CC, *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 1995 (3) SA 391 CC; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 CC (The right to housing trumped the right of creditors to execute.); S *v Makwanyana* 1995 (3) SA 391 CC (the right to life overrode society's right to retribution.)

[23] Quoted at paragragraph 48 of PUTCO's heads of argument.

"A related argument was that the principle of equality requires that, if the right to strike is included in the [1996 Constitution], so should the right to lock out be included. This argument is based on the proposition that the right of employers is a 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 [1996] Constitution. That proposition cannot be accepted.[24]*"*

21 Snyman AJ's view is also diametrically opposed to the following words which appear in the *First Certification Case*:[25]

"A related argument was that the principle of equality requires that, if the right to strike is included in the [1996 Constitution], so should the right to lock out be included. This argument is based on the proposition that the right of employers is a 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 [1996] Constitution. That proposition cannot be accepted.[26]*"*

22 The dispute between the parties turns on the meaning provisions of s64(1)(c) of the LRA.[27]

23 The *"Golden Rule"* of interpretation of statues is that the ordinary meaning of words used in a statute must be followed, unless this would lead to absurdity, or is at variance with the intention of the legislature.[28]

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[24] Emphasis supplied.
[25] Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic Of the Republic of South Africa, 1996 (10) BCLR 1253 (CC) at para 66.
[26] Emphasis supplied.
[27] Labour Relations Act No 56 of 1996.
[28] *Venter v R* 1907 TS 910, 914 - 15

(Labour lawyers and jurists tend to express the inquiry into the intention of the legislature as an inquiry into the purpose of the LRA.)

24 If the meaning of words in an Act is clear, the court is not concerned with the policy of the legislature.[29]

25 In fact, where the language of a statute is plain and admits of one meaning, the task of interpretation does not arise.[30]

26 *In casu,* the relevance of the *'Golden Rule"* is that the purposive approach that PUTCO clamour for may not be invoked unless and until something in the wording of section 64(1)(c) and section 213 insofar as it pertains to the definition of a *"lock-out"* give rise to a result that is inherently at variance with the scheme of the LRA and our jurisprudence, or a *lacuna* appears that cannot be cured without second guessing the intention of the Legislature. Now, for the provisions of s64(1)(c).

27 S64 of the LRA provides:

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

(a)....

(b)...

(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

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[29] *S v Shangase* 1972 (2) SA 410 N

[30] *S v Robinson* 1975 (4) SA 438 RAD, 442 E - G

a collective agreement to be concluded in a council, in which case, notice must have been given to that council."[31]

28 The language of section 64(1) is clear and does not lead to any absurdity or ambiguity. S 64(1)(c) requires notice of a lock-out to be given:

(a) to any trade union that is a party to the dispute;

(b) if there is no trade union which is a party to the dispute, then to the employees concerned;

(c) if the issue in dispute relates to a collective agreement to be concluded in a council, notice must have been given to that council.[32]

29 The part of section 64(1)(c) which is captured in paragraph 25(a) hereof indicates that the Legislature views collective bargaining as something that involves trade unions in the main even where no bargaining council exists.

30 The part of section 64(1)(c) which is captured in paragraph 25(b) hereof indicates that the Legislature was alive to the fact that there may be instances where collective bargaining occurs in the absence of trade unions.

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[31] Emphasis Supplied.
[32] Emphasis Supplied.

31 A dispute involving workers that are envisaged in the part of section 64(1)(c) that is captured in paragraph 25(b) hereof cannot be a dispute that relates to a collective agreement that is to be concluded in a bargaining council since individual employees cannot be members of a bargaining council. Thus, 25(c) does not arise when you have 25(b) employees.

32 In dealing with the true meaning of the part of 64(1)(c) which is captured under paragraph 25(c) hereof one must accept that the paragraph 25(c) wording can only relate to instances where there are unionised workers.

33 In interpreting the latter part of section 64(1)(c) one must read *"except where"* for *"unless"*. One must then ask the question: What justifies the conclusion that the words *"notice must have been given to that council"* mean that *"notice must be given only to that council "* as PUTCO contend.

34 This requires an analysis of the structure and functioning of bargaining councils. Bargaining councils are established in terms of section 27(1) of the LRA. It provides that one or more registered trade unions and one or more employers' organisations may establish a bargaining council for a sector or an area by adopting a constitution that meets the requirements of section 30 and obtaining registration of the bargaining council in terms of section 29.

35 Section 30 prescribes the minimum requirements for a valid bargaining council constitution. Of interest to us is subparagraph 30(1)(j) which provides that the constitution of a bargaining council must provide for the procedure to be followed if a dispute arises between a registered trade union that is a party to the bargaining council, or its members or both, on the one hand, and employers who belong to a registered employers' organisation that is party to the bargaining council, on the other hand.

36 Section 31 provides that a collective agreement concluded in a bargaining council binds:

"(a) the parties to the bargaining council who are also parties to the collective agreement;

(b) each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such party and the members of such other party;

(c) the members of a registered trade union that is a party to the collective agreement and the employers who are members of the registered employers' organisation that is such a party, if the collective agreement regulates-

(i) terms and conditions of employment;

(ii) the conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers."

37 Flowing from the above, it is submitted that the requirement in section 64(1)(c) that if a lock-out concerns a dispute relating to a collective agreement that is to be concluded in a bargaining council,I notice of a lock-out must be given to the bargaining council concerned is predicated upon the facts that the bargaining council has an interest in the lock-out since it is already seized with the dispute.

38 In legislating as it did, the Legislature must have had it mind that the trade union(s) whose members are to be the subject of the envisaged lock-out is a member of, or are members of the bargaining council concerned such that notification to the bargaining council is effectively notification to the trade union(s) concerned.

39 The Legislature must also have had in mind the provisions of section 30(j) when passing the latter words of s64(1)(c). It is envisaged that, amongst others, the constitution, in compliance with section 30(j), would stipulate how such notification should be brought to the bargaining council with the view of it having transmitted to all interested parties.

40 The procedures that are prescribed by the constitution for the resolution of disputes would bind members and would also stipulate the consequences of such resolution.

41 One such consequence is that the lock-out which is envisaged by section 64(1)(c) will culminate in a collective agreement that is binding upon members of the bargaining council and those who are represented therein.

42 It follows that the Legislature could not have intended that simply on the basis that the issue in dispute relates to a collective agreement that is to be concluded in a bargaining council only the bargaining council should be notified of an impending lock-out since the bargaining council's constitution and its collective agreements are not binding on non-parties.

43 The notion that an employer can institute a lock-out without notifying a party who has received neither actual nor constructive notice of a lock-out is contrary to an essential object of the act, namely, orderly collective bargaining. It is also repugnant to the general legal convictions or culture of the land that adverse action should generally be preceded by notice to its intended object.

44 A dispute with a trade union which is not a member of a bargaining council cannot be a dispute that *"relates to a collective agreement to be concluded in a council"*, because when that dispute is resolved the resultant collective agreement will not be signed at the bargaining council.

45 It is submitted that where an employer intends to institute a lock-out against its employees who are members of a trade union which is not a member of a bargaining council, section 64(1)(c) requires the employer to give notice to any trade union that is a *"party"* to the dispute.

46 According to the Reader's Digest Oxford Complete Wordfinder *"party"* means *"a person or persons forming one side in an agreement or dispute"*.

47 It follows that s 64(1) does not authorise a lock-out against a trade union which is not a party to a dispute and its members.

48 Since TAWUSA was not party to the dispute that had arisen in SARPBAC, and since TAWUSA had not declared any dispute with PUTCO, and was not in any fashion involved in the negotiations that were taking place in SARPBAC, the lock-out that was instituted by PUTCO against TAWUSA and its members was unlawful, and was correctly interdicted by Moshoana J.

49 The definition of a lock-out cannot assist PUTCO to surmount this conclusion. This is because section 213 defines a lock-out and section 64(1)(c) stipulates the circumstances under which an employer may have recourse to a lock-out. Put differently, even if it were to be held that PUTCO's lock-out complies with the definitional elements of a lock-out, PUTCO cannot succeed because under the circumstances that prevailed, namely, that TAWUSA was not a party to any dispute with PUTCO, nor was it a party to any dispute that existed in SARPBAC, the prerequisites for a lock-out against TAWUSA were not met.

50 In terms of section 213 of the LRA *"lock out" means-*

"The exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee, whether or not the employer breaches those employees' contracts of employment in the course of or for the purpose of the exclusion."[33]

[33] Emphasis supplied.

51 Section 213 provides that *"issue in dispute"* –

"in relation to a strike or lock-out, means the demand, the grievance, or the issue in dispute that forms the subject matter of the strike or lock-out

52 This definition renders *"demand"* to be synonymous with *"issue in dispute that forms the subject matter of the strike or lock-out"*.

53 What this boils down to is that there must be a dispute between the employer and the employees before the employer may be entitled to lock-out.

54 According to the Reader's Digest Oxford Complete Wordfinder some of the meanings of *"dispute"* are *"a disagreement between management and employees, esp(ecially) one leading to industrial action"*, and *"resist"*.

55 Thus, the purpose of a lock-out must be to compel the employees concerned to agree with the employer about an issue regarding which the employer and the employees are in disagreement. This means that, as in this case, if the employees concerned do not disagree with the employer on an issue, the exclusion of the employees from the workplace is not a lock-out as defined. *A fortiori*, the lock-out is not a protected lock-out as defined in section 67(1) of the LRA.

56 Put differently, a lock-out must be functional to collective bargaining by having as its purpose the removal of a *casus belli*. Where the

employees are not resisting the employer there is no *casus belli* and a lock-out in those circumstances is a declaration of an unprovoked war. Such a lock-out is not functional to collective bargaining. It cannot, for that reason, be a protected lock-out.[34]

57 It has been held that a demand may be acceded to by conduct.[35] Thus, even if it could be held that PUTCO was entitled to lock TAWUSA members out in order to induce them to accept the employers' position at SARPBAC, TAWUSA members acceded to the demand by conduct when they tendered their services. In the premises, the lock-out was not functional to collective bargaining. It, therefore, was an unlawful lock-out, and not a protected lock-out.

58 In terms of the definition of a lock-out in section 213 of the LRA, the purpose of a lock-out must be to compel *"the"* employees to accept a demand in respect of any matter of mutual interest between employer and employee.

59 It is submitted that the effect of the use of the definite article *"the"* in conjunction with *"employees"* in the definition of *'lock-out"* is that the demand that the employer requires the employees to meet must have been made to *"the"* employees that are being locked out in order for the lock-out to fall within the ambit of the definition.

60 *In casu*, since wage negotiations were taking place at a bargaining council in which TAWUSA did not participate, no demand was made to TAWUSA and its members.

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[34] *Afrox Ltd v SACWU and Others, SACWU and Others v Afrox Ltd* [1997] 4 BLLR 382 (LC), 286D – E, *Ceramic Industries Ltd t/a Betta Sanitaryware v NCBAWU & Others* [1997] 5 BLLR 547 (LC), 552C – D.

[35] *SA Post Office Ltd v CWU and Others* [2010] 1 BLLR 84 (LC), paragraph 17 at 89A - B

61 PUTCO's argument that the purpose of the lock-out was to induce TAWUSA members to put pressure on SATAWU members to accede to employers' demands at SARPBAC must fail, because the argument is not supported by evidence,[36] nor has any such demand ever been made to TAWUSA.

62 Furthermore, a lock-out whose purpose is to induce the employees who are being locked out to put pressure on striking workers to accede to the employers' demand presupposes that the employer has no direct economic demand against the employees. The lock-out is in the nature of a secondary lock-out.

63 The Act does not authorise secondary lock-outs.

64 Even if it does, the lock-out must have a sound rationale with regard to collective bargaining. This means that it must be borne in mind that the rationale for a lock-out is that it causes financial hardship on employees by depriving them of remuneration. On the other hand, the rationale for a strike is that it causes financial hardship on an employer by withdrawing labour. When some workers report for duty while others are embarking on a strike, the strike is weakened because the employer does not suffer economically. When an employer locks out the non-striking employees he strengthens the strike.

65 The thesis that the non-striking workers would influence the striking workers to return to work is illogical as it is the refusal to join in the strike that should precipitate the calling off of the strike. All what the non-striking employees can do is to plead, and the likelihood that they

[36] AA 110: 28 - 5

will be given a merciful hearing is less than the probability that they will be mocked, especially where, as in this case, the non-striking employees are in the minority. Thus, such a lock-out is not functional to collective bargaining. Accordingly, it cannot be a protected lock-out.

66 The argument that is set out in paragraphs 61 and 62 hereof finds support in the *Clidet No 957 (Pty) Ltd v SA Municipal Workers Union & Others*[37] where the Labour Court approved the following passage in *SALGA v SAMWU:*[38]

"Whether or not a secondary strike is protected is determined by weighing up two factors – the reasonableness of the nature and extent of the secondary strike (this is an enquiry into the effect of the strike on the secondary employer and will require consideration, inter alia, of the duration and form of the strike, the number of employees involved, their conduct, the magnitude of the strike's impact on the secondary employer and the sector in which it occurs) and secondly, the effect of the secondary strike on the business of the primary employer, which is in essence an enquiry into the extent of the pressure that is placed on the primary employer."

67 In *Coca Cola Fortune (Pty) Ltd v Food & Allied Workers Union*[39] it was held[40] that where the possibility is remote that the secondary strike will have an effect on the primary employer, the secondary strike is not reasonable, and cannot, therefore, be countenanced. By way of analogy, where a lockout which is intended to put pressure on those who have declared a dispute would have little prospect of causing the

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37 (2011) 32 ILJ 1070 LC, para's 7 and 8.
38 (2007) 28 ILJ 2603 (LC), para 16.
39 (2010) 31 ILJ 1855 (LC).
40 At para 15.

strikers to capitulate it would not be protected. In the present case, it was not the case of the respondent that it locked out TAWUSA members so as to put pressure to bear on the strikers. This point was an argument that was raised in the air as an afterthought. In any event, the respondent's version is that TAWUSA were a tiny minority, and it does not suggest that TAWUSA had any prospect of pressurising the strikers to capitulate.

68 Reliance was placed on *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another*[41] on the incorrect thesis that a lock-out is the flipside of a strike. It has already been demonstrated that our jurisprudence treats entrenched rights differently from those rights that are not entrenched. The LRA emphasises this difference by not describing a lock-out as a right.

69 Quite apart from the aforegoing, PUTCO's thesis is fallacious as the notice requirements of section 64(1)(b) for a strike notice are different from the notice requirements of section 64(1)(c) for a lock-out notice. The effect of these differences is that the *dicta* in *Moloto* cannot simply be applied to a section 64(1)(c) dispute.

70 S64 of the LRA provides:

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

(a)....

[41] [2012] 12 BLLR 1193.

(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...

(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..."[42]

71 Section 64(1)(c) requires that notice of a lock-out must be given *"to any trade union that is a party to the dispute"*. However, section 64(1)(b) only requires that notice must have been given to the employer without requiring that the employer must be a party to the dispute, and without, for instance, specifying that where there are more than one trade unions the notice must have been given by the trade union that intends to embark on a strike.

72 In the final analysis, the dispute in *Moloto* was whether a party who has not given notice of a strike is entitled to join in a strike of a party who has given notice of that strike. In the present case, the question is whether a party who is not a party to the dispute can be locked out. The case is not about whether an employer who has not given notice of a lock-out may lock-out on the strength of a lock-out notice that has been given by a third party as the-other-side-of-the-coin of *Moloto* would be.

73 The fact that the right to strike is entrenched in the Constitution weighed heavily in *Moloto* and prompted the Constitutional Court to

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[42] Emphasis Supplied.

adopt the approach that since s 64(1)(b) constitutes a limitation of a constitutional right, an interpretation of section 64(1)(b) which is least restrictive of the right to strike must be adopted.[43]

74 PUTCO argue that the strike notice that was issued by SATAWU reinforces the validity of the lock-out notice insofar as the lock-out applied to all employees.

75 PUTCO reach this conclusion by avoiding the wording of section 64(1)(c) that a notice of a lock-out must be given to a trade union that is a party to the dispute. TAWUSA was not a party to the dispute. Only members of SARPBAC were at loggerheads with each other.

76 As part of the argument that it is no defence to a lock-out that the employees being locked out are not on strike, PUTCO rely on the findings in paragraphs 47 to 51 of *Moloto* to the extent that the judgement states that SATAWU and Equity Aviation had a recognition agreement in terms of which SATAWU was recognised as the majority trade union which represented its non-members as well in the negotiations, and that had agreement been reached in negotiations that agreement would have been binding on non-members as well. They ignore that the basis of these findings is that SATAWU and Equity Aviation had a closed shop agreement.[44]

77 If in *Moloto* there wasn't a closed shop agreement, upon settlement of the dispute by SATAWU at conciliation stage, non-unionised workers and TAWUSA members would not have been bound by that agreement,

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[43] *South African Transport and Allied Workers' Union and Others v Moloto NO and Another* [2012] 12 BLLR 1193 CC, paragraphs 52 – 55.

[44] *South African Transport and Allied Workers' Union and Others v Moloto NO and Another* [2012] 12 BLCR 1193 CC, paragraph 47

and they would have been entitled to declare a dispute with PUTCO on the settled issue, and, in due course, to invoke section 64(1).

78 PUTCO also submit[45] that the purpose of the LRA to promote collective bargaining would be frustrated by an interpretation that required the issuing of a lock-out notice to non-unionised employees. They submit that it would render the collective process nugatory.

79 This argument is supported by the *dictum* in *CIWU v Plascon Decorative (Inland) (Pty) Ltd*[46] which reads:

> *"The argument ...proceeded, also in my view correctly, on the premise that a proper appreciation of the statutory provisions concerning strikes depends on their purpose. [It was] 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 the right of non-bargaining unit members to strike for which the provisions of the statute offer no explicit or implicit support. I agree with this submission."*[47]

80 Reliance on this passage is misplaced. The question that the Court was seized with in *Plascon Decorative* is whether members of a trade union

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[45] At paragraph 58 of their Heads of Argument.
[46] [1998] 12 BLLR 1191 (LAC).
[47] Emphasis supplied by PUTCO.

who fall outside of the bargaining unit which is represented by a trade union which is on strike may join in the strike.[48]

81 The underlined were addressing the question whether there is any superior consideration such as the promotion of orderly collective bargaining, majoritarianism, or effective dispute resolution that would call for a finding that members of a trade union who are not affected by the dispute or grievance and, therefore, have no clear or direct interest in the issue in dispute, may not join in the strike after negotiations have failed. The emphasised words express the conclusion that there is none.

82 The Court's main reasoning is contained in paragraph 22 of the judgement where the Court breaks the definition of *"strike"* into elements and concludes thus:

"It follows that while it is clear that the employees not performing work must all share the purpose of remedying a grievance or resolving a dispute, the definition imposes no other requirement of mutuality – whether a shared employment relationship with an employer or shared interest".[49]

83 PUTCO also rely on the following words that can be found at paragraph 87 of *Moloto*:

"The applicants accepted that, in relation to lock-outs, the express provisions of section 64(1)(c) of the Act require notice only to a trade union, if there is one, and not to non-unionised employees as well. To

[48] *CIWU*, paragraph 1
[49] Emphasis supplied.

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."

84 PUTCO's observation that these words are *obiter* is correct. It is respectfully submitted that they are also wrong and came from a minority judgement

85 The correct approach to s 64(1)(c) is that where there is a trade union, there is no need to give several notices to the trade union and to its members. Notice to the trade union should suffice. Where there are several trade unions, notice should be given to those that are party to the dispute. Where there is no trade union, notice should be given directly to the employees, except those who may have made it clear that they are not part of the dispute.

86 Section 64(1)(c) does not deal with non-unionised members where there are both unionised and non-unionised employees. However, the idea that the legislature intended that non-unionised members may be locked out without notice, is contrary to the legal convictions and the legal culture of South Africans that action against a person whose rights, legitimate expectation, or legal interest may be adversely affected by such action should be preceded by notice, unless the right to notice is clearly and justifiably excluded.

87 Another reason why the *dictum* should not stand is that there are times when strikes revolve around political issues or where economic demands are calculated to achieve political objectives such as the embarrassment of management or pure politics.

88 Pre-democracy one can think of the struggle for Workers Day. Initially, the National Party refused to recognise 1 May as a holiday because Communists, in its eyes, would triumph if it were to be recognised. It later partially succumbed and appointed a day in May other than 1 May as Workers Day. This was unacceptable to Black trade unions which did not relent in their demand and continued to stay away on this day. To White persons, generally, this was pure Communist trash no self-respecting White person should associate with. If section 64 was good law then what would have happened is that the Black trade unions would have complied with section 64 and eventually gave notice to strike. Imagine a *Schindler Jew* employer locking all White employees, including non-unionised ones, out as a result of the strike notice.

89 Post democracy, imagine Afrikaner *"Nationalists"* demanding that 10 October should be reinstated as a *Kruger Day*. This would clearly anger most South Africans. Imagine Solidarity, as a result of the political demand, demanding that wages be paid for no work while government is resisting this demand and giving proper strike notice. Imagine an Afrikaner *"Nationalist"* employer locking out all employees, including Black non-unionised ones, out.

90 Some disputes are cultural and class orientated. In a workplace where management supplies food to employees, but *umngqusho, ulusu* and *umvubo* are not provided, a Black trade union might demand the inclusion of these on the menu. They might also be protesting against the provision of oxtail, because, to them, it is an insult to serve oxtail to men. A White trade union, let alone non-unionised members, whose constituency regards oxtail as an exotic would probably find this dispute to be ridiculous and be disinterested in this dispute which might have

arisen without its knowledge, especially where the dispute is located in one branch. There might be a number of non-unionised workers whose staple diet is *teng* and some Black middle class types who have no cultural issues with men being served oxtail and are as disinterested as their White colleagues in the struggle for the aforementioned delicacies of *ulusu* and *umvubo* failing to recognise that there is no difference of substance between *umvubo* and Italian macaroni cheese for which they have since acquired a taste.

91 It is not unthinkable that in all the examples the non-unionised workers might not even be aware of the demand especially in cases where the dispute is plant based or small-town based in a multi-branch organisation.

92 It has been held that the purpose of section 64 is to give an employer the opportunity to prepare for a looming strike by prohibiting a strike action within the cooling off period in the interests of orderly collective bargaining. Equally, the purpose of section 64 is to give employees and trade unions the opportunity to prepare for a looming lockout in the interests of orderly collective bargaining. Thus, another reason why paragraph 87 of *Moloto* should not be upheld is that it is inconsistent with a superior objective of the Act, namely, the promotion of orderly collective bargaining.

93 Besides, the facts that paragraph 87 of *Moloto* was *obiter*, it does not appear that this Court was seized with the question in the first place and that the *dictum* is *obiter* as statements that were dispositive of the *lis* had already been made and its paragraph 87 was mere surplusage. This makes it unlikely that the matter was fully ventilated by this Court.

to regard the union as the representative of the employee and to deal with him on that basis. We say generally speaking because there are situations where, even if an employee has resigned as a member of a union, such union remains entitled to in effect represent such employee and the employer remains obliged to deal with such union as representing, among others, such employee. The latter situation will occur, for example, where the union is a representative union that enjoys majority status in a workplace or in a sector because in such a case such union may conclude a collective agreement with the employer, or employers, in the case of a sector, which binds even those employees who are not its members and those who may have been its members but have since resigned as well as those employees who will be employed by the employer or employers during the currency of such collective agreement. (For example see section 23(1)(d); section 25 (agency shop agreement); section 26(closed shop agreements); section 32(extension of collective agreements.) That this is the case is because majoritarianism is the system that the legislature has preferred in a number of areas in our labour relations system."

103 This passage cannot be followed. Where a non-member of a union is bound by the provisions of a collective agreement, it is not because the trade union in any way represents him. It is because when the employer and a trade union conclude an agreement their agreement takes the life of domestic legislation to the extent that it binds non-parties. In a sense, the employer and the trade union *"co-legislate"*. For example, the African National Congress and the National Party were the dominant parties in CODESA. The AWB and the Inkatha Freedom Party did not participate, but the agreements that were reached at CODESA bound them. It does not follow that the African National

Congress or the National Party represented them, their members, and the *apolitical* types. The majority ruled them, it did not represent them.

104 Section 32 exists precisely because of a recognition of the fact that some may not be represented at a bargaining council, and a collective agreement concluded at bargaining council level may not bind them. Subordinate legislation is then resorted to in order to make it binding on those who are not represented.[58]

105 PUTCO also argue that the effect of an extension of an award is to make a non-party a party to the agreement.

106 A non-party to an extended agreement does not become a party to the agreement. Because a non-party to the agreement is a stranger to the agreement, a non-party can neither enforce nor cancel the collective agreement, even after it has been extended to him. When parties to it cancel it, he has no right to object to its delegislation by the Minister. What rights, obligations, and remedies he may have regarding the extended agreement are not contractual, but derive from public law. In the event where a non-party were to successfully institute proceedings for the setting aside of an extension, the agreement would remain valid and binding *inter partes*.

107 We have already established that a lock-out notice can only be issued to a trade union that is a party to the dispute, and that TAWUSA not being a party to the dispute or not having raised any issue in dispute in SARPBAC, it was not competent for PUTCO to lock its members out.

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[58] *Unitrans Fuel & Chemical (Pty) Ltd v TAWUSA* [2011] 2 BLLR 153 (LAC), para 14.

108 Reliance on *Technikon South Africa v NUTESA* is misguided. The judgement does not assist PUTCO in this appeal as it deals with the question whether a lock-out can be instituted before a strike, simultaneously with it, or only after it has commenced. That issue does not arise in this appeal.

109 In the premises, the respondent prays for an order that

(1) The appeal succeeds.

(2) The respondent is ordered to pay the costs of appeal in the Labour Appeal Court and in this Court.

F R Memani
Counsel for the Appellant
Chambers
Johannesburg
02.09.2015

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 98/15

In the matter between:

TRANSPORT AND ALLIED WORKERS UNION OF SOUTH AFRICA (obo its members) Applicant

and

PUTCO LIMITED Respondent

INDEX TO RESPONDENT'S HEADS OF ARGUMENT

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RESPONDENT'S WRITTEN SUBMISSIONS

INTRODUCTION

1. This is an appeal against the judgment of the LAC,[1] in which it found that the lock-out of TAWUSA[2] members by PUTCO[3] constituted a protected lock-out under the LRA.[4] (PUTCO does not oppose the application for leave to appeal, but opposes the appeal on the merits.)

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[1] Labour Appeal Court. The judgment appears at record: pp 96-124. It is now reported at (2015) 36 *ILJ* 2048 (LAC) and [2015] 8 BLLR 783 (LAC).

[2] The applicant.

[3] The respondent.

[4] Labour Relations Act 66 of 1995. Unless otherwise indicated, all reference to sections herein are to the LRA.

2. The key issue raised in the appeal is whether employees who are members of a union that is *not a party* to a bargaining council (i.e. TAWUSA members) may lawfully be locked out in response to a bargaining council strike, together with members of the unions who *are party* to the bargaining council (and who called the strike). This essentially involves a determination of whether the lock-out of non-party members constitutes a "lock-out" as defined in section 213 of the LRA. The issue stands to be determined in the context of the peculiar facts of this matter.

3. The LAC determined this and other related issues addressed below in favour of PUTCO. For the reasons that follow, we submit that the judgment of the LAC is correct and accordingly that the appeal should be dismissed.

BARGAINING COUNCILS, INDUSTRIAL ACTION & THE DISPUTE IN THIS CONTEXT

4. So as to contextualise the matter, it is convenient to commence with a brief outline of industrial action in the context of bargaining councils. This leads us to the issue at the heart of this appeal.

5. One of the main purposes of the LRA is to promote orderly collective bargaining and collective bargaining at sectoral level.[5] The LRA seeks to achieve this objective by providing for the establishment of bargaining councils ("councils") at sectoral level, with the parties to councils being registered employers' organisations and trade unions.[6] Amongst the functions of councils are the resolution of disputes and the conclusion of collective agreements (typically

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[5] Section 1(d).

[6] Section 27.

wage agreements).[7] Council agreements are binding on the parties and their members.[8] They can also be made binding on non-parties falling within the registered scope of the council by the Minister[9] in terms of the section 32 extension process, provided that the statutory requirements are met (prime amongst them being that there must be majority support within the council).

6. In *Kem-Lin*, the LAC explained the rationale for the section 32 extension process and the fact that it is integral to the success of collective bargaining at sectoral level as follows:[10]

> "If the collective agreement is not extended to non-parties, the non-parties would be able to pay employees at rates which are lower than those which their competitors who are party to collective agreements have to pay to their employees. The result of this would be a serious threat to the business of those who are parties to collective agreements. This would seriously discourage orderly collective bargaining in general and collective bargaining at sectoral level in particular which are part of the primary object of the Act. If this were allowed, there would be little, if any, point in any employer seeking to be party to a bargaining council. That would be a threat to one of the pillars of the labour relations system in this country." (Own emphasis.)

7. Where a council agreement is extended to non-parties (employers and employees alike) they effectively become parties to the agreement.[11]

8. Typically where a wage agreement is concluded in a council, it will include a peace clause in terms of which the party unions undertake not to strike for the duration of the agreement (at least over matters dealt with in the agreement). This is the *quid pro quo* to the employer for entering into the agreement. If the

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[7] Section 28.

[8] Section 31.

[9] Minister of Labour.

[10] *Kem-Lin Fashions CC v Brunton & another* (2001) 22 *ILJ* 109 (LAC) at para 21.

[11] *Kem-Lin* at para 25.

clause is breached and a strike called, it would be unprotected in terms of section 65 and liable to being interdicted. Where the agreement is extended to non-parties in terms of section 32, the peace clause would also operate in relation to them.

9. As a further mechanism to ensure labour peace during the operation of a wage agreement, typically the agreement itself or the council's constitution would contain a clause prohibiting (or at least restricting) plant-level bargaining during the currency of the agreement. This prevents unions from having a "second bite at the cherry", which, if permitted, would serve to undermine collective bargaining at sectoral level.[12]

10. If during the course of collective bargaining within a council over wages,[13] the parties are unable to reach agreement, they are entitled to resort to industrial action (strikes and lock-outs) provided that the requirements of the LRA are met. Generally speaking, the requirements are that a dispute must be referred to the council for conciliation by either party, a certificate of non-resolution must be issued or a period of 30 days must elapse (during which conciliation will typically occur), and the party concerned must then give 48 hours' notice of a strike or lock-out.[14] In the case of a council strike, the 48 hours' notice need only be given to the council itself (and not to all the parties thereto).[15] Where the union parties call a protected strike (i.e. one that complies with the procedure outlined), the employer parties are entitled to respond by locking out the union

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[12] These clauses quite often give rise to disputes. See for example, *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of SA & others* (2014) 35 *ILJ* 3241 (LC).

[13] We use this as the example throughout.

[14] Section 64.

[15] Section 64(1)(c).

members on 48 hours' notice (this off the back of the unions' referral for conciliation).[16]

11. Thus far we have been dealing with industrial action as between the parties to the council themselves. But where a dispute exists over wages within a bargaining council, non-parties (employees and unions) falling within the registered scope of the council are also entitled to enter the fray.

12. So, for example, employees may strike[17] against an *employer who is not a party* to the council (through an employers' organisation) if they have a material interest in the dispute at council level.[18] Importantly, in circumstances where a protected strike is already on the go within the council, these employees could strike against their employer without referring a dispute for conciliation or even giving 48 hours' notice (and can effectively piggyback off compliance with these requirements by the party unions).[19]

13. Regarding the meaning of a material interest in this context, Du Toit comments as follows:[20]

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[16] *Technikon SA v National Union of Technikon Employees of SA* (2001) 22 *ILJ* 427 (LAC) at para 31.

[17] See in this regard, the definition of "secondary strike" in section 66(1), which is defined as not including "a strike in pursuit of a demand that has been referred to a council if the striking employees, employed within the registered scope of the council, have a material interest in that demand". (A primary strike is directed at one's own employer, while a secondary strike is in support of a strike by other employees against their employer.)

[18] *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v NUMSA & others* [1999] 1 BLLR 66 (LC) at paras 23-25; *Plastics Convertors Association of SA v Association of Electric Cable Manufacturers of SA & others* [2011] 11 BLLR 1095 (LC) at para 23.

[19] This in the light of *SA Transport & Allied Workers Union & others v Moloto NO & another* (2012) 33 *ILJ* 2549 (CC) at paras 50, 64 and 65.

[20] Du Toit, *et al, Labour Relations Law* (6th ed) at 361. See also Grogan *Collective Labour Law* (2nd ed) at 279-280.

> "A 'material interest' for the purposes of section 66(1) constitutes something more than solidarity with the 'primary' strikers. 'Material interest', it has been held, must have 'specific effect and value' for the secondary strikers. A reasonable expectation that an agreement reached at a bargaining council will be extended to the entire industry would constitute a 'material interest'. *A fortiori*, where an employer has agreed to apply the terms of the settlement to its employees, they will have a material interest in the dispute. Where there is no reasonable expectation of a bargaining council agreement being extended, the position is more complex. It may, however, still be argued that the strikers have a material interest in the dispute because an industry agreement may set benchmarks for local negotiation." (Own emphasis.)

14. Another example, which brings one closer to the facts of this case, is this. Employees who are members of a *union that is not a party* to the council (TAWUSA, in this case) may join a council strike that their employer and other unions, who are party to the council, are involved in, provided they have a material interest in the dispute (see above). Again, these employees would not have to comply themselves with the procedural requirements for a strike – and could thus join the strike without any notice whatsoever.

15. The present appeal deals with a scenario that has parallels with both the scenarios sketched in paras 12 and 14 above. In this case, the employer (PUTCO) was party to a council (through an employers' organisation); a strike was called by the (majority) unions party to the council over wages; in response, PUTCO instituted a lock-out in support of the employer-party demands at the council against the party union members and non-party union members (i.e. TAWUSA members) within its workplace. It did so off the back of the dispute processed by the party unions, and gave the unions (including TAWUSA) 48 hours' notice of the lock-out.

16. As mentioned above, the central controversy is whether the "lock-out" of TAWUSA members (being a non-party union) constituted a lock-out as defined

in section 213.[21] The definition has three elements: (i) the physical exclusion from the workplace (ii) for the purpose of compelling the employees to accept a demand, (iii) in respect of a matter of mutual interest.[22] To narrow the dispute further, the essential issue is whether the lock-out of TAWUSA members satisfied the purpose element of the definition. Put differently, was the demand made by PUTCO on TAWUSA members a demand that could give rise to a lock-out as defined?

17. Before addressing this issue further, it is necessary to have regard to the chronology of essential facts, because certain of them have an important bearing on the determination of this and related issue.

CHRONOLOGY OF ESSENTIAL FACTS

18. As its name denotes, SARPBAC is a bargaining council in the road passenger industry. At all material times, SARPBAC was made up of two employers' organisations (COBEO[23] and SABEA[24]) and two unions (SATAWU[25] and TOWU[26]). PUTCO is a member of COBEO. The two unions represent the majority of employees in the industry.[27]

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[21] The relevant parts read: "the exclusion by an employer of employees from the employer's workplace, for the purpose of compelling the employees to accept a demand in respect of any matter of mutual interest between employer and employee".

[22] *Technikon SA* at para 15.

[23] Commuter Bus Employers' Organisation.

[24] South African Bus Employers' Association.

[25] South African Transport and Allied Workers' Union.

[26] Transport Omnibus Workers' Union.

[27] LAC judgment: paras 3 and 4.

19. TAWUSA was previously a member of SARPBAC, but resigned with effect from 21 December 2010. At all material times, TAWUSA was attempting to revive its membership of SARPBAC.[28]

20. In terms of SARPBAC's constitution, collective agreements entered into at the council are binding on all eligible employees in the employ of employers' organisations, and on those parties and / or individuals to whom it is extended in terms of section 32.[29]

21. Although this was not mentioned by the LAC, SARPBAC's constitution also provides that "the national bargaining forum shall be the sole forum for negotiating collective agreements on substantive conditions of employment applicable to individuals in the bargaining unit".[30]

22. Industry-wide negotiations over wages and other terms and conditions of employment take place at SARPBAC. The last wage agreement concluded in SARPBAC before the events relevant hereto was the 2012 wage agreement, which was concluded in April 2012. TAWUSA did not participate in the negotiations and was thus not a signatory to the agreement. The agreement was, however, extended to non-parties by the Minister in terms of section 32, ultimately up until 31 July 2013.[31]

23. Focusing on PUTCO, it recognises the following three unions, with their level of representivity within the workplace being indicated in brackets: SATAWU (46%);

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[28] LAC judgment: para 4.

[29] LAC judgment: paras 48-49.

[30] LAC record: vol 2, p 134.

[31] LAC judgment: paras 5-6.

TOWU (27%); and TAWUSA (26%).[32] (As mentioned above, SATAWU and TOWU were members of SARPBAC, but TAWUSA was not.)

24. Although also not mentioned by the LAC, a recognition and procedural agreement was entered into between PUTCO and TAWUSA on 30 July 2002, which agreement remains operative. In terms of clause 9 thereof (headed "annual substantive negotiations"), the parties agreed that "the minimum terms and remuneration and conditions of employment in the industry are negotiated and regulated by the [SARPBAC]".[33]

25. Turning now to the chronology of events immediately preceding the lock-out in question, on 17 April 2013, and further to wage negotiations at SARPBAC having deadlocked, SATAWU and TOWU gave notice that they would commence with a strike on 19 April 2013.[34] There is no dispute about the fact that the strike was protected.[35]

26. On 18 April 2013, after the strike notice had been received, TAWUSA addressed a letter to PUTCO wherein it requested, *inter alia*, that the employer ensure the safety of its members, and indicated that it intended to engage with the employers' organisations represented at SARPBAC to better the conditions of its members in the industry.[36]

27. On 19 April 2013, and in response to the strike notice, PUTCO gave notice to the trade unions recognised by it (including TAWUSA) of its intention to lock-out

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[32] LAC judgment: para 4.

[33] LAC record: vol 2, p 169.

[34] LAC judgment: para 7.

[35] LAC judgment: para 56.

[36] LAC judgment: para 9.

all employees in the bargaining unit with effect from 21 April 2013. Non-union members in the bargaining unit were also informed of the impending lock-out.[37]

28. The text of the lock-out notice read as follows (under the subject line "notice of intention to lock-out all employees in the bargaining unit"):

> "In response to the strike notice issued, the company hereby gives 48 hours' notice of its intention to lock-out all employees in the bargaining unit from all Putco Limited's workplaces in support of the employer wage proposals in the wage negotiations in the [SARPBAC]."[38]

29. Also on 19 April 2013, and pursuant to a telephonic discussion between PUTCO's senior executive for corporate services, Mr Malherbe, and TAWUSA's general secretary, Mr Mankge, Mr Malherbe confirmed via e-mail to Mr Mankge that the lock-out notice was sent to all unions represented at PUTCO and SARPBAC, and that it was posted at all PUTCO business units.[39]

30. Mr Mankge, in turn, replied by indicating, *inter alia*, that TAWUSA was not currently a member of SARPBAC, and that its members were therefore not party to the dispute that gave rise to the lock-out. In those circumstances, TAWUSA stated that its members were not on strike. Further, its members would "continue to tender services as usual and will not sign any new conditions which you seek to impose by way of unlawful lock-out", but TAWUSA is "readily available to meet with you at short notice to discuss the improvements of our members' conditions of employment".[40]

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[37] LAC judgment: para 8.

[38] LAC judgment: para 8.

[39] LAC judgment: para 10.

[40] LAC judgment: para 11.

31. On 21 April 2013, the lock-out commenced as scheduled. This prompted TAWUSA to launch an urgent application for an interdict on 23 April 2013, which was heard on 25 April 2013. In a judgment delivered on 3 May 2013, the Labour Court granted the interdict.[41]

32. We turn now to deal briefly the main findings made by the LAC in the course of its judgment.

THE MAIN FINDINGS OF THE LAC

33. The essential part of the LAC's *ratio decidendi* appears from para 50 onwards of its judgment.

34. Dealing first with the issue of whether the lock-out of TAWUSA members constituted a lock-out as defined in section 213 (and was thus lawful), the LAC reasoned as follows.

34.1. To begin with, the intention of the parties at SARPBAC "was to enter into a collective agreement that would be binding on all employees and employers in the industry", and "all the parties were aware that the will of the majority would prevail during negotiations".[42]

34.2. Although the will of the majority would prevail, the minority would benefit if an agreement was reached, and would benefit from a successful strike by the majority. It was in this context that the LAC asked whether the minority

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[41] Appeal record: pp 81-95.

[42] LAC judgment: para 50.

"should ... be spared when the employer decides to lock-out its employees?"[43]

34.3. With reference to the lock-out notice, the lock-out was about the wage proposal that had not been accepted at SARPBAC – "where [TAWUSA] did not enjoy representation but the SARPBAC's decision would be binding on [it]".[44]

34.4. TAWUSA members had an interest in the negotiations and the dispute – this in the following circumstances:

> "The issue in dispute arose at the SARPBAC which is the forum where all negotiations pertaining to wages and conditions of employment for the entire industry were conducted. All the parties included [TAWUSA] knew that the negotiations at the SARPBAC relates to bargaining for a multi-party collective agreement and that the will of the majority would prevail. Members of [TAWUSA] would be bound by the collective agreement and would therefore reap the benefits of the wage negotiations should the majority unions' demand be accepted. They had an interest in the negotiations and the dispute was indeed about a matter of mutual interest to the employer and the employees. The whole bargaining unit would therefore have benefits from any wage increase."[45] (Own emphasis.)

34.5. The definition of "lock-out" does not confine an employer to only locking out employees who are on strike; an employer can exclude from the workplace all employees (striking and non-striking) who do not accept its demand.[46] It may do so (i.e. lock-out all employees including non-strikers) as part of a

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[43] LAC judgment: para 51

[44] LAC judgment: para 59.

[45] LAC judgment: para 62.

[46] LAC judgment: para 63.

strategy "to achieve a systematic consecutive group or individual capitulation".[47]

34.6. Given that TAWUSA members could have joined the strike at any time without giving notice to PUTCO, it would be unfair to expect the company not to institute a lock-out against them while they refused to accept its demand. The TAWUSA members could have caused serious economic damage to PUTCO by striking unannounced, with the result that it "should ... be able to act proactively against them".[48]

34.7. To limit a lock-out to striking employees would have further serious consequences. In the face of a strike which was not fully subscribed to, the employer would not be able to shut down its operations and would have to pay non-strikers (despite them not accepting the demand) which would be costly.[49]

34.8. Reverting to the facts, the LAC made the following key finding:

> "It must be remembered that in this matter, [TAWUSA] expressly rejected the employer's wage demand. Its general secretary made it plain and in express terms when he wrote that 'our members will continue to tender services as usual and will not sign any new conditions which you seek to impose by way of unlawful lock-out'. Had they tendered their services and accepted the employer's proposal, the employer would have had no reason to lock them out."[50] (Own emphasis.)

34.9. A lock-out aimed at all employees in the bargaining unit promotes collective bargaining at sectoral level and gives effect to the majoritarian principle (a

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[47] LAC judgment: para 64.

[48] LAC judgment: para 65.

[49] LAC judgment: para 66.

[50] LAC judgment: para 67.

key legislative policy choice at the heart of the collective bargaining dispensation).[51]

34.10. Finally, the court reverted to a point made earlier. Given that strikes against non-party employers are permitted in the context of a bargaining council dispute, "by parity of reasoning the same should hold true for lock-outs".[52]

34.11. In the result, the lock-out was lawful.[53]

35. Dealing then with TAWUSA's challenge based on section 64(1)(c),[54] the LAC found as follows.

35.1. TAWUSA contended that because section 64(1)(c) provides that notice of a lock-out must be given to "any trade union that is party to the dispute", it followed that a lock-out cannot be effected against a union that is not in dispute with the employer party. But according to the court, TAWUSA "was a party to the dispute because its interest at the SARPBAC were represented by the majority unions, based on the majoritarian principle and the constitution of the SARPBAC".[55]

35.2. Insofar as TAWUSA's challenge was that notice had actually not been given to it, the court found that notice had been given.[56]

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[51] LAC judgment: para 68.

[52] LAC judgment: para 69.

[53] LAC judgment: para 70.

[54] Section 64(1)(c) reads: "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".

[55] LAC judgment: para 71.

[56] LAC judgment: paras 56 and 74.

36. In all the circumstances, the LAC found that the lock-out complied with the definitional and legislative requirements for a protected lock-out.[57]

TAWUSA'S GROUNDS OF APPEAL

37. On our understanding of TAWUSA's heads of argument, TAWUSA advances five main submissions.

37.1. First, section 64(1)(c) (the lock-out notice provision) could not be met in relation to TAWUSA in the circumstances of this matter because it was not "a party to the dispute". It follows that a lock-out was impermissible and unlawful.[58]

37.2. Second, "demand" in the "lock-out" definition must be read as synonymous with "issue in dispute", which is defined in section 213 as follows: "in relation to a strike or lock-out ... the demand, the grievance, or the dispute that forms the subject matter of the strike or lock-out". In circumstances where there was no dispute between PUTCO and TAWUSA, the employer could not institute a lock-out.[59]

37.3. Third, the effect of the use of the definite article "the" in conjunction with "employees" in the lock-out definition is that the demand that the employer requires the employees to meet must have been made on "the employees" who are excluded from the workplace in order for such action to constitute a

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[57] LAC judgment: para 71.

[58] TAWUSA heads: paras 37-38.

[59] TAWUSA heads: paras 51-56.

lock-out as defined. According to TAWUSA no demand was made on its members.[60]

37.4. Fourth, assuming that the demand to which TAWUSA was to capitulate was the employers' wage demand at SARPBAC, TAWUSA submits that it acceded to the demand when its members tendered their services. Accordingly, the lock-out was not functional to collective bargaining and was therefore unlawful.[61]

37.5. Fifth, insofar as it is contended by PUTCO that the purpose of the lock-out was to induce TAWUSA members to put pressure on the majority union members to accede to the employers' demands at SARPBAC, this is not supported by the evidence and no such demand was made. In any event, this would constitute a secondary lock-out (which is not permitted) because no direct economic demand is being made against TAWUSA members.[62]

The first ground of appeal

38. In our submission, this ground of appeal should fail for the following reasons.

38.1. It is misconceived to use the interpretation of a procedural requirement (section 64(1)(c)) as a basis for contending that a lock-out as occurred herein is not envisaged by the lock-out definition. The answer to that issue lies in the lock-out definition itself.

38.2. But in any event, section 64(1)(c) specifically caters for the giving of notice of a lock-out where the issue in dispute relates to a collective agreement to

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[60] TAWUSA heads: paras 58-60.

[61] TAWUSA heads: paras 56-57.

[62] TAWUSA heads: paras 61-63.

be concluded in a bargaining council – it provides that "notice must be given to that council". That such notice stands, in effect, as notice to all unions operating within the jurisdiction of SARPBAC appears from the judgment of the Labour Court (per Zondo J) in *Tiger Wheels* (which deals with the comparative section 64(1)(b)(i)[63]):

> "There must be a reason why the legislature decided to provide for exceptions to the general rule that the strike notice must be given to the employer. In so far as the exception in section 64(1)(b)(i) is concerned, it must be because the bargaining council must be taken to be a forum which is representative of the industry over which it has jurisdiction and if notice is given to the council, it must be deemed to have been given to all employers[64] who fall within the scope of the council. The other reason may well be that in the absence of the exception in section 64(1)(b)(i), notice would have had to be given, in a case such as this one, to thousands of employers individually. In that event, administratively and logistically not only would an industry-wide strike be a nightmare but also it would almost be impossible to embark upon."[65]

38.3. Furthermore, and in any event, as found by the LAC, TAWUSA was effectively "party to" the SARPBAC dispute (for the reasons given by it) and was given notice of the lock-out.[66] (We mention in this regard that in circumstances where the effect of a section 32 extension is to make a non-party into a party,[67] it is artificial to contend that TAWUSA was not a party to the dispute.)

The second ground of appeal

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[63] Section 64(1)(b)(i) reads: "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".

[64] Not just those who are members of a party employers' organisation.

[65] *Tiger Wheels* at para 19.

[66] LAC judgment: para 71.

[67] See para 7 above.

39. In our submission, this ground of appeal should also fail for the following reasons.

39.1. We point out the the lock-out definition speaks of "a demand", with the phrase "issue in dispute" not appearing in the definition.

39.2. But, in any event, there was plainly a dispute between PUTCO and TAWUSA. Immediately in response to the lock-out notice, TAWUSA advised not only that its members refused to agree to the wage offer, but also that it sought to negotiate separately at plant level with PUTCO and reopen negotiations in due course with the employers' organisations at SARPBAC.[68] Not only was this utterly opportunistic, but it signalled an attempt by TAWUSA to undermine the whole structure of collective bargaining at sectoral level.[69] (TAWUSA would surely have known that it was in breach of, *inter alia*, the prohibition against plant-level bargaining clause in SARPBAC's constitution.[70])

39.3. In these circumstances – and in circumstances where a section 32 extension that would bind TAWUSA members loomed large – the LAC was correct in finding that there was a dispute. In response to PUTCO's demand, TAWUSA expressly rejected it.[71]

The third ground of appeal

40. In our submission, this ground of appeal should fail for the following reasons.

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[68] See paras 26 and 30 above.

[69] *Komatsu Southern Africa (Pty) Ltd v NUMSA and Others* (J1437/2013) [2013] ZALACJHB 298 (17 September 2013) at para 44-45. See also *SA Clothing & Textile Workers Union & others v Yarntex (Pty) Ltd t/a Bertrand Group* (2013) 34 *ILJ* 2199 (LAC) at paras 57-59.

[70] See para 21 above.

[71] LAC judgment: para 67.

40.1. There is no need to get tied up with TAWUSA's interpretation of the implications of the use of the words "the employees" in the lock-out definition. This is because a demand was made on TAWUSA members – it being that they should accept the employers' proposals made at SARPBAC. If they had done so, as found by the LAC, PUTCO would then have had no reason to lock them out.[72]

40.2. The aforesaid finding by the LAC accords with the following finding of the Labour Court in *Autopax* (in a comparative case):[73]

> "I will suffice by concluding that the purpose of a lock-out is simply not just to compel specific employees to accept a specific offer. It is rather the implementation of the deadlock breaking mechanism bestowed on employers in the collective bargaining process to resolve the issue in dispute between the parties, whatever the issue in dispute may be. This issue in dispute may be articulated by different offers by the respective parties or it may not. To use the current matter as a specific example - the issue in dispute concerns the demand by SATAWU and its members for additional Sunday pay and a meal allowance and a strike is implemented as the deadlock breaking measure to get the first respondent to agree to this demand, which process UTATA and its members were always entitled to join for as long as the issue in dispute remained unresolved. Opposed to this, the demand by the first respondent is the application of the SARPBAC collective agreement in this regard and the lock-out is implemented as the deadlock breaking mechanism to get all employees to accede to this demand. All that UTATU and its members had to do in response was to agree to (accede to) this demand of the first respondent. This would actually end the issue in dispute insofar as it concerns them and as a result, the lock-out against them would have to be lifted. On the facts in this current matter, UTATU and its members never so agreed, and all they did was not to declare a dispute against the first respondent, not join the strike, and continued to tender their services. They could, however, only defeat the lock-out by actually

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[72] LAC judgment: para 67.

[73] *United Transport & Allied Trade Union/SA Railways & Harbours Union & others v Autopax Passenger Services (SOC) Ltd & another* (2014) 35 *ILJ* 1425 (LC). The LAC in the present matter endorsed *Autopax* in para 75 of its judgment.

agreeing to the position adopted as the first respondent as articulated in the lock-out notice." (Own emphasis.)

40.3. The functional purpose served by such a lock-out is that PUTCO plainly had an interest in securing an undertaking by TAWUSA members that they would abide by the agreement to be concluded at SARPBAC. In addition to this, inherent in securing the commitment of TAWUSA members was the strategic advantage of weakening the solidarity of members of other unions. As found by the LAC, this is what locking out non-strikers is all about.[74]

The fourth ground of appeal

41. There is patently no merit in this ground of appeal. Although TAWUSA members are said to have tendered their services, they simultaneously rejected the wage proposal, and TAWUSA indicated its intention to reopen negotiations (either at SARPBAC or at PUTCO). The dispute remained very much alive.

The fifth ground of appeal

42. In our submission, this ground of appeal should also fail for the following reasons.

42.1. It is inherent in the strategy of locking out all employees (including non-strikers) that the employer seeks to achieve, as the LAC put it, "a systematic consecutive group or individual capitulation".[75] PUTCO did not need to lead evidence to establish this.

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[74] LAC judgment: para 64.

[75] LAC's judgment: para 64.

42.2. The lock-out of TAWUSA members did not constitute a secondary lock-out. The TAWUSA members had a direct and material interest in the dispute / demand – this in circumstances where a section 32 extension was likely.[76] And the fact that the lock-out strategy (of locking everyone out, as opposed to just the strikers) was aimed at breaking the solidarity of the employees through individual or group capitulation, did not serve to characterise the lock-out as being secondary.

CONCLUSION

43. We have addressed above what we consider to be the main legs of TAWUSA's argument. We take issue with any material ancillary points.

44. In the premises, the appeal should be dismissed with costs, including the costs of two counsel.

ANTON MYBURGH SC
TEMBEKA NGCUKAITOBI
JEREMY RAIZON
Counsel for the Respondent
Chambers, Sandton

9 October 2015

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[76] See para 13 above.

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT94/15

LABOUR COURT CASE NO: J837/13

LABOUR APPEAL COURT CASE NO: JA 106/13

In the matter between:

TRANSPORT AND ALLIED WORKERS
UNION OF SOUTH AFRICA
(On behalf of its members) Appellant

and

PUTCO LIMITED Respondent

SUPPLEMENTARY WRITTEN SUBMISSIONS

BACKGROUND

1. The background to these Supplementary Written Submissions is that the respondent has informed the appellant that it will at the hearing of the matter make reference to government notices published in the Government Gazette which record the collective agreements on wages concluded at the South African Road Passenger Bargaining Council (SARPBAC) on 15 May 2013, 21 May 2014 and 29 June 2015, and their respective extensions to non-parties by the Minister in Terms of Section 32 of the Labour Relations Act (LRA) promulgated on 16 August 2013, 5 September 2014 and 4 September 2015

2. The appellant has in correspondence exchanged between the parties objected to the respondent's stated intention, which objections are set out more fully below. The Respondent has now invited the appellant to deal with the issue relating to the collective agreements on wages concluded at SARPBAC and their respective extensions to non-parties by the Minister of Labour in argument in this Court.

3. The respondent has furthermore in its written submissions made reference to clauses 2, Appendix A of the SARPBAC Constitution and to clause 9 of the Recognition Agreement, which are not before this Court. The respondent sought the appellant's confirmation that the quotations cited in its written submissions are an accurate recordal of clause 2 of Appendix A of the SARPBAC Constitution and clause 9 of Recognition Agreement.

AD CLAUSE 2 OF APPENDIX A TO SARPBAC CONSTITUTION

4. The appellant does not agree that clause 2 of Appendix A to the SARPBAC Constitution has been quoted correctly.

5. The clause reads thus:

> ***"2. The Parties agree that the National Bargaining Forum shall be the sole forum for negotiating Collective Agreement on Substantive Conditions of Employment applicable to individuals in the Bargaining Unit".***

AD CLAUSE 10 OF APPENDIX A TO SARPBAC CONSTITUTION

6. This clause was central to the respondent's case in the Labour Court. It reads thus:

"10. Collective Agreements conducted by a majority of the Trade Union Parties to SARPBAC and a majority of Employers' Organisations to SARPBAC bind all Parties to SARPBAC and their members as well as all Employers and Employees bound in law by such CollectiveAgreements".

AD CLAUSE 9 OF THE RECOGNITION AGREEMENT BETWEEN THE PARTIES

7. Clause 9 of the Recognition Agreement between the parties reads thus:

"9. ANNUAL SUBSTANTIVE NEGOTIATIONS

The parties recognise that the minimum terms and remuneration and conditions of employment in the industry are negotiated and regulated by the South African Road passenger Bargaining Council and acknowledge their membership of this council".

AD REFERENCE TO GOVERNMENT NOTICES

8. The appellant seeks to make reference to government notices that extended the collective agreements of the years 2013 to 2015.

9. The respondent contends that *"the government notices (particularly that relating to the section 32 extension in 2013) are relevant as they relate to the fact that (members of TAWUSA) had an interest in the wage dispute that gave rise to the lock-out, and an appeal court is entitled to have regard to instruments of this nature, despite them not having been produced in the lower court."*

10 The respondent incorrectly contends that *Unitrans Fuel and Chemicals (Pty) Ltd v TAWUSA*[1] supports its view. Paragraph 14 of *Unitrans* reads thus:

> *"The new grounds relied upon by the appellant are essentially legal in nature and were also canvassed in the founding affidavit. There is in any event no bar to the raising of these grounds at the stage it did. The new grounds did however refer to a number of Collective Agreements concluded between the trade unions and employers that form part of the industry in which the appellant and first respondent operate and to which it and the first respondent are parties. These Agreements constitute public documents and in terms of the Civil Proceedings Evidence Act 25 of 1965 the production of these documents is not a prerequisite for them to be considered by any court of law. These Agreements have been duly promulgated and are therefore binding on those who are party thereto or to whom they apply. The promulgation of a Collective Agreement places it in the sphere of subordinate legislation and it must be considered more as a statute than a contract and as such can properly be referred to as a statute rather than a contract."*[2] [3]

11. It is clear from the underlined wording that whatever the LAC referred to as new grounds was not a new case which was not made out in the papers.

12. In the event where it is held that the Labour Appeal Court held that by using the words *"new grounds"* it meant that it is permissible to raise a new ground on appeal which is outside of the case that was made out in the papers in the lower court, then paragraph 14 of *Unitrans* is clearly wrong, and must be overruled.

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[1] [2011]2 BLLR 153 (LAC), para 14

[2] Emphasis supplied.

[3] Footnotes omitted.

13. The correct legal position was stated by Jafta J in *SA Transport and Allied Workers Union & Another v Garvis*[4] *& Others*[5] thus: [6]

" Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a Constitutional challenge should know the requirements it needs to satisfy and every party likely to be affected by the relief sought must know precisely the case it is expected to meet."

13. In *Gcaba v Minister of Safety and Security*[7] Van Der Westhuizen J held[8]:

"… (T)he applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim …"

14. Bearing these judgements in mind, the relevant part of the respondent's answering affidavit in the Labour Court reads:

"*SUMMARY OF GROUNDS OF OPPOSITION*

4 The Applicant seeks final relief, on urgent grounds, in the form of an order interdicting the First Respondent from locking out its members who are

[4] In some authorities referred to as *"Garvas"*
[5] (2012) 33 ILJ 1593 CC; [2012] BCLR 840 CC.
[6] At para 114
[7] [2009] 12 BLLR 1145 CC; [2010] 1 BLLR 35 CC
[8] At para 75. See also Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality 1991 (3) SA 98 C, 111H

employed by the First Respondent. Although the basis for the alleged urgency in the application is financial harm, the Applicant does not seek any order directing the First Respondent to reinstate the salaries of the employees that are the subject of the lockout.

5 In any event, the application is misconstrued on the grounds that I set out below

(i) Members of the Applicant fall within the bargaining unit

6 The only basis for the interdict sought is that the Applicant – and its members- are 'not involved in the negotiations that have given rise to the lock-out and that, therefore, TAWUSA members should not be subject to the lock-out. This reasoning is contrived and artificial

6.1 In terms of clause 10 of Appendix A to the constitution of the South African Road Passenger Bargaining Council ("SARPBAC"), collective agreements concluded by a majority of the Trade Union Parties to SARPBAC and a majority of Employers' Organisations bind all Parties to SARPBAC and their members as well as all Employers and Employees bound by law by such Collective Agreements.

6.2 Although the Applicant itself is currently not a member to the SARPBAC, its members will be bound by any wage agreement concluded at SARPBAC. This is a consequence of the simple fact that any agreement would have been concluded by a majority of the parties represented at SARPBAC.[9]

…

25 The Applicant in the founding affidavit contends that the lock-out of its members in the bargaining unit is unlawful as there is no issue in dispute

[9] Emphasis supplied.

between the Applicant and the First Respondent. This is disputed for the reasons set out in the 'SUMMARY OF GROUNDS FOR OPPOSITION

7 On this basis alone the application stands to be dismissed.

(For ease of reference the appellant annexes hereto paragraphs 1 – 7, and 25 of the respondent's answering affidavit.)

15 The other two grounds which the respondent raised were that the appellant's members were, in fact, on strike, and that since employees who are in an industry who have not given notice to strike can join in a protected strike in that industry, an employer can lock-out workers who are not on strike so long as they belong in an industry in which there is a deadlock.

16 Nowhere in the papers is the case made out that members of the applicant had an interest in the proceedings of SARPBAC due to the possibility of a section 32 extension.

17. In the premises, reference to the aforementioned government notices should not be allowed at all, alternatively, it should not be allowed for the purposes of making out any case which was not made out in the respondent's answering affidavit.

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Chambers
Johannesburg
29.10.2015