IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO.: CCT105/2022

LAC CASE NO.: DA3/2021

CASE NO.: D595/2020

In the matter between:

THE NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA **APPLICANT**

and

TRENSTAR (PTY) LTD **RESPONDENT**

RESPONDENT'S WRITTEN ARGUMENT

Contents Page No.

Introduction and overview

1. This is an opposed Leave to Appeal application in terms of which the Appellant/Applicant seeks to overturn the Labour Court Judgment[1] and refusal of Leave to Appeal of such Judgment in addition to a refusal of a Petition of such Judgment by the Honourable Labour Appeal Court[2] over the issue as to:

   a) whether or not, seeing that it is common cause that this dispute is moot, the Court in the interests of justice would require intervention seeing that this matter "*no longer presents an existing or live controversy*" in circumstances where the two judgments the Applicant/Appellant allege are conflicting in circumstances where they are not as:

      i. in ***NASAWU v Kings Hire***[3], the strike was suspended and not settled i.e. the union reserved and retained the right, in the same dispute, to go out on strike again.

      ii. in ***Sun International***[4] where the strike was settled and over.

      Accordingly, these judgments do not conflict with each other and should the facts be such **as in this matter** where the strike was temporarily suspended, then the ***NASAWU v Kings Hire*** case is to be followed but where the strike is settled, then the ***Sun International*** case is to be followed. On this basis it is not in the interest of justice for a moot case such as this, both on the

[1] Labour Court judgment, vol 1, p 87 - 93
[2] Application for Leave to Appeal, vol 3, p 244 – 249. LAC judgment vol 3, p 244 - 249
[3] J2290/19
[4] South African Commercial Catering and Allied Workers Union v Sun International 2016 (1) BLLR 97 (LC)

facts and in law to be allowed the resources and time of the Honourable Court in dealing with the matter;

b. whether or not the Respondent's lock out was in response to a strike in circumstances where the strike was suspended but the lockout persisted and

c. then whether or not replacement labour could be utilised in terms of Section 76(1)(b) of the Labour Relations Act.

Summary of the relevant facts

2. The Respondent undertakes all the internal logistics of parts within Toyota South Africa Manufacturing's (TSAM) plant in Prospecton Durban, and has its operation and employees including the members of the Appellant, housed within the TSAM plant. The nature of the contractual relationship between the Respondent and TSAM is one where the Respondent is responsible for moving 100% of the local parts for TSAM at the receiving dock which is manned by the Respondent's personnel. This amounts to approximately 20 000 bins of parts[5].

3. The Respondent's operation and contracted existence is directly linked to TSAM, including what it pays its employees and accordingly is tied directly to its budget, which is negotiated with TSAM on an annual basis and clearly fixed and finite.

[5] Respondent's Opposing Affidavit, vol 1, p 31 – 67 and vol 3, p264 - 284

4. The Appellants and the Respondent for the past at least ten years have negotiated on an annual basis in March of each year where the Respondent and NUMSA had agreed, due to the Respondent undertaking the logistics for TSAM, an OEM, many years ago to implement the increase reached at the National Bargaining Forum (NBF) the OEMS (the South African vehicle manufacturers) and NUMSA's as captured in the NBF Agreement (the collective agreement that governs the terms and conditions in the automotive manufacturing industry)[6].

5. Furthermore, this arrangement is confirmed in a collective agreement between the Appellant and the Respondent in 2017, which is set out below for ease of reference[7].

"Future Wage negotiations timing

In terms of historic practice, wage and benefit improvements are effective on the 1st April every year and contained in the Relationship Agreement will be a procedure that regulates the timing of wage negotiations and any related aspects so determined in order to meet company budget planning purposes"

[6] Respondent's Opposing Affidavit, vol 1, p 44 - 45
[7] Respondent's Opposing Affidavit, vol 1, p 56 - 58

6. The parties in March 2020, as is customary, agreed to apply the NBF increase with effect from 1 April 2020, which was 9%. This would apply until 30 March 2021. Clearly once the parties had agreed on the increase, there could be no wage related strike for a period of 12 months, as implied by custom and practice and / or law. A copy of the type of letter where this agreement is then placed in writing and given to staff is attached to the record[8].

7. Both with reference to "A", and "B" these are contended by the Respondent to be collective agreements[9], between the Respondent as an Employer and a union, NUMSA, being agreements in writing (in regard to A, these evidence in writing this agreement and therefore are collective agreements). Accordingly, in terms of Section 65(1)(a) of the LRA, the Respondent's contended that the Applicants were precluded from striking until 1 April 2021.

8. The Applicants happily received the increase, did not raise the issue of the R7500 in March, which would have been the time to raise it so the parties could negotiate and engage then on powerplay, only to ambush the Respondent months later when wages were finalised. This was not only in breach of the agreement but not in good faith. It also takes away the ability for the company to deal with its budgetary consequences with TSAM.

9. Notwithstanding the wage increase on the 1st April 2020 the Applicants referred a demand to the Respondent for a bonus of R7500, and made a mutual interest

[8] Respondent's Opposing Affidavit, vol 1, p 44 - 55
[9] Respondent's Opposing Affidavit, vol 1, p 44 - 58

demand to the CCMA[10]. The Respondent was surprised by the demand seeing that the annual negotiations were over until 2021.

10. The Appellants on the same day, issued a 48-hour strike notice being the 23 October 2020[11].

11. The Appellants commenced with strike action on Monday 26th October 2020 with picketing rules being agreed. The strike ran for approximately a month until the Appellant notified the Respondent on the 20th November 2020 at 13:25pm of its intention to suspend the strike[12], to which the Respondent responded by serving a lockout notice[13] at 15:24pm in which the demands were:

> "*Please take note that the Company hereby gives 48 hours' notice that it intends locking out all NUMSA members, with effect from 07.am on Monday the 23rd November 2020.*
>
> *This lockout is in accordance with Section 64(1)(c) of the LRA, in terms of which the Company's demand is that:*
>
> > *The NUMSA members in the TrenStar bargaining unit drop and waive their demand to be paid by the Company a once off taxable gratuity in an amount of R7500 to be paid in addition to the ATB.*

[10] Respondent's Opposing Affidavit, vol 1, p 59 - 63
[11] Respondent's Opposing Affidavit, vol 1, p 66 - 67
[12] Applicant's Founding Affidavit, vol 1, p 24
[13] Applicant's Founding Affidavit, vol 1, p 25

The Company records that this lockout is in response to NUMSA's strike action and accordingly Section 76(1)(b) is applicable.

During the lockout the picketing rules agreed between the parties shall be applicable.

Finally, the issuing of this lockout notice does not constitute a waiver by the company that the strike action to date has been unprotected and which is currently before the Labour Court in respect of a Leave to Appal application."

12. In response to the strike action in accordance with Section 74(1)(c) of the LRA in terms of which the company's demand was,

"*The NUMSA members in the Trenstar Bargaining Unit drop and waive their demand to be paid by the company a once-off taxable gratuity in an amount of R7500 to be paid in addition to the ATB."*

13. It is pointed out that this lockout was in response to NUMSA's strike action and accordingly Section 76(1)(b) would remain applicable. It has also, at all material times, being the Respondents contention that the strike was unprotected by virtue of the submissions made above, reserved its rights and specifically pointed out in the lockout notice that,

"*Finally, the issuing of this lockout notice does not constitute a waiver by the company that the strike action to date has been unprotected and which is currently before the Labour Court in respect of a Leave to Appeal application."*

14. It is clear from the Appellants notice suspending the strike that this was indeed a suspension and as a result at any time could commence again.

Mootness

15. The Appellants in their Heads of Argument concede that the matter is moot as per paragraphs 34 to 39 to their Heads.

16. It is submitted that this matter became moot once the Appellants accepted the Respondent's lock-out demands on the 30 November and the lock-out ended.

17. The Constitutional Court in the matter of ***The President of the Republic of South Africa***[14] dealt with the principal mootness where the Court concluded with reference to the case of the ***National Coalition for Gay and Lesbian Equality & Others***[15]**,**

"*Case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law. Such is the case in JT Publishing (Pty)*

[14] The President of the Republic of South Africa v The Democratic Alliance, Case No. 664/17 ZASCA 79 (31 May 2018)
[15] National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs 2000 (2) SA 1 (CC), paragraph 21

Ltd & another v Minister of Safety and Security & others 1997 (3) SA 514 (CC) 1996 (12) BCLR 1599 where Didcott J said the following at paragraph 17: 'There can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted have now become'"

18. In the matter of ***Normandien Farms (Pty) Limited***[16], the Court noted with reference to the limited circumstances where it was in the interest of justice to grant leave to appeal that,

"*[46] It is clear from the factual circumstances that this matter is moot. However, this is not the end of the inquiry. The central question for consideration is: whether it is in the interests of justice to grant leave to appeal, notwithstanding the mootness. A consideration of this Court's approach to mootness is necessary at this juncture, followed by an application of the various factors to the current matter*

[47] Mootness is when a matter "no longer presents an existing or live controversy". The doctrine is based on the notion that judicial resources ought to be utilised efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are "abstract, academic or hypothetical

[16] Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited and Others [2020] ZACC 5

[48] This Court has held that it is axiomatic that "mootness is not an absolute bar to the justiciability of an issue [and that this] Court may entertain an appeal, even if moot, where the interests of justice so require".38 This Court "has discretionary power to entertain even admittedly moot issues"

[49] Where there are two conflicting judgments by different courts, especially where an appeal court's outcome has binding implications for future matters, it weighs in favour of entertaining a moot matter

[50] Moreover, this Court has proffered further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter. These include:

> *(a) whether any order which it may make will have some practical effect either on the parties or on others;*
> *(b) the nature and extent of the practical effect that any possible order might have;*
> *(c) the importance of the issue;*
> *(d) the complexity of the issue;*
> *(e) the fullness or otherwise of the arguments advanced; and*
> *(f) resolving the disputes between different courts.*

[51] I will now consider some of these factors in the context of the current matter.

[52] As a point of departure, an order by this Court in this matter will not have a practical effect. It must be borne in mind that the main relief sought by Normandien in the High Court was for the setting aside of the acceptance of Rhino's application by PASA. Now that Rhino's application has been withdrawn, there is nothing to set aside or interdict. There is no triable issue to consider and no party will receive any direct benefit or advantage as a result of an order on the merits by this Court. In terms of complexity, section 10 of the MPRDA is clear – there is no discrete legal principle that requires this Court to decide the case.

[53] It is necessary to consider whether it is in the interests of justice to grant leave to appeal in order to resolve disputes between courts and conflicting judgments. Indeed, the High Court and Supreme Court of Appeal did come to different conclusions. Normandien contends that Rhino will rely on the judgment of the Supreme Court of Appeal in future applications.

[54] I disagree. The judgment of the Supreme Court of appeal will not be of assistance for the following reasons: first, the Supreme Court of Appeal did not decide Normandien's review application on the merits not did it pronounce on the legality of the process. It dismissed the matter on preliminary issues such as ripeness and lack of prejudice. The complaint about the alleged non-compliance with the procedural requirements was not decided by the Supreme Court of Appeal. Second, the fundamental importance of public participation in the process for an exploration right application was not undermined by the Supreme Court of Appeal. Rather, the Supreme Court of Appeal stated that

"while [Bengwenyama] concerned a prospecting right for minerals, the views expressed by Froneman J apply equally to exploration rights for petroleum". This evinces the Supreme Court of Appeal underscoring the importance of public participation in the process of applying for an exploration right.

[55] Third, Rhino will have to bring a new application should it wish to apply for an exploration right in the future and comply with the provision of the MPRDA. It cannot rely on the Supreme Court of Appeal's judgment to bypass the procedures that are set out in section 10 of the MPRDA.

[56] Based on this analysis, the various factors are not present in this matter. Therefore, there are no factors to trigger this Court to exercise its judicial discretion and consider that even though the matter is moot, it is in the interests of justice to grant leave to appeal. It is, therefore, not necessary to consider other issues raised such as ripeness, prejudice and peremption."

19. In this particular matter besides the concession by the Appellants that the matter is moot, there are no conflicting cases when reference is made to their merits.

20. It is submitted that with reference to the merits, there are no competing decisions as in the ***Kings Hire (supra)*** case was decided on a set of facts almost identical to those before the Court a quo, i.e., that the strike was suspended and could resume, whereas in the ***Sun International*** case is one where the strike was over. In any event the Labour Appeal Court noted in the

Appeal Judgment in regard to the ***Sun International Limited*** matter that the matter was in any event moot and paragraph 21 is instructive.

"21. Appellant has in effect asked for an advisory opinion as to future conduct. Appellant does not represent the broader labour law community nor did any other party seek to join as an amicus in order to provide further information or argument to this court. There was a dispute between two parties and that matter has been resolved. It is not a case which should be heard by this Court because it falls within the doctrine of mootness as I have outlined it. There is therefore no basis by which to decide the interpretation question relating to s76(1)(b) of the LRA."

21. It is submitted with respect that the Appellants have accepted the demands made in the Respondent's lock-out and the matter is at an end.

22. The question of whether or not the Respondent was permitted to use replacement labour in any event, would have been academic seeing that the employees remained locked out during this period and would have, and did remain subject to the principle of no work no pay.

23. Accordingly, the outcome of the Appeal would have no practical affect and certainly would not permit the Appellants any relief.

Applicable regulatory framework

24. The use of replacement labour is regulated by Section 76 of the Labour Relations Act which reads as follows,

"***76 Replacement labour***

(1) An employer may not take into employment any person-

(a) To continue or maintain production during a protected strike if the whole or a part of the employer's service ha been designated a maintenance service; or

(b) For the purpose of performing the work of any employee who is locked out, unless the lock-out is in response to a strike.

(2) For the purpose of this section, 'take into employment' includes engaging the services of a temporary employment service or an independent contractor."

25. **NASAW v Kings Hire[17],** *where the Court found that,*

"[46] Because the underlying issue in dispute still remained unresolved, and with the respondent having implemented the lockout, the respondent was entitled not to accept the employees' tender of services. It is insufficient for NASAW to simply suspend the strike or hold it in abeyance, to secure the uplifting of the lock-out and the return of the employees to work. The reason for this is that for as long as the underlying issue in dispute remains unresolved, NASAW and the employees can at any time resume the strike. In

[17] Respondent's Opposing Affidavit, vol 1, p 68 – 86, J2290/19

Transportation Motor Spares v National Union of Metalworkers of SA and Others (199) 20 ILJ 690 (LC), the Court said:

'… the employer is entitled at the stage of the proposed return to work on the part of the strikers to lock them out until the dispute over which they had gone out on strike has been resolved. It is therefore up to the employer to enquire from the strikers when they seek to return to work what the basis is for their return to work and to decide whether he will allow them to resume their duties or not and if he will, then on what terms they will be so allows.'

[47] I was informed, even when this matter was argued in Court, that the underlying dispute had still not been resolved. It is only once this dispute is settled, or the demand for a 13th cheque abandoned by NASAW, that the lock-out is uplifted and the employees can demand their return to work. The employees are consequently not be entitled to be paid, until this happens."

26. Accordingly, in these circumstances where the lockout notice is given while the strike is still underway and where the union have now suspended the strike, it can never be the case that a union defeats the lockout simply by suspending the strike. The dispute continues whilst the Employer maintains a demand, backed by the lockout.

27. In respect to the decision of ***South African Commercial Catering and Allied Workers Union v Sun International***[18] the facts of that matter are distinguishable with those of the ***Kings Hire*** judgment (supra) where in the ***Sun International*** matter the strike was at an end and there was no threat of a

[18] South African Commercial Catering and Allied Workers Union v Sun International 2016 (1) BLLR 97 (LC)

further strike whereas in the ***Kings Hire*** case and in the facts of this particular matter, the union reserved its rights to embark upon strike action.

28. The Respondents concur with the interpretive approach by the Court in ***Natal Joint Municipal Pension Fund***[19] and with reference to 76(1)(b) the lock-out was clearly in response to a strike both in that:

28.1 The lock-out notice was issued whilst the strike was still underway and prior to the strike ending at 5 pm on Friday 20th November 2020;

28.2 The lock-out was factually in response to the strike at hand and as noted in the ***Kings Hire*** matter, Snyman AJ noted the reciprocal relationship between a strike and a lockout over the same dispute where the Court noted,

"*40. It is therefore not required that the strike must actually start before a lock-out can be implemented. As said in Technikon SA v National Union of Technikon Employees of SA 2001(22) ILJ 427 (LAC);*

'S64 also does not say that once employees have given notice to strike or once they have begun with their strike before the employer can either give its notice to lock-out or can institute its lock-out, the

[19] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

employer can no longer exercise its recourse to lock-out under s64(1) even if all the requirements have been met. Equally, there is no provision to the effect that, if the employer has given the notice to lock-out first or has begun with its lock-out before the employees can begin with their strike or can give their notice to strike, the employees lose their right to strike. This, therefore, means that a lock-out may commence before, simultaneously with, or, after, a strike has commenced. It also means that a lock-out and a strike can run concurrently between the same parties. What this would mean in practice is that the strikers would be excluded from the premises for the employer.'

41. The strike notice of NASAW, and the following lock-out notice by the respondent, are simply two sides to the same underlying dispute and part of the same collective bargaining process, aimed at finally resolving the issue dispute of the 13th cheque. The respective purposes are thus identical. The argument that because NASAW decided to hold the strike in 'abeyance' after giving the strike notice, but before it actually started, it meant that the respondent could not pursue a lock-out, is thus without any substance."

28.3 The Court in SACCAWU v Sun International was presented with a set of facts where the strike had ended.

"[18] …The present state of the law can be expressed as follows:
Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation;….The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

"*[5] The crisp issue for determination in this matter is whether in terms of section 74(1)(b) of the LRA, an employer may continue to use replacement*

labour after a strike has ended. The union concedes that the lock-out in casu is protected. However, it submits that an employer's right to use replacement labour must be 'in response to a strike' and once a strike has ended, section 75(1)(b) of the LRA no longer applies."

Applicant's grounds for Leave to Appeal

29. The Applicant's grounds on which they seek Leave of Appeal fall to be dismissed.

Submissions on merits

30. It is the Respondent's submission that:

30.1 the 48-hour lockout notice was issued on the 20th November 2020 shortly after the notice of the suspension of the strike had been sent through at 13:25 but before the strike was suspended at 5pm on Friday the 20th November 2020.

30.2 the lockout took effect at 7 am on Monday morning when the Applicants would have returned for duty in circumstances where their suspension took place at 5 pm which when their shifts for the week would ended. Accordingly, the suspension of the strike and the commencement of the lockout notice would have been seamless in that the first time that the

Appellants would have lockout would have been 7 am on Monday which is when they would have reported for duty which is simultaneous with the suspension.

31. It is submitted that the Appellants had not withdrawn the strike or the demand and simply had suspended it and may have at any time reinstituted it.

32. It is the Respondent's contention that if the Appellants' argument were be accepted, no lockout in response to strikes could be successful as every time an employer was give 48-hours' notice of a lockout in response to a strike, a union could defeat this by simply issuing a suspension notice bringing the strike to an end before the lockout notice took effect.

33. The Honourable Judge in the Court *a quo* concurred and correctly identified that the Applicants could resume their strike at any time[20], and further linked the suspension of the strike as a means to disqualify the use of replacement labour,

"*[27] In my view the word 'strike' in section 76(1)(b) functions imply to qualify and identify the kind of lockout during which replacement labour may be used. This is a lock-out in response to a strike. It cannot be that the mere suspension of a strike which has attracted the counter-measure of a lockout by an employer disqualifies the use of replacement labour. I agree with the respondent that*

[20] Judgment, vol 1, p 91 - 92, paragraph 25

such a reading will render section 76(1)(b) effectively nugatory in the context of tactical collective bargaining. It will lead to an insensible or unbusinesslike result, undermining the clear purpose of the section. The purpose of section 76(1)(b) is clearly to permit employers to use replacement labour when a union has initiated a strike and a lawful lockout has been instituted in response to that industrial action. Properly interpreted, section 76(1)(b) provides that the trigger for the lawful use of replacement labour is the lockout of those employees whose labour is to be replaced, not the existence of a continuing refusal to work by those employees. That the strike, in the form of a refusal to work, may have ended shortly before the lockout commenced, such as occurred in casu, is not determinative. The question a court should ask is whether a lawful lockout in response to a strike is in operation. If so, replacement labour is permitted. Once the lockout ends, either as a matter of fact (if the employer so decides) or law (a lockout cannot persist after the employees have capitulated), the right to use replacement labour ends too."

34. The nub of the Appellants argument is that they are weakened in their bargaining position by their own circumstance where they have suspended their strike but the lock out continues as does the use of replacement labour. This argument overlooks the fact that the Appellants retain the right to start striking again. In any event the wording of Section 76(1)(b) is clear and has been corrected interpreted by the Court a quo and the Courts in the ***NASAW v Kings Hire*** matter.

35. Where a strike has been settled or permanently withdrawn the Courts may have had different findings but that is not the facts in this matter emphasising the futility of this leave to appeal application and its unique set of facts which do not accord at all with the ***Sun International*** decision.

Costs

36. It is submitted that the facts of this matter have never warranted an argument that there are conflicting judgments and this together with the fact that the case is moot in circumstances where the employees accepted the lockout demand, and on the merit, lack prospects of success is such that the litigation that followed was without merit and has put the Respondent to enormous expense unnecessarily.

37. Clearly the parties remain in an employer trade union relationship but in this particular instance the Applicant/Appellant have not shown respect to their bargaining partner by putting the Respondent to these unnecessary expenses. Accordingly, the Court as a sign of indicating its displeasure with such conduct should grant a costs order in the Respondent's favour.

WHEREFORE the Leave to Appeal application should be dismissed with costs.

BRUCE MACGREGOR
MACGREGOR ERASMUS ATTORNEYS Inc.
Respondent's Attorneys
27 September 2022

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No.: **105/22**

Labour Appeal Court Case No: **DA3/2021**

Labour Court Case No: **D595/2020**

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA Applicant/Appellant

and

TRENSTAR (PTY) LTD Respondent

APPLICANT/APPELLANT'S WRITTEN ARGUMENT

Contents Page No.

Nature of the application

1. The National Union of Metalworkers of South Africa, a registered trade union (hereinafter called "NUMSA") acting in a representative capacity on behalf of its members that are employed by Trenstar Pty Limited, the abovenamed respondent, seeks the leave of the Constitutional Court to appeal against judgments and orders of both the Labour Court[1] and Labour Appeal Court ("the LAC")[2] and, if leave is granted, for the Constitutional Court to uphold the appeal and set aside the judgments on appeal and confirm the interpretation advanced by NUMSA regarding the meaning of the section in the Labour Relations Act 66 of 1995 (hereinafter called "the LRA") that deals with the circumstances under which an employer who engages in a lockout may utilise the services of replacement labour in response to a strike (s76(1)(b)).

[1] Labour Court judgment, vol 1, p 87 – 93. Now reported as National Union of Metalworkers of SA on behalf of members v Trenstar Pty Ltd (2021) 42 ILJ 555 (LC)
[2] Application for Leave to Appeal, vol 3, p 244 – 249. LAC Judgment Vol. 3, pages 244 – 249 now reported as National Union of Metalworkers of SA on behalf of members v Trenstar Pty Ltd (2022) 43 ILJ 1314 (LAC)

Jurisdiction of the Constitutional Court

Constitutional Matter

2. The dispute concerns the interpretation of a section of the LRA that falls within Chapter IV thereof that deals with strikes and lockouts.

3. It is now well established that the interpretation of the LRA is a Constitutional matter and that the jurisdiction of this court is engaged in terms of s167(3)(b)(i) of the Constitution to such a dispute[3].

Point of law of general public importance

4. Section 76(1)(b) of the LRA precludes an employer from taking into employment any person for the purpose of performing the work of any employee who is locked out, unless the lockout[4] "is in response to a strike[5]".

[3] National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and others [2002] ZACC 27; 2003 (3) SA 1 (CC) at para 14 and Association of Mineworkers and Construction Union and Others v Anglo Gold Ashanti Limited [2021] ZACC 42; (2022) 43 ILJ 291 (CC) at para 27. See too National Union of Metalworkers of SA and others v Aveng Trident Steel (2021) 42 ILJ 67 (CC) at para 33.

[4] **'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 that exclusion. Definition in s213 of the LRA.

[5] **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

5. The legislative meaning to be attributed to the phrase “is in response to a strike” has been interpreted differently in various judgments in the Labour Court.

6. The one line of cases (and the interpretation adopted by the Labour Court in this matter) is that the phrase only defines the nature of the lockout[6] and once the lockout falls into that category its nature does not change and so, even if the employees decide to end their strike, the exemption of the prohibition to employ replacement labour continues to have application for so long as the employer persists in the lockout or the employees capitulate to the employer’s demand.

7. On this interpretation, once the strike stops the collective bargaining balance swings overwhelmingly and disproportionally in favour of the employer, making

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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. Definition in s213 of the LRA.

[6] Judgment of Court *a quo* paras 26 and 27 Vol 1 page 92. See also in this regard Ntimane and others v Agrinet t/a Vetsak (Pty) Ltd [1999] 3 BLLR 248 (LC) para 20. This judgment was expressly disapproved and not followed in SACCAWU v Sun International (2016) 37 ILJ 215 (LC) para 19

capitulation to its demands by the employees highly likely if not inevitable[7].

8. The other line of cases[8] holds that the exception to the prohibition of employing replacement labour ceases to apply once the employees tender to return to work and are no longer on strike[9], their refusal to work has ceased so there is no longer a strike as defined in s213 of the LRA.

9. This interpretation maintains the balance of bargaining power, the proportionality that is necessary and that is generally applicable limiting what would otherwise be disproportionate and unfair power at the disposal of the employer when using the bargaining tool of lockout.

10. This is the line the Applicant contends this Court should favour.

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[7] Recognised in judgment of Court *a quo*: see paragraph 28 Vol 1 page 93. Pillay AJ in NUTESA v Technikon SA [2000] 9 BLLR 1072 (LC) para 12 – If recourse to replacement labour were available to an employer during an offensive lockout the collective bargaining would degenerate into collective begging.

[8] The main judgment being SACCAWU v Sun International (2016) 37 ILJ 215 (LC). It cannot be reconciled with the present case – one of them must be incorrect.

[9] Strike means the partial or complete concerted refusal to work….s213 of the LRA definition of "strike". Once there is no longer a refusal to work there is no longer a strike.

11. Since the differing interpretations cannot both be correct, it is unsatisfactory for there to be contradictory judgments of courts of equal standing. It is accordingly in the interests of justice for the legal question to be resolved by an appeal court.

12. The LAC declined to decide the legal point in this case for the same reason it declined to do so in the Sun International case[10] because, by the time the matters reached the LAC in both cases, the underlying dispute giving rise to the lockout had been resolved and the respective disputes had become moot.

13. The contradictory Labour Court judgments create considerable confusion for trade unions, employers, workers, and the many members of the public at large who are or may become involved in collective bargaining that potentially could lead to strike action and lockouts and it is of general public importance that the point of law be clarified so that collective bargaining parties know their rights.

[10] Sun International Ltd v South African Commercial Catering and Allied Workers Union (2017) 38ILJ 1799 (LAC).

14. The fact that there are contradictory judgments provides evidence of the existence of an arguable point of law.

15. It is submitted that it is of general public importance for clarity to be given by the Constitutional Court on the contentious arguable legal point and, that being so, the jurisdiction of the Constitutional Court is engaged in terms of s167(3)(b)(ii).

Common cause facts

16. NUMSA's members, on about 26 October 2020, embarked upon a strike in support of a demand made by them to the respondent for the payment of a once-off taxable gratuity of R7,500.00 per employee ("the demand")[11].

17. On 20 November 2020 at about 13h25, email correspondence[12] was addressed by NUMSA's attorney of record to the respondent's attorney to inform the Respondent that the Applicant and its members had decided to suspend "the protected strike action which

[11] This is dealt with in paragraphs 7-9 of the founding affidavit Vol1 pages 6-7
[12] Annexure FA2, vol 1, p24. Dealt with in the founding affidavit in paragraphs 13 and 14 Vol 1 page 8

commenced on the 26th October 2020" and to do so with effect from close of business on that day, Friday, 20 November 2020. The email ended by informing the Respondent that the NUMSA members who had been on strike tendered their services and would return to work the following Monday 23 November 2020.

18. Almost immediately after the despatch of the email informing the Respondent that the employees intended returning to work on the Monday following the weekend, and seemingly in response to the said email, the Respondent gave 48 hours' notice of its intention to lock out all NUMSA's members with effect from 7am on the following Monday, 23 November 2020.[13]

19. The demand contained in the notice of lock-out was as follows:

> "The NUMSA members in the TrenStar bargaining unit drop and waive their demand to be paid by the Company

[13] Annexure FA3, vol 1, p25.

a once off taxable gratuity in an amount of R7500 to be paid in addition to the ATB."

20. The Notice of Lockout included a sentence reading: "The Company records that this lockout is in response to NUMSA's strike action and accordingly Section 76(1)(b) is applicable". The Respondent thereby communicated its intention to utilise replacement labour to perform the work of NUMSA's members that were to be locked out in spite of the tender to return to work.

21. NUMSA took the view that this was impermissible on its interpretation of s76 (1)(b) of the LRA.[14]

22. The Respondent remained adamant that s76(1)(b) permitted it to use replacement labour during the lockout on the basis that the lockout was, on its interpretation of the section, in response to the strike.

[14] This finds expression in paragraph 21 of the Founding Affidavit Vol 1 page 10: "As NUMSA's members are no longer on strike, the respondent is clearly not entitled to make use of replacement labour to perform the functions of NUMSA's members while they are locked out of the workplace. Any use of replacement labour by the respondent in those circumstances is patently unlawful and in contravention of the provisions of section 76 of the LRA".

23. There was thus a standoff and NUMSA decided to go to court to secure an interdict premised on its interpretation being the correct interpretation, bolstered in this regard by the judgment in the Sun International case[15].

The history of the litigation

24. NUMSA was of the view that the use of replacement labour by the respondent during the course of the lock-out was unlawful and instituted the application[16] in the Labour Court for an order interdicting the respondent from making use of replacement labour.

25. The interpretation of the said section of the LRA was the issue in the application.

26. The Respondent opposed the application.

27. Whitcher J, dismissed the application in the judgment that is challenged in the present application. Notably, although she was referred to and even mentioned the Sun International

[15] SACCAWU v Sun International [2015] ZALCJHB 34; (2016) 37 ILJ 215 (LC).
[16] Urgent application, vol 1, p1 – 30.

judgment,[17] in her judgment she did not deal with it directly and did not explain why she had declined to follow it.

28. The dismissal of the application meant that the Respondent could lockout and use replacement labour. As a result the employees' bargaining position was rendered impossibly weak forcing them to capitulate completely to bring the lockout to an end and to be able to return to work, which is what occurred.

29. Once the lock-out ended, the relief sought by NUMSA became moot even though the disputed point of law remained a very live issue because the judgment had created a situation where there were two directly contradictory judgments by the Labour Court, each having adopted a different approach to interpretation and having come to diametrically opposite conclusions.

30. NUMSA sought leave to appeal to enable the LAC to resolve the now conflicting decisions of courts of equal standing

[17] Judgment para 89 Vol 1 page 89 with reference to the Applicant's submissions. SACCAWU v Sun International [2015] ZALCJHB 34; (2016) 37 ILJ 215 (LC)

pertaining to the interpretation of section 76 (1)(b) of the LRA which was granted by Whitcher J.

31. The LAC declined to hear the matter on its merits on the grounds of mootness. It relied on and followed the Sun International LAC judgment in declining to hear the appeal on the basis of mootness.

32. This time though the LAC faced a situation where there were two conflicting judgments and the LAC in the earlier one had declined to deal with the appeal on the merits on the grounds of mootness. It was now in the interests of justice for the LAC not to have exercised a discretion to decline to hear for mootness because doing so would allow the confusion that it could clear up to persist unnecessarily.

33. It is submitted that the LAC erred in its approach.

Mootness in relation to the present application

34. It is conceded that the underlying dispute was moot when it came before the LAC and remains moot.

35. It is moot because the employees when faced with the prospect of being locked out by an employer who could replace their labour after they had decided to stop striking gave in to the demand and the lockout ended.

36. The LAC has missed two opportunities of providing clarity on a controversial point of law of general public importance. Allowing the confusion to persist when there is an opportunity for this Court to clarify and resolve the controversy and bring certainty is not in the public interest and there is accordingly a good and sound reason for the Court to hear the appeal notwithstanding mootness.

37. This Court has held that the interests of justice standard applies for determining whether a moot matter should be heard[18].

38. If leave is granted the decision in the appeal would clarify whether an employer can take into employment replacement labour during a lockout when employees who

[18] Association of Mineworkers and Construction Union and Others v Anglo Gold Ashanti Limited [2021] ZACC 42; (2022) 43 ILJ 291 (CC) at para 30.

were on strike cease to be on strike and tender their services. A judgment of this Court will resolve disputes between different courts. The issue is important, controversial and complex.

39. It is submitted that, in the interests of justice, the Court should therefore grant leave to appeal notwithstanding the mootness.

Prospects of Success

40. It is contended that the interpretation of s76(1)(b) of the LRA of the Court *a quo* is incorrect and unconstitutional as it results in unfair labour practices, unfair collective bargaining, impacts on the right to strike and not to strike and is in conflict with the purposes of the LRA as set out in s1 thereof.

41. The interpretation advanced by the Applicant below gives the words of the statute their ordinary meaning, retains the collective bargaining balance and proportionality, accords with the purposes of the LRA, and it is submitted should find favour with this Court and be upheld on appeal.

42. That being so it is submitted that there are reasonable prospects of success and that in the interests of justice leave to appeal should be granted.

Interpretation of s76(1)(b)

43. This court has endorsed as the correct approach to interpretation the explanation of the process set out in paragraph 18 of the Endumeni Municipality case[19] which explains that interpretation is the process of attributing meaning to the words used *inter alia* in legislation, having regard to the context provided by reading the particular provision in the light of the statute as a whole and the circumstances attendant upon its coming into existence.

44. Endumeni explains that consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed. In a situation where more than one meaning is possible each possibility must be

[19] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 18. Approved by this Court *inter alia* in Airports Company South Africa v Big Five Duty Free Pty Ltd and others 2019 (5) SA 1 (CC) para 29; Transport and Allied Workers of South Africa obo Ngedle and others v Unitrans Fuel and Chemical Pty Ltd (2016) 37 ILJ 2485 (CC) para 239

weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the provision. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the relevant background.

45. The context in the present exercise is the Constitution and the entrenched rights to fair labour practices and to strike set out in s23 of the Constitution as well as the statute in which the provision finds itself, being the LRA.

46. The primary objects of the LRA set out in s1 thereof that are material to the present interpretative exercise are the objects to give effect to the fundamental rights conferred by s23 of the Constitution, and to promote orderly collective bargaining and the effective resolution of labour disputes.

47. It is submitted that legislation that negatively impacts the efficacy of strike action, such as an employer's rights under section 76(1)(b) of the LRA, constitutes an infringement of

the constitutionally guaranteed right to strike[20] and must be construed in such a manner as to least impact upon that right. A court should be slow to interpret a provision in a manner that places a damper on that fundamental right when an alternative interpretation would not.

48. Proportionality and balance of the power dynamic in collective bargaining are essential to promote orderly collective bargaining and the effective resolution of labour disputes and give effect to the right to fair labour practices. An interpretation that results in a disproportionate swing in the power dynamic should be avoided if an alternative interpretation would better preserve proportionality and balance in that dynamic.

49. The duty to interpret in accordance with the Constitution applies also where two or more interpretations of a legislative provision are possible. The court must prefer the reading of a statute that 'better' promotes the spirit, purport

[20] As set out in section 23 (2)(c) of the Constitution.

and objects of the Bill of Rights, even if neither interpretation would render the provision unconstitutional."[21]

50. Section 76 (1)(b) reads as follows:

> *"(1) An employer may not take into employment any person-*
>
> *(a) …*
>
> *(b) for the purpose of performing the work of any employee who is locked out unless the lock-out is in response to a strike.*"

51. The operative portion of section 76(1)(b), for the purposes of this interpretative exercise, is that part that reads *"unless the lock-out is in response to a strike"*. Once the strike ends common sense and the ordinary meaning of "response to a strike" suggests so too should the exemption allowing replacement labour which is only permitted if it is in response to a strike and that, it is submitted, is the correct

[21] Currie, I & De Waal, J. 2013. *The Bill of Rights Handbook, 6th ed*. at page 58, chapter 3.4. See also Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd 2009 (1) SA 337 (CC) at para 46.

interpretation of the section that should be reached applying the interpretative principles[22].

52. In relation to general context, it is pointed out that there is a good reason for the general prohibition on the use of replacement labour in a lockout as contained in s76(1). The possibility of employing persons to maintain production during a lock-out can place an employer in a virtually unassailable position. There is a disparity in bargaining power between employers and employees who cannot find a replacement employer during a strike. If an employer could use replacement labour at will any demand directed at employees could be followed by a lock-out, resulting in business as usual for the employer and economic pressure exerted exclusively on employees until their inevitable submission[23]. Such a power dynamic is unfair and

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[22] This is the conclusion reached in SACCAWU v Sun International (2016) 37 ILJ 215 (LC) para 19: "I find that the interpretation to be accorded to s 76(1)*(b)* of the LRA is that the statutory right of an employer to hire replacement labour is restricted to the period during which a protected strike pertains, and not after it has ceased".

[23] See *Halton Cheadle Tamara Cohen et al* Strikes and the Law online edition updated September 2017 para 7.10. The learned authors take the view that the employer's entitlement to use replacement labour should terminate once the strikers offer to return to work at para 7.10.2.

disproportionate and appropriately restricted by the general prohibition with very limited exceptions in s76(1).

53. This imbalance and disproportionality is recognised in the LRA and there are only two exceptions to the general prohibition where replacement labour may be used during a lockout namely (a) for the purposes of maintenance services – a sensible exception to avoid physical destruction to any working area, plant or machinery or (b) if the lockout "is in response to a strike".

54. In the strike context where the employees withdraw their labour it is recognised that the balance in the bargaining power exchange is to permit the employer to use replacement labour while the employees are on strike and strikers may in turn picket to dissuade them from doing so. This is a factor that the employees have to balance in their decision to strike.

55. All the limited exemption from the prohibition of using replacement labour in a lockout in s76(1)(b) does, it is submitted, is to permit the existing right to use replacement

labour during the strike to continue if the employer decides to lockout in response to the strike, so as not to disproportionally weaken the employer's bargaining strength if it decides to respond to the strike by engaging in a lockout. If the exemption was not there the bargaining position of the employer would weaken significantly if it decided to lockout in response to a strike and by so doing lost its right to use replacement labour. This would be disproportionate and unfair and that result is avoided by the exemption.

56. Accordingly once the strike and lockout exist side by side there is balance in permitting replacement labour to continue to be available to the employer. This is sensible, businesslike and fair.

57. Once the employees are no longer on strike and tender to return to work, if the employer wishes to persist in the lockout there is nothing preventing it from doing so, but then, it is submitted, because what it is doing in locking out is no longer *de facto* in response to a strike, the exemption should no longer apply. The section is capable of bearing this

meaning and it is the more obvious and logical meaning too. This would produce a sensible, fair and businesslike result. Allowing replacement labour has no purpose if there is no strike so why should the provision be interpreted to allow a lockout with replacement labour to continue if the situation where it was meant to provide protection no longer exists and protection is no longer needed.

58. So, properly interpreted - if there is no longer a strike the exemption should fall away. That would make sense and retain the proportionality and balance built into the design in the LRA of prohibiting the use of replacement labour in a lockout that is not in response to a strike.

59. Once the strike ends, if the employer can continue the lockout with replacement labour the situation reverts to the position where the imbalance is overwhelming, the kind of situation the general prohibition in s76(1) was designed to avoid, and submission to the employer demands would be inevitable. This outcome is grossly unfair, not sensible or logical and is not businesslike in irrationally advantaging the employer and prejudicing the employees. This interpretation

should be avoided, even though it is linguistically possible on the grammar and syntax of the section to interpret the section that way.

60. As is apparent from the different judgments and from what is set out above it is linguistically possible for the phrase to have two different meanings.

61. The first possible meaning of the phrase and the one the Court *a quo* favoured is that it is just descriptive of the nature of the lockout[24], sometimes called a defensive lockout, and once the lockout commences it retains its attributes and is thus always a lockout of the kind where replacement labour may be used. That is also how Landman J interpreted the provision in the *Vetsak* case[25].

[24] "the word strike functions simply to qualify and identify the kind of lockout during which replacement labour may be used." Judgment para 27 Vol 1 page 92

[25] Ntimane and others v Agrinet t/a Vetsak (Pty) Ltd [1999] 3 BLLR 248 (LC); (1999) 20 ILJ 896 (LC) para 17. "The section does not provide that it is rendered inapplicable when the strike in response to which the lock-out was instituted terminates. On the contrary, it seems, on a reasonable interpretation, that the nature of the lock-out as a defensive one, and the concomitant right to employ replacement labour, accrues at the stage the defensive lock-out is implemented and endures until the lock-out ceases." The learned judge in the Vetsak case did not engage in an interpretative exercise expressly, and merely stated that his interpretation was reasonable.

62. The other interpretation that is linguistically possible but the correct one, it is submitted, is that the exemption from the general prohibition on using replacement labour is time and fact based and is dependent on there actually being a strike at the time the replacement labour is used. An actual strike must be occurring for the exemption to apply because on this argument the lockout is in response to a strike only if there is a strike[26]. Note the use of the present tense "is". That is the tense used in section 76(1)(b): "unless the lockout is in response to a strike".

63. On this interpretation even if there was a time when the lock-out was in response to a strike, as soon as the strike ends the lockout is no longer in response to a strike as there is no longer a strike for it to respond to. The prohibition against using replacement labour again applies from the time the strike has ended.

64. This interpretation is much more rational and accounts for the change of circumstance that has occurred by the ending

[26] SACCAWU v Sun International (2016) 37 ILJ 215 (LC) para 19

of the strike. It gives effect to the use of the present tense in the section. It is businesslike and it makes common sense to keep the power dynamic proportional.

65. It is quite arbitrary that an overwhelming advantage should accrue to an employer to enforce its demands by way of possible indefinite lockout because of the ability to make use of replacement labour when the employees are not on strike, merely because they once were. There is just no proportionality in this and the outcome is unfair. An interpretation that has that result should be avoided.

66. The Constitution makes specific provision for the right of an employee to strike. An employer on the other hand has recourse to lockout – one of the bargaining tools open to it. "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… 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."[27]

67. If embarking on a strike means that the employer can lock out and use replacement labour to enforce its demands even after the strike ends, that meaning will constitute a significant damper on the exercise of the right to strike, which must include the right not to strike. An interpretation that is restrictive and that least interferes with a fundamental constitutional right should be preferred.

68. It is accordingly submitted that the interpretation advanced by the Applicant should prevail as the correct interpretation of section 76 (1)(b).

[27] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at paragraph 66.

It is in the interests of justice to grant leave to appeal.

69. The court should grant leave to appeal because there are reasonable prospects of success and the appeal raises a matter of considerable importance in the labour field which is a cornerstone of society and the economy. It raises a matter of general public importance and amongst workers, their trade unions and employers there is a great deal of interest in having the doubt with regard to the correct meaning and application of the use of replacement labour during a lockout resolved, and there is accordingly a real societal benefit in having the constitutional issue decided[28].

70. Such issues are of importance not only to the parties involved who face each other in many workplaces in an ongoing relationship involving collective bargaining, but also to the members of the general public who are engaged in collective bargaining. Accordingly reaching certainty and finality on the interpretation which is the issue in dispute is in the public interest and in the interests of justice warrants a determination by the Constitutional Court.[29]

[28] See for example National Union of Metalworkers of SA and others v Aveng Trident Steel (2021) 42 ILJ 67 (CC) at para 35.
[29] A loose reproduction of the last two sentences of para 35 in Aveng supra.

Judgment of the Labour Court and LAC

71. It is now well established that the interpretation of a constitutional provision in a Statute that is enacted to give effect to a constitutional right is holistic and although the inevitable point of departure is the language of the provision itself this has to be read in context and having regard to the purpose of the provision.[30] In the course of interpretation preference should be given to a sensible meaning rather than one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the provision[31]. The learned judge paid lip service to this approach, but for reasons that follow did not actually apply it.

72. The learned judge appreciated that it fell on her to interpret s76(1)(b) and she highlighted the words "unless the lockout is in response to a strike."[32]

[30] See for example FAWU obo Gaoshubelwe v Pieman's Pantry Pty Ltd (2018) ILJ 1213 (CC) para 186 applying Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18. A judgment that has been applied many times by this Court.
[31] NUMSA v Lufil Packaging (2020) 41 ILJ 1846 (CC) at para 53, also applying Endumeni.
[32] Paras 22 and 23 Vol 1 page 91.

73. She found with respect correctly that the lockout was lawful and appreciated that this was not the issue before her. She found correctly with respect "that the current state of play is that the strike is over because the employees are once again tendering their services".[33]

74. The learned judge mouths the tools of interpretation and the purposive approach having regard to the purposes of the LRA where entrenched rights to fair labour practices and the right to strike are implicated, but it is submitted really limits herself to the linguistic approach, finding that the operative legal precondition for the use of replacement labour is not a strike[34] but a lockout. Not any lockout she finds, but a particular kind of lockout - one that is in response to a strike.[35] The word "strike" she finds functions simply to qualify and identify the kind of lockout during which replacement labour may be used. She states that the contrary reading would render s76(1)(b) nugatory stating that she agrees with the respondent's contention in this

[33] Para 25 Vol 1 page 92. This must be so having regard to the definition of strike in s213 of the LRA, which is referred to in para 26 of the judgment.
[34] Remarkable it is submitted because the right to use replacement labour is in response to a strike.
[35] Para 26 last two sentences Vol 1 page 92

regard, but does not state why this is so. The employer can still lockout if it believes it needs to induce acceptance of its demand. She says that this will lead to an insensible and unbusinesslike result undermining, she says, the clear intention of the section. Unfortunately the learned judge does not explain why this is sensible and businesslike or identify the clear intention of the section.

75. With due respect to the learned judge, if the strike has ended and the power dynamic is now disproportionally in favour of the employer the opposite seems to be true. This outcome is not sensible or businesslike and surely the intention of the section could not be to achieve such a result if there is no strike.

76. The learned judge does not explain how she understands the purpose of the provision and why the purpose that operates when the strike exists continues even once the strike ceases as she says it does. The purpose of the section is of course the critical question that has to be answered and it is the one question that the learned judge does not address in her judgment. She finds that there is a

trigger and once it is pulled that is the end of the story. From then, according to her interpretation, it remains lawful to continue to use replacement labour even if the strike in response to which it is permitted has ended.

77. It is submitted that the learned judge's reasoning is unsound and her conclusion wrong. Since the learned judge was disagreeing with another judgment where the reasoning is, with all due respect to her, fuller and much more compelling and constitutionally based, one would have expected an explanation for the departure or distinguishing of the earlier judgment. There is none. There is no explanation why she chose not to follow the Sun International judgment.

78. In paragraph 28 of the judgment the learned judge acknowledges the obvious, namely that the bargaining position of the employees is weakened considerably by her interpretation, but says that this is what the drafters of the legislation intended by permitting replacement labour in a lockout in response to a strike. The intention to permit a lockout with replacement labour in response to an ongoing strike is not equivalent to an intention to permit a lockout

with replacement labour once that strike has ended and is no longer ongoing. There is no logic in the reason that it is. No explanation is provided as to why this is sensible, businesslike, and achieves the purposes of collective bargaining identified in the LRA, as the learned judge suggests it does.

79. It is submitted that completely weakening the employees' bargaining position merely because they initiated strike action which has ended is not sensible, not businesslike, is disproportionally advantageous to an employer, frustrates the right to strike entrenched in the Constitution, and is not the correct interpretation of the provision.

80. The right of an employer to make use of replacement labour to carry out the work ordinarily done by striking workers diminishes the efficacy of strike action as a bargaining tool, as it minimises the economic harm felt by the employer as a result of the strike action. This is particularly the case if, once strike action has been embarked upon by employees and the employer has instituted a retaliatory lock-out in response thereto, the employer is entitled to continue

making use of replacement labour until such time as the employees are forced to withdraw their initial demand or agree to the employer's demands, irrespective of whether the employees remain on strike or choose to end it.

81. It is accordingly submitted that the interpretation of the learned judge *a quo* was wrong and should be corrected on appeal.

82. The merits and the interpretation issue were not decided by the LAC, who it is submitted should not have declined to hear the appeal, but that is water under the bridge and of no relevance in this appeal where the question of mootness has to be addressed by this Court afresh for it to decide whether this is a reason to decline to entertain the appeal on the merits.

83. For the reasons set out herein, it is submitted that it is in the interests of justice for this Court to hear the appeal even though the main dispute has been resolved, a task that has become necessary and appropriate because the LAC

declined to do so when in the interests of justice it ought to have.

Relief

84. The Applicant accordingly seeks an order allowing it leave to appeal, an order upholding the appeal in a judgment setting out that upon a proper constitutional interpretation of s76(1)(b) of the Labour Relations Act 66 of 1996 (as amended) it is not permissible for an employer who has locked employees out to use replacement labour if the employees tender to return to work and it elects to preclude them from doing so by enforcing a lockout.

85. The court should find that the interpretation accorded to s76(1)(b) of the LRA in SACCAWU v Sun International[36] is correct, namely that the statutory right of an employer to hire replacement labour is restricted to the period during which a strike pertains, and not after it has ceased.

[36] SACCAWU v Sun International (2016) 37 ILJ 215 (LC) para 19.

86. Since the lockout has ended and the dispute moot, the Court should merely declare that had it not been moot it would have found for the Applicant/Appellant.

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12 September 2022