THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 478/09

In the matter between:

Equity Aviation Services (Pty) Ltd **Appellant**

and

South African Transport and Allied Workers Union **First Respondent**

Employees dismissed by the Appellant **Second and further respondents**

Neutral citation: Equity Aviation v SATAWU (478/09) [2011] 232 ZASCA (30 November 2011)

Coram: **Brand, Lewis, Malan and Shongwe JJA and Plasket AJA**

Heard: **17 November 2011**

Delivered **30 November 2011**

Summary: Employees who are not members of a trade union do not strike lawfully where they have not given notice to strike in terms of s 64(1)(*b*) of the Labour Relations Act 66 of 1995.

ORDER

On appeal from: Labour Appeal Court (Zondo JP, Khampepe ADJP and Davis JA sitting as court of appeal):

1 The appeal is upheld with costs including those of two counsel.

2 The order of the Labour Appeal Court is set aside and replaced with the following:

'The appeal is upheld. The order of the Labour Court is set aside and replaced with the following:

"The dismissal of the second and further applicants was not automatically unfair."'

JUDGMENT

LEWIS JA (BRAND, MALAN and SHONGWE JJA and PLASKET AJA concurring)

[1] This is an appeal against the majority decision of the Labour Appeal Court on the interpretation of s 64(1)(*b*) of the Labour Relations Act 66 of 1995. The section deals with the procedures to be followed by employees who intend to embark on strike action or employers who intend to lock-out. This case concerns only the right to strike.

[2] Section 64 must be complied with in order for employees to strike lawfully, and to enjoy the protection afforded by the Act. It provides that every employee has the right to strike, and every employer has recourse to lock-out if, first (under 64(1)(*a*)), the issue in dispute has been referred to a council or the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation, and either a certificate is issued by the council or CCMA that the issue remains unresolved, or a period of 30 days has elapsed since the referral of the dispute; and, second, after the certificate has been issued, or

time has lapsed, under s 64(1)(*b*) notice is given of the proposed strike. Section 64(1)(*b*) provides:

'[I]n 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 . . . .'

There are further provisos that are not relevant to this dispute.

[3] At issue is whether, where a union has given the requisite notice on behalf of its members, and has embarked on a strike, other employees who are not members of that union need also to give notice in order for their strike action to be lawful. Khampepe ADJP and Davis JA in the Labour Appeal Court held not. Zondo JP held that a separate notice must be given by the non-union members in order for their strike to be protected. This appeal lies with the special leave of this court.

[4] The facts, at this stage, are largely common cause. The appellant, Equity Aviation Services (Pty) Ltd (Equity), is an aviation logistics company which provided services on the ramps and runways of South African airports, including the largest. The first respondent, the South African Transport and Allied Workers Union, was the majority union for Equity's employees. At the relevant time, Equity employed some 1157 people, 725 of whom were members of the union. The other respondents were employees who did not belong to the union.

[5] On 13 November 2003 the union referred a wage dispute to the CCMA. Conciliation did not succeed and on 15 December 2003 the CCMA issued a certificate that the dispute remained unresolved. The union issued a strike notice to Equity on the same day. It read: 'We intend to embark on strike action on 18 December 2003 at 08h00.'

[6] The union members did strike, for some four months. Their strike was regarded as lawful as the union had complied with the requirements of s 64(1)(*b*). Other employees who did not belong to the union participated in the strike too. Equity took the view that their participation was unlawful: none had given the requisite notice. On 19 November 2004, Equity dismissed them for unauthorized absenteeism during the strike.

I shall refer to the union as such, to the other respondents as 'the dismissed respondents', and to 'the respondents' when referring to the union and the dismissed respondents collectively.

[7] The dismissed respondents referred a dispute about the lawfulness of their dismissal to the CCMA. Conciliation was unsuccessful, and the matter was referred to the Labour Court, the respondents alleging that their dismissals were automatically unfair in terms of s 187(1)(*a*) of the Act. The Labour Court was asked to determine whether the dismissed respondents were required to be members of the union in order to participate in the strike lawfully. On 15 June 2006, some 18 months after their dismissal, the Labour Court found that the dismissed respondents were in fact members of the union at the time of the strike, but that in any event, they were not required to be members in order to participate lawfully. Their participation was thus lawful, and their dismissals automatically unfair. Equity was ordered to reinstate them with back pay, this despite the fact that the parties had agreed that the quantum of damages would be decided separately and at a later stage.

[8] The Labour Court granted leave to appeal to the Labour Appeal Court, and that court heard the appeal on 18 June 2008. On 14 May 2009 the Labour Appeal Court handed down its judgments. The appeal before this court, with its special leave, was heard on 17 November 2011. I shall revert in due course to the time taken for this matter to move through the adjudication process.

[9] As I have said, Khampepe ADJP wrote the majority judgment. Davis JA wrote a separate concurrence and Zondo JP dissented. But the court decided unanimously that the relief granted by the Labour Court should be set aside and that the dismissed respondents had not been members of the union when they participated in the strike. It found also that the notice issued by the union had not referred to the dismissed respondents, but that the latter had not been required to refer a separate dispute to conciliation.

[10] The sole point of difference between the majority judgments and the dissenting judgment was whether the dismissed respondents were required to issue a separate

strike notice to Equity, or whether the union's notice was sufficient to make the strike action by the non-union members lawful. Khampepe ADJP, observing that s 64(1) is silent on who must refer a dispute to the CCMA and on who must give the notice to strike, said that the section had to be interpreted in the light of the purpose of the Act as a whole and the purpose of the section itself.

[11] Equity contended before the Labour Appeal Court and this court that to allow employees, who had not given notice of their intention to strike, to participate with those who had given notice, would lead to disorderly strike action: that the employer would have no opportunity to prepare for the scale of the strike that would eventuate. The respondents contended, on the other hand, that once an employer had notice that a strike was proposed on a particular date it would be overly formal to require further strike notices: that s 64(1)(*b*) did not in express terms require more than one notice in respect of different groupings or unions; and that to require a notice given by the other respondents would limit their right to strike. I shall return to these arguments.

[12] Section 3 of the Act requires it to be interpreted in such a way as to give effect to its primary objects, in compliance with the Constitution, and in compliance with the public international law obligations of the country. In *Chirwa v Transnet Ltd & others*[1] Ngcobo J pointed out that the provisions of s 3 are not merely textual aids to be employed when the language of a provision is ambiguous. He said:

'[W]here a provision of the LRA is capable of more than one plausible interpretation, one which advances the objects of the LRA and the other which does not, a court must prefer the one which will effectuate the primary objects of the LRA.'

[13] Section 1 of the Act sets out its primary objects. These include providing a framework for, and promoting, orderly collective bargaining and promoting the effective resolution of labour disputes. Section 64(1)(*b*) is clearly designed for just that purpose. The question is whether employees who have not given notice of a proposed strike defeat orderly collective bargaining when they participate in a strike where other participants have given notice.

---

1 *Chirwa v Transnet Ltd & others* 2008 (4) SA 367 (CC) para 110.

[14] In interpreting s 64(1)(*b*) Froneman DJP in the Labour Appeal Court in *Ceramic Industries Ltd t/a Betta Sanitaryware & another v NCBAWU & others*[2] said that the section must be interpreted and applied in a manner which best gives effect to the primary objects of the Act, 'within the constraints of the language used in the section'. He continued:

'One of the primary objects of the Act is to promote orderly collective bargaining. Section 64(1)(b) gives expression to this object by requiring written notice of the commencement of the proposed strike. *The section's specific purpose is to give an employer advance warning of the proposed strike so that the employer may prepare for the power play that will follow.* That specific purpose is defeated if the employer is not informed in the written notice in exact terms when the proposed strike will commence.' (My emphasis.)

[15] The purpose of the strike notice is elaborated on by Helen Seady and Clive Thompson in their chapter on *Strikes and Lockouts* in Clive Thompson and Paul Benjamin *South African Labour Law*[3] as four-fold. First, the notice tells the employer that 'words are about to escalate into deeds', which they term 'settlement brinkmanship'. Second, it leads to more orderly industrial action: the employer is given the opportunity to regulate what is inherently volatile – to agree or impose picket rules, for example. Third, it allows for 'damage limitation'. Strikes are intended to cause financial loss, but the notice can prevent unnecessary loss – where an employer works with perishable goods, for example, it can take steps to protect them. And fourth, 'health and safety considerations'; in some cases an orderly slow down of production might prevent or reduce health and safety risks to everyone in the workplace and to the public. I would add that the requirement of a strike notice has an additional purpose: to protect employees. If they issue a strike notice in proper terms they are protected under the Act: their conduct is lawful. It is thus in all parties' interests that a strike notice is given by or on behalf of all those who intend to strike.

[16] In this matter Khampepe ADJP considered that requiring more than one notice of a strike would be contrary to labour law jurisprudence on the interpretation of s 64(1)(*b*),

---

2 *Ceramic Industries Ltd t/a Betta Sanitaryware & another v NCBAWU & others* [1997] 6 BLLR 697 (LAC) at 702F-I.
3 Clive Thompson and Paul Benjamin *South African Labour Law* (looseleaf) vol 1 AA1-314.

including the decisions of the Labour Appeal Court in *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd*,[4] and the Labour Court in *Afrox Ltd v SA Chemical Workers Union & others (1)*.[5] She held that to require the dismissed respondents to issue separate strike notices would be 'too technical and constitute an absurdity which the legislature could not have contemplated'. She also considered that the effect of Equity's interpretation would limit participation in strike action without justification. She added that in terms of s 64(1)(*b*) an employer is entitled to notice of the commencement of a strike but not to be informed about the identity of the strikers. She concluded, therefore, that the dismissed respondents' strike action had not been unlawful.

[17] Davis JA, who concurred with Khampepe ADJP, responding to the dissent of Zondo JP, considered that the latter's view that chaos might ensue if employees, who had not given notice, participated in strike action where other employees had given notice (through a union or individually), was based on hypothetical examples that were different from those in this dispute. He added:

'In my view, when collective bargaining fails and a strike commences the fact that a notice is provided by a *significant group of workers* within the bargaining unit which proposed to strike is sufficient to ensure the necessary form of orderly industrial relations. To read further limitations to section 27 [sc 23] of the constitution does not appear to me to be justified, either in terms of the purpose of the Act or the express wording of section 64 which . . . must be the starting point of the enquiry.' (My emphasis.)

[18] In argument in this court, even the respondents' counsel indicated that they did not rely on the test of a 'significant group of workers' and could not say what it meant. And Zondo JP pointed out that this construction of the section would introduce a considerable degree of uncertainty in the law governing industrial action. He said that the meaning of s 64(1)(*b*) should not change depending on the facts (a general rule of statutory interpretation). Davis JA's view, he cautioned, would lead to the conclusion that if an insignificant number of employees gave notice of their intention to strike, then

4 *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 *ILJ* 321 (LAC) para 28.
5 *Afrox Ltd v SA Chemical Workers Union & others (1)* (1997) 18 *ILJ* 399 (LC).

a further notice would have to be given for a significant number of employees who also intended to strike. On the other hand, if the significant number gave notice first, no further notice need be given by the insignificant number. That made no sense. I agree.

[19] The majority judgments, Equity argued, did not appreciate the differences between s 64(1)(*a*) and s 64(1)(*b*). The purpose of (*a*) is to provide first for conciliation, or a period to 'cool off'. The object of (*b*), on the other hand, requires notice of intended strike action in order for the employer to prepare for the power play that will follow. That purpose, Equity argued, would be undermined if an employer had no indication of the number of employees who would participate in the strike. The reason for notice – to warn the employer so that it can make preparations for the strike that ensues and to protect the employees themselves[6] – was not considered in the majority judgments.

[20] Were that fundamental purpose to be undermined, Equity argued, an employer would not be able to determine before the strike its scale, intensity and focus. It would thus not be able to make an informed decision as to whether to accede to the employees' demands; would be prevented from taking adequate steps to protect its business; could not make informed decisions on pre-strike regulatory decisions; and would be precluded from implementing adequate health and safety measures.

[21] Zondo JP took these considerations into account in reaching the conclusion that the dismissed respondents were not protected by the Act. He gave several examples that illustrate the chaos that might ensue should notice not be given that particular employees proposed to strike (the examples that Davis JA said were not useful). Equity advanced others. One suffices to illustrate the point.

[22] Assume that an employer employs 10 000 workers in the country. Two employees in a small town are dissatisfied with their particular work conditions. The majority union is not interested in their plight. The two individuals refer a dispute to the CCMA. It issues a certificate of non-resolution. One of the two employees issues a notice stating that they both intend to strike, giving 48 hours' notice. The employer does not consider this to be a threat to its business and takes minor steps to deal with their

6 See para 15.

absence. But on the day of the strike the majority of the 10 000 employees across the country embark on strike action. Had the employer known of the scale of the strike it would have acceded to the demands made by the two employees, or taken measures across the country to prevent chaos in the workplace. This consequence could not conceivably have been intended by the legislature.

[23] The example is an extreme one. The respondents argued that it is too far-fetched to be taken seriously, and that such extremes are unlikely. They contended that a strike notice is not issued in a vacuum. It can be issued only after negotiation and an attempt at mediation. The context would thus indicate to an employer who the likely participants will be, and thus the scale of the strike. In this case, the respondents argued, Equity was not caught by surprise. It knew that all the employees in the bargaining unit were affected by the dispute, regardless of whether they were members of the union or not. Indeed, a representative of Equity discussed their participation with representatives of the non-unionised employees. Moreover, the respondents argued, strike action is inherently disruptive and some uncertainty as to the identity or number of those who propose to strike does not necessarily make the strike disorderly. But in fact, Equity did not know that the non-unionised members would strike. It made enquiries and was told that only members of the union would strike. Its contingency arrangements were made on this basis.

[24] The argument of the respondents is premissed on the principle that the right to strike should be limited as little as possible. That principle flows from cases such as *S v Zuma & others*[7] in which the Constitutional Court said that constitutional rights 'conferred without express limitation should not be cut down by reading implicit limitations into them'. Thus limitations must themselves be strictly construed. And in *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd*[8] Cameron JA warned against importing into the Act 'without any visible textual support, limitations on the right to strike which are additional to those the legislature has chosen clearly to express'.

---

7 *S v Zuma & others* 1995 (2) SA 642 (CC) para 15 and *Chemical Workers* above, para 20.
8 *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 *ILJ* 321 (LAC) para 28.

[25] That proposition flows also from *Ceramic Industries*[9] argued the respondents. But in that case the Labour Appeal Court was concerned primarily with the employer's right to be given prior warning of a proposed strike, 'in exact terms'[10] and does not in any way suggest that the requirement of notice is a limitation of the right.

[26] In my view, the basic premiss of the respondents' argument is flawed. The requirement of notice is not a limitation of a right. It is a procedural requirement for the *exercise* of the right to embark on strike action. Requiring all employees to serve such a notice does not impinge on their rights. Nor does such a requirement need to be read into the section. It is the logical interpretation of the section required to give effect to its purpose: warning of the power play that will follow, in such a way that the employer can make informed decisions.

[27] That this must be the correct interpretation of s 64(1)(*b*) is assumed by the authors of *Labour Relations Law: A Comprehensive Guide*.[11] They state that once there has been a discharge of the conciliation and notice requirements, a union is entitled to 'call out on strike all its members employed by the employer, and not only those members in dispute with the employer. Employees who are not union members would also be able to join the strike (the requirement is only that the dispute be conciliated) *provided they give separate notice of their intention to strike*'. (My emphasis.)

Zondo JP relied on this statement in support of his conclusion, while Khampepe ADJP dismissed it as being unsupported by authority.

[28] I consider that Zondo JP correctly interpreted s 64(1)(*b*): employees who do not belong to the union that has given the strike notice must, in order lawfully to embark on strike action, give notice that they too intend to strike. They may do so through a representative or personally, provided that their notice alerts the employer to the extent of the strike (which will always be a matter of fact) and allows it to make the necessary arrangements. If it were otherwise, in Zondo JP's words, the Act would 'promote not

9 *Ceramic Industries Ltd t/a Betta Sanitaryware & another v NCBBAWU & others* [1997] 6 BLLR 697 (LAC), cited above, at 701.
10 At 702G-I.
11 *Labour Relations Law; A Comprehensive Guide* 3 ed (1999) by D du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch and S Christie at 238.

only disorderly collective bargaining but will also usher in an era of chaotic collective bargaining in our labour dispute resolution system'. The appeal must thus succeed.

[29] This matter has taken an inordinate time to reach this stage. The wage dispute was first referred to the CCMA in November 2003. The CCMA issued a certificate of non-resolution on 15 December 2003. The union's strike notice was issued the same day. The strike commenced three days later than that, on 18 December 2003. The dismissed respondents were dismissed 11 months later. Their dispute was referred to the CCMA on 1 December 2004. It was not resolved. The matter was heard by the Labour Court on 12 June 2006, some 14 months after the statement of case was delivered to the Labour Court. That court delivered its judgment within a month, and gave leave to appeal within two months. The Labour Appeal Court's hearing was on 18 June 2008. Its judgments were in turn handed down some 11 months later. The hearing of the matter in this court was delayed because of intervening factors affecting Equity. In the circumstances, where employees had been dismissed some eight years before the hearing in this court, both Equity and the dismissed respondents must have been prejudiced. The delays in the court system are to be deplored. The Registrar of this court is requested to bring this judgment to the attention of the Judge President of the Labour Appeal Court.

[30]

1 The appeal is upheld with costs including those of two counsel. The order of the Labour Appeal Court is replaced with:

2 The order of the Labour Appeal Court is set aside and replaced with the following:

'The appeal is upheld. The order of the Labour Court is set aside and replaced with the following:

"The dismissal of the second and further applicants was not automatically unfair."'

_____

C H Lewis

Judge of Appeal

APPEARANCES:

FOR APPELLANT:	J J Gauntlett SC (with him G Leslie)
	Instructed by
	Senekal Simonds Inc, Bedfordview
	Honey Attorneys, Bloemfontein
RESPONDENT:	J G van der Riet SC (with him T M G Euijen)
	Instructed by
	Cheadle Thompson & Haysom, Braamfontein
	McIntyre & van der Post, Bloemfontein.