# *Equity Aviation v SATAWU* (478/09) [2011] ZASCA 232 (30 November 2011)

*The issue of separate strike notices where employees are not members of a trade union*

## 1 Introduction

Recently the question whether employees who are not members of a trade union may strike "lawfully" where they have not given (separate) notice to strike to their employer in terms of section 64(1)(b) of the Labour Relations Act 66 of 1995 (the LRA) was considered by the Supreme Court of Appeal. The court held a different view from the majority of the Labour Appeal Court. Since the preferred interpretation of section 64(1)(b) has been described by some as resulting in a *prima facie* limitation of the right to strike the judgment merits discussion (the judgment has also been referred to the Constitutional Court).

## 2 Requirements for a Protected Strike

The LRA regulates the fundamental right of workers to strike (as found in s 23(2)(c) LRA) in more detail. In chapter IV of the LRA the procedural and substantive requirements for a protected strike are set out. As far as procedural requirements are concerned two conditions are relevant: first the issue in dispute must have been referred for conciliation. Section 64(1) requires that the dispute must have been referred to either a bargaining or statutory council or to the Commission for Conciliation, Mediation and Arbitration (CCMA) and a certificate must be issued that the dispute remains unresolved, or 30 days must have lapsed since referral. Secondly, the employer must be given at least 48 hours' notice of the intended strike – in the case of the public service 7 days (see s 64(1)(c) LRA). If a notice to commence a strike does not specify the exact time and date of commencement, it will be defective. A strike can be suspended and it is not necessary to give a new notice for the resumption of a protected strike. There are some instances when these procedures are inapplicable. For example, where a lock-out is in reaction to a strike or lock-out which does not conform to the LRA, or where (in the case of a strike) the strike is in reaction to the unilateral change to conditions of service (s 64(3), (4) LRA). It is no longer a requirement that a ballot be held first before employees may make use of the strike mechanism (s 67(7) LRA). Although a ballot is not required before employees may make use of the strike weapon, the LRA does stipulate that the constitution of a union must provide for a ballot to be held, and that a member may not be disciplined or his/her membership terminated for non-participation in a strike, unless a ballot was held and the majority of the voting members voted in favour of the strike (see s 95(5)(p), (q) LRA).

It is evident that parties remain to some extent free to contract out of (a) the right to strike and recourse to the lock-out (see s 65(1)(a) LRA);

(b) the procedures to be followed before they can embark upon industrial action (see s 64(3)(a), (b) LRA). However, this leaves the question whether a strike can be protected when complying with the procedural requirements of the LRA but not with the more stringent requirements of a collective agreement. Many recognition agreements provide that should the parties deadlock during wage negotiations they will hold a number of "cooling off" meetings and, if no agreement can be reached at these meetings, the parties will then refer the dispute to mediation before resorting to industrial action. In *County Fair Foods (Pty) Ltd v FAWU* 2001 5 BLLR 494 (LAC) the issue before the Labour Appeal Court was this: If a recognition agreement provides for a specific pre-strike procedure but the union chooses to deviate from the agreed procedure and to follow the procedures laid down in the LRA instead, is the strike unprotected? The court answered this question with a firm negative. It reasoned that section 65(1)(a) of the LRA, which prohibits strikes if the employees are "bound by an agreement that prohibits a strike or lock-out in respect of the issue in dispute", applies only to agreements that prohibit strikes over specific "substantive" issues. In other words, the agreement will prevail over the LRA only if the parties agree that they will not strike over certain kinds of disputes. The court stated that if section 65(1)(a) was to be extended to *procedural* requirements laid down in collective agreements the phrase "in respect of the issue in dispute" would be rendered meaningless (par 13).

Although the Constitutional Court did not finally hold thus, the LRA does not recognise a so-called duty to bargain that can be enforced in a court of law. O'Regan J noted in an *obiter dictum* that a justiciable duty may present difficulties to all concerned (see Van Niekerk *et al Law@work* (2012) 372 regarding *SANDU v Minister of Defence* 2006 11 BLLR 1043 (SCA)) in the *SANDU* case (par 55):

> [I]t should be noted that were section 23(5) to establish a justiciable duty to bargain, enforceable by either employers or unions outside of a legislative framework to regulate that duty, Courts may be drawn into a range of controversial industrial relations issues.

In *NEWU v Leonard Dingler (Pty) Ltd* 2011 7 BLLR 706 (LC) the Labour Court expressly held that an employer is not obliged to bargain with a union. Parties therefore remain free to make use of industrial action in order to enforce their demands in this regard (that is in respect of, for example, a refusal to recognise a trade union or to agree to the establishment of a bargaining council, the withdrawal of recognition of a collective bargaining agent, resignation from a bargaining council, and disputes about appropriate bargaining units, bargaining levels, or bargaining subjects). However, the LRA does impose a procedural constraint in the event of such a dispute: a party may only give notice of industrial action once an advisory arbitration award has been obtained (see s 64(2) LRA).

For completeness sake, one should add that there can only be a protected strike if the strike is not prohibited by section 65 of the LRA. In addition, there must be an issue in dispute. In *City of Johannesburg*

*Metropolitan Municipality v SAMWU* 2011 7 BLLR 663 (LC) the point was raised that before a union can fulfil any procedural requirements there must be an issue in dispute (which issue must be a matter of mutual interest) to be referred to conciliation. The court cautioned against the view that requires terms such as "demands" and "deadlocks" as used under the Labour Relations Act 28 of 1956 (see par 12). The court cited the categorisation of the Labour Appeal Court (per Zondo JP) in *TSI Holdings (Pty) Ltd v NUMSA* 2006 *ILJ* 1483 (LAC) par 27: "[There are] three categories of strikes, namely, those which have a demand, those where there is no demand but there is a grievance and those in which there is a dispute". The court however stated (par 12) that:

> [t]here are no bright lights between these categories. Sometimes the word 'demand' is used in a generic sense to refer to all three categories of strikes; sometimes it is used to refer to demands for higher wages. But these are not statutorily sanctioned requirements. The LRA refers only to a 'grievance' or a 'dispute'. There is thus no statutory requirement for the existence of a deadlock before a referral to either the CCMA or a bargaining council.

Furthermore, the definition of "dispute" in section 213 of the LRA also includes "an alleged dispute". The court thus stated (par 14) that for "the purposes of the definition of a strike, therefore, all that need be established as an objective fact is the allegation of a dispute, not its existence."

In cases where there is an express demand, the Labour Court held in *FGWU v The Minister of Safety & Security* 1999 4 BLLR 332 (LC) that the "issue in dispute" may be identified by asking what the addressee of the demand is actually expected to do in order to bring the dispute to an end.

## 3 The Facts in the Equity Aviation Case

The facts are summarised in the judgment of the Supreme Court of Appeal (refer to par 4-9).

Equity Aviation Services (Pty) Ltd (Equity) is an aviation logistics company providing services on the ramps and runways of South African airports. The South African Transport and Allied Workers Union (SATAWU) at the time of the dispute was the majority union for Equity Aviation's employees (725 out of some 1157 employees were members of the union). The respondents other than SATAWU were employees not belonging to the majority union. The union referred a wage dispute to the CCMA on 13 November 2003. A month later, after unsuccessful conciliation the CCMA issued a certificate declaring that the dispute remained unresolved on 15 December 2003. The union then issued a strike notice to the employer on the same day. The strike notice informed the employer that: "We intend to embark on strike action on 18 December 2003 at 08h00." The union members proceeded to strike for some four months, which strike was considered protected as it complied with section 64(1)(b) of the LRA. However, other employees who were not members of the union also participated in the strike and the employer considered such participation as unprotected as these non-union employees had not given separate notice of their intention to

strike. These employees were dismissed on 19 November 2004 for unauthorised absenteeism during the strike. The non-union dismissed employees referred a dispute about the fairness of their dismissal to the CCMA. (The Supreme Court of Appeal used the term "lawfulness" instead of "fairness".) In order for the Labour Court to decide whether the employees' dismissals were automatically unfair in terms of s 187(1)(a) of the LRA the court had to decide whether the dismissed respondents were required to be members of the union in order to participate in the strike without fear of dismissal. Almost two years after their dismissal, on 15 June 2006, the court found that the dismissed employees actually were 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 dismissals were thus held to be automatically unfair. Equity Aviation was ordered to reinstate them with back pay. Leave to appeal was granted, which appeal was heard on 18 June 2008 (two years after the court *a quo's* judgment). The Labour Appeal Court handed down its judgment on 14 May 2009. That court unanimously held that the dismissed employees were not members of the union at the relevant time and that the strike notice of the union did not refer to the dismissed employees. However, the court members differed regarding the impact of such fact. The majority held that the dismissed employees had not been required to refer a separate dispute to conciliation. Furthermore, Khampepe ADJP, noting that section 64(1) is silent on *who* must refer a dispute to the Commission and on *who* must give the notice to strike, held that the section had to be interpreted in the light of the purpose of the LRA as a whole and the purpose of the section itself. She also found that to require the dismissed employees to issue separate strike notices would be "too technical and constitute an absurdity which the legislature could not have contemplated" (par 174). Another interpretation would limit participation in strike action without justification and, according to this interpretation the judge added that in terms of section 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 (par 175). The court's conclusion was therefore that the dismissed employees' participation in the strike action was not unprotected (par 175).

The issue to consider on further appeal was formulated as follow by the Supreme Court of Appeal (par 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 Right to Strike

As indicated earlier the right of workers to strike is a fundamental right in South Africa. This and other provisions underline the significance of the right to strike. The preamble to the LRA states that the aim of the LRA

is to change the law governing labour relations and, *inter alia*, "to promote and facilitate collective bargaining". As many modern statutes do today, the LRA boasts with both purpose (s 1) and interpretation (s 3) provisions. Section 1(c) of the LRA notes that two of its purposes are "to provide a framework within which employees and their trade unions and employers and employers' organisations can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest" and "to promote orderly collective bargaining" (s 1(d)).

In addition, section 67(2) of the LRA states that:

> [a] person does not commit a delict or a breach of contract by taking part in a protected strike or a protected lock-out or in any conduct in contemplation or in furtherance of a protected strike or protected lock-out.

The Constitutional Court has on more than one occasion acknowledged the importance of this right to workers and unions and, ultimately, for successful collective bargaining. In *Re Certification of the Constitution of the Republic of South Africa 1996* 1996 4 SA 744 (CC) the court held that the inclusion of the right to strike in the Constitution (but not the right to lock out for employers) does not diminish the right of employers to engage in collective bargaining, nor does it weaken their right to exercise economic power against workers (par 65). In fact, while workers must act collectively and ultimately depend on the right to strike to further their interests and achieve desired outcomes, employers as the stronger party in the employment relationship have other social and economic means to further their interests. It should perhaps be mentioned that the LRA does not generally prohibit the use of replacement labour during industrial action (refer to s 76).

In *NUMSA v Bader Bop (Pty) Ltd* 2003 2 BLLR 103 (CC) the court considered the right of a minority trade union to strike in support of a demand that the employer recognise the union's shop stewards. The court, in accordance with section 39(1) of the Constitution, recognised the importance of the right to strike and preferred an interpretation that would not unduly limit the right to strike which was also more in accordance with interpretations of Conventions 87 and 98 by the International Labour Organisation supervisory bodies.

## 5 The Strike Notice

Although the Labour Relations Act 28 of 1956 did not provide for a strike or lockout notice the courts, in a number of cases, did require unions to give the employer prior notification of strike action. The industrial court in 1987 (*MAWU v BTR Sarmcol* 1987 *ILJ* 815 (IC) 836g) and in 1988 (*BAWU v Palm Beach Hotel* 1988 *ILJ* 1016 (IC) 1023g) stated that the failure to give notice was unfair. In fact in the *BAWU* case the industrial court (1023g) held that the failure to give notice was a serious failure. The respondent in this case was a hotel and had an obligation to its guests. The Labour Appeal Court created by section 17 of the 1956-Act as well as the then Appellate Division of the Supreme Court followed this approach. The National Manpower Commission (established in 1990) then

recommended that a written notice be given before the commencement of a lawful strike (see Technical Committee of the National Manpower Commission "Proposals for the Consolidation of the Labour Relations Act" (1990) 11 *ILJ* 285 297).

Traditionally the aspects raised with regard to strike notices related to the content thereof – whether it specified the commencement and the scope of the proposed industrial action sufficiently. In 1997 the Labour Appeal Court considered the requirements for a valid strike notice (*Fidelity Guards Holdings (Pty) Ltd v PTWU* 1997 9 BLLR 1125 (LAC)). Myburgh JP held the notice "'that we give you 48 hours notice of the workers' intent to embark on strike action. The strike will not commence before the expiry of the 48 hours notification' … might have been defective in that it had not given a specific time for the commencement of the proposed strike" (1132). Froneman DJP also considered the notice and made some additional remarks (with which Myburgh JP agreed). The discussion starts with the prior judgment of the Labour Appeal Court in *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction and Allied Workers Union* 1997 6 BLLR 697 (LAC) 702:

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

Froneman DJP continued to state that in the *Ceramic Industries* case non-compliance with section 64(1)(b) was expressly linked to the non-fulfilment of the purpose of the section. That purpose was identified as providing advance warning to an employer of a proposed strike so that the employer may prepare for what will follow.

Recently, in *Transnet Ltd v SATAWU* 2011 11 BLLR 1123 (LC)) the Labour Court considered whether a notice was deficient and the resultant strike therefore unprotected. In this case the union demanded that the applicant abandon changes to its workers' shift roster and the discipline of a manager for "incompatibility" or incompetence. After the relevant bargaining council certified the dispute unresolved the union gave notice of its intention to call its members out on strike.

The court (par 12) also cited the case of *Ceramic Industries* (701-702):

> In determining whether there has been compliance with section 64(1)(b) of the Act an interpretation must be sought, as stated earlier, which best gives effect to the broader purpose of the Act and the specific purpose of the section itself. Section 64(1)(a) sets out the first requirement to be met before embarking on a protected strike viz an attempted conciliation of the issue in

> dispute before collective action is taken. Section 64(1)(b) sets out the next requirement: notice of the proposed strike to the employer. Its purpose is to warn the employer of collective action, in the form of a strike, and when it is going to happen, so that the employer may deal with that situation. By their very nature strikes are disruptive, primarily to the employer, but also to employees and, sometimes, to the public at large. One of the primary objects of the Act is to promote orderly collective bargaining. Section 64(1)(b) assists in that orderly process. A failure to give proper warning of the impending strike may undermine that orderliness. This might, in turn, frustrate labour peace and economic development, other important purposes of the Act (section 1). Compliance with the provisions of the section is thus called for.

The court held that warning employers of a proposed strike may have at least two consequences for the employer (par 12; see also the *Ceramic Industries* case 701-702): "The employer may either decide to prevent the intended power play by giving in to the employee demands, or, may take other steps to protect the business when the strike starts."

*In casu* the notice was deficient for the second reason – the employer did not know when, after 48 hours, the proposed strike will commence. The notice also did not specify at which depot it would occur. The court continued by clearly indicating that the language and purpose of section 64(1)(b) require that a *specific time* for the commencement of the proposed strike be set out in the written notice. According to the court the legislature was "anxious" that attention be paid to the "commencement" of the strike (par 12; see also the *Ceramic Industries* case 701-702):

> The use of an exact time expressed in hours as a minimum of the notice to be given seems to indicate that the longer period envisaged by the phrase 'at least' should also be expressed in an exact manner. The manner in which the time of the commencement of the strike is expressed may, however, differ depending on the nature of the employer's business. Strikes can occur which involve the whole workforce and others which merely involve one or more shifts. In a shift system notice of the exact time of the proposed strike in respect of particular shifts may be necessary.

In addition, the court held that the fact that the applicant could infer from the facts and the circumstances the extent of the strike did not remedy the defect in the strike notice (par 14).

In *Public Servants Association of South Africa v Minister of Justice and Constitutional Development* 2001 11 BLLR 1250 (LC) par 68 the court held that the grievance need not be set out in the strike notice as the notice will have been preceded by negotiations and at conciliation meetings opportunities would have been created to explore the nature and ambit of the demand. In *SAA (Pty) Ltd v SATAWU* 2010 *JOL* 24947 (LC) the court differed from the above judgment. The court stated that the employer must be in a position to know with some degree of precision which demands a union and its members intend to pursue through strike action and what is required to meet those demands (see par 27). Although this may *prima facie* appear to introduce a further limitation on the right to strike as the court goes further than the *Public Servants Association* case, this approach relates to the purpose of the strike notice

as mentioned in the *Ceramic Industries* case, namely to enable the employer to decide whether its interest are best served by resisting the union's demands or acceding to them. In *Edelweiss Glass & Aluminium (Pty) Ltd v National Union of Metal Workers of South Africa* 2012 1 BLLR 10 (LAC) the court had to consider whether a change to a demand not made during the conciliation process, but during the course of the protected strike, renders the strike unprotected (see par 46). The court found that the demand for the 13th cheque did not render the protected strike unprotected. The strike will only lose its protected status if the employees used the protected strike as leverage to achieve objects in respect of which no strike action could be taken (par 52). It appears from the *Edelweiss* case that a party may bring a proposal to the table, after the commencement of the strike, if the purpose of the proposal is an attempt to resolve the dispute that gave rise to the strike. One may ask whether the *Edelweiss* case allows the employer to know with a degree of precision which demand the union will pursue, if such demands are not mentioned in the strike notice.

The recent dispute regarding the strike notice in the *Equity Aviation* case dealt with another aspect – that is, who is covered under a strike notice. In other words, where a strike notice is given to an employer (which notice is not deficient in any way) a further question, namely whether such notice covers all the employees who are proposing to embark on the proposed strike, should be answered. In the *Equity Aviation* case the court refused to view the requirement of a notice as a limitation of a right. The court stated that it (the strike notice) "is a procedural requirement for the *exercise* of the right to embark on strike action" (par 26). Therefore, the court stated, requiring all employees to serve such a notice does not impinge on their rights.

The appellant argued that the majority judgments of the Labour Appeal Court did not have proper regard of the purpose of section 64(1)(b), namely advance warning for the employer and that to allow employees to strike, who had not given notice of their intention to strike, would lead to disorderly strike action (par 11). The argument was made that if an employer does not know how many employees will embark on the strike (par 20):

> 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.

This reasoning is in line with the fourfold purpose of the strike notice as formulated by Seady and Thompson ("Strikes and Lockouts" in *South African Labour Law* (eds Thompson & Benjamin) (loose leaf) Vol 1 AA part 1 314 *et seq*): first, serving as a warning to the employer that "words are about to escalate into deeds"; second, promoting orderly industrial action; third, limitation of damages; and fourth advancing health and safety considerations.

The Supreme Court of Appeal added a fifth purpose, namely to protect employees (par 15). The court stated that if employees issue a strike notice in proper terms they are protected under the LRA and their conduct is lawful. The court thus held that it is in all parties' interests that a strike notice is given by or on behalf of *all* those who intend to strike.

The Supreme Court of Appeal concluded by preferring the minority judgment of Zondo JP's interpretation of section 64(1)(b), namely that those employees who do not belong to the union giving 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 … and allows it to make the necessary arrangements" (par 28).

The court was of the opinion (in agreement with Zondo JP) that another interpretation would not only promote disorderly collective bargaining but would also "usher in an era of chaotic collective bargaining in our labour dispute resolution system" (par 28).

## 6 Evaluation

At first glance the procedural requirements found in section 64 seem uncomplicated and simple. However our courts have been called upon to engage with the content of this section on numerous occasions, indicating that the legislature could be more prescriptive in terms of the requirements for a valid strike notice.

A distinction is made by Zondo JP in respect of the purposes of section 64(1)(a) and section 64(1)(b). The purpose of section 64(1)(a) is to provide parties with the opportunity to resolve their dispute through conciliation or mediation. During this cooling-off period parties can reflect and determine how to resolve the dispute.

If one accepts that the purpose of section 64(1)(b) is to give an employer advance warning of the proposed strike to enable the employer to prepare for the power play that may follow, then prior knowledge of the number of employees that will partake in the strike is of some importance as it would be much easier for an employer to prepare for the industrial action if it knows how many employees will be involved. As stated by the Supreme Court of Appeal (par 15), a strike notice given in proper terms by all those who intend to strike is also beneficial to the employees as they may then be protected under the LRA.

One of the reasons given for a notice of strike action in the *Ceramic Industries* case 1997 6 BLLR 697 (LAC) was to enable the employer to decide whether to prevent strike action by giving into the union's demands. Notifying the employer of the exact number of employees intending to strike may influence the employer's decision whether to accede to the union's demands. If more employees are taking part in the strike, the employer might be under greater pressure to accede to the union's demands, thereby averting the strike. This will be beneficial for both employers and employees. This illustrates how information about the number of employees planning to take part in the strike can influence

the power play that will follow. The judgments by Zondo JP and the Supreme Court of Appeal, underwrite the approach followed in the *Ceramic Industries* case. In both the *Equity Aviation* case and the *Ceramic Industries* case (and in the minority judgment of Zondo JP in the Labour Appeal Court) it was highlighted that section 64(1)(b) gives expression to one of the primary objects of the LRA, namely to promote orderly collective bargaining. The Supreme Court of Appeal adopted the approach followed by Zondo JP that requiring all employees to give notice is not a limitation of their rights and this requirement does not need to be read into the section. In fact the requirement that all employees must serve notice is a logical interpretation of section 64(1)(b). The Supreme Court of Appeal in this case made it clear that the purpose of this section is to give an employer advance warning of the proposed strike, enabling the employer to make informed decisions. The different purposes of section 64(1)(a) and section 64(1)(b) lead to the different interpretations of the sections. The employees dismissed by the appellant in this case were not required to issue a separate referral of the same dispute in terms of section 64(1)(a), however in terms of section 64(1)(b) they were required to inform the employer of their intention to embark on strike action.

The right to strike should not be limited unduly, in fact this right should be limited as little as possible (see *eg S v Zuma* 1995 2 SA 642 (CC); *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* 1990 *ILJ* 321 (LAC); *NUMSA v Bader Bop (Pty) Ltd* 2003 2 BCLR 182 (CC); *Business South Africa v The Congress of South African Trade Unions* 1997 6 BLLR 681 (LAC) (in particular the minority judgment of Nicolson JA)). The question posed by the case under discussion is whether the requirement of notice by non-union members is a limitation of a right. If one accepts that the requirement of a notice is a procedural hurdle employees must overcome to exercise the right to strike, then this requirement cannot be viewed as a real limitation of a right. The court in the current matter also found it unnecessary to read this requirement into section 64(1)(b) and found it to be a logical interpretation of the section; warning the employer of the power play and enabling the employer to make informed decisions. This procedural requirement should ensure orderly collective bargaining and thereby promote an important purpose of the LRA. Internationally, procedural restrictions on the right to strike are permissible, however these restrictions may not place substantial limitations on the right to strike (Ben-Israel "The Scope and Extent of the Right to Strike" in *International Labour Standards: The Case of Freedom to Strike* (ed Ben-Israel) (1988) part III). Procedural requirements must be reasonable. According to the Supreme Court of Appeal informing the employer of the number of employees that will partake in the strike can be construed as reasonable and does not impose a serious limitation on workers' right to strike.

Any commentary on this judgment would in earlier years probably have ended at this juncture. However, since the LRA has to be interpreted in light of the Constitution and South Africa's international obligations,

and since orderly collective bargaining is but one of the primary objects of the LRA, there remains a small measure of discomfort. The import of section 64(1)(b) has been interpreted primarily having regard to the purpose of a strike notice (set out earlier in this contribution), which has been formulated by the Labour Appeal Court and the Supreme Court of Appeal. According to the Supreme Court of Appeal the purpose of a strike notice is to assist and protect not only employers but also employees. No doubt SATAWU and its members remain unconvinced and may advance the view that where the express wording of a provision does not limit the right to strike a court should be very hesitant to find that an additional hurdle (whether of a substantive or procedural nature) exists. Employees may very well argue that several requirements now have to be met in order to embark on a protected strike (notice of the exact commencement of the strike, the extent of the strike, the formulation of the demands/issues in dispute with some degree of precision, and information about the identity of the employees planning to strike). These requirements coupled with the general, albeit not unlimited right to make use of replacement labour, may very well impact on the effectiveness of planned industrial action. After all is said and done the Constitutional Court has recognised that workers must act collectively and ultimately depend on the right to strike to further their interests and achieve desired outcomes. The matter is forthcoming in the Constitutional Court – *South African Transport and Allied Workers Union and Others v Moloto* CCT128/11 – so that we may expect finality on this issue once and for all.

A matter of concern is the time this case took to reach the Supreme Court of Appeal. Seven years had lapsed from the referral of the dismissal dispute to the CCMA until the case was heard in the Supreme Court of Appeal. This delay in our dispute resolution system does not support the purpose of the LRA, namely the effective resolution of labour disputes.

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