IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Johannesburg

Case no: JA49/06

In the matter between

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

And

South African Transport and **1st Respondent and**

Allied Workers Union & others **further Respondents**

JUDGMENT

ZONDO JP

Introduction

[1] I have had the benefit of reading the judgment prepared by Khampepe ADJP in this matter. Regrettably I am unable to agree with the conclusion that she reaches in that judgment that the appeal falls to be dismissed. In my view the appeal should succeed. I set out below how I arrive at this conclusion. After I had prepared an earlier draft of this judgment, Davis JA prepared his judgment as well in which he concurs in the order proposed by Khampepe ADJP. I shall comment on one or two of its aspects later herein.

[2] This case is about the dismissal of the second and further respondents from the appellant's employment for effectively

participating in a strike that took place in the appellant company from the 18th December 2003 to the 2nd January 2004. That strike took place pursuant to a strike notice that had been issued by the first respondent to the appellant on the 15th December 2003.

[3] The first question in this appeal is whether or not the second and further respondents were members of the first respondent at the time that the first respondent issued the strike notice to the appellant on the 15th December 2003 for the strike that was to commence on the 18th December 2003. If they were members of the first respondent, that is the end of the matter and the appeal falls to be dismissed. However, if they were not members of the first respondent at the time of the issuing of the strike notice, then another question will arise. That is whether or not the second and further respondents, not being members of the first respondent, were entitled to commence striking on the 18th December 2003 and continue taking part in the strike until the 2nd January 2004 *on the strength of the strike notice issued* by the first respondent on the 15th December. If they were entitled to do so on the strength of that strike notice, the appeal must fail. If they were not so entitled, the appeal must succeed.

[4] I have framed the issues in this case in the terms in which I have, despite the fact that in its written heads of argument the appellant included an argument to the effect that the second and further respondents were not entitled to participate in the strike because

they were not party to the referral to conciliation of the dispute which gave rise to the strike. The reason why I have not included this contention among the issues for determination in this appeal appears from paragraph 13 below. Before I consider the appeal, it is necessary to set out the facts of this matter.

The facts.

[5] The appellant has been described in this case as an aviation logistics company that provides service primarily on the ramps and runways of South Africa's six major airports. The first respondent, the South African Transport Allied Workers Union, ("**SATAWU**"), is a registered trade union which represented the majority of the appellant's employees in the appellant company. The appellant employed at the material time 2196 employees of which 1157 were permanent employees and the balance contract workers. Of the 1157 permanent employees 725 were members of SATAWU. The second and further respondents – their names appear in annexure "**A**" to the founding affidavit - are former employees of the appellant who were dismissed and whose dismissal is the subject of these proceedings.

[6] From the 18th December 2003 to the 2nd January 2004 there was a strike in the appellant company. The strike related to a wage dispute between the appellant and SATAWU. SATAWU had previously referred the dispute to the Commission for Conciliation, Mediation and Arbitration ("**the CCMA**") for conciliation as required by sec 191(1) of the Labour Relations Act, 1995 ("**the LRA**") but the dispute was not resolved at such conciliation.

[7] After the failure of the conciliation process, the CCMA issued a certificate of non-resolution of the dispute on the 15th December 2003. On the same day SATAWU issued a strike notice to the appellant. The strike notice read thus:

"**We intend to embark on strike action on 18 December 2003 at 08h00."**(my underlining).

The issuing of the strike notice was pursuant to the provisions of sec 64(1)(b) of the LRA which requires a 48 hours notice of the commencement of a strike to be given to an employer before a strike can be embarked upon.

[8] On the 18th December 2003 the strike started and went on until the 2nd January 2003. The second and further respondents took part in that strike. Mr du Preez, who was the National Human Resources Manager of the appellant at the time of the strike gave evidence that he had been given an assurance by the other trade unions to which he believed most of the second and further respondents belonged at the time, that their members would not take part in the SATAWU strike. That evidence was not challenged nor was it contradicted. Accordingly, the appellant must have been taken by surprise when employees who, it believed, were members of the other unions joined the strike as well on the 18th December. The appellant accepted that SATAWU's members were entitled to participate in the strike and that, accordingly, such strike was, "**for union members**", a protected strike. However, it adopted the attitude that employees who were not members of SATAWU were not entitled to participate in such strike and that, "**for such employees,**" the strike was not protected.

[9] Subsequent to the strike coming to an end, the second and further respondents were dismissed by the appellant for absence from work without permission. Their absence from work was without

permission but they were absent from work because they were participating in the strike from the 18th December 2003 to the 2nd January 2004.

[10] A dispute arose between the appellant, on the one hand, and, SATAWU and the second and further respondents, on the other, about the fairness or otherwise of the second and further respondent's dismissal. SATAWU contended that the reason for the second and further respondents' dismissal was the second and further respondents' participation in a protected strike and that, therefore, the dismissal was automatically unfair whereas the appellant contended that the second and further respondents' participation in the strike was not protected and, that, therefore, it was not automatically unfair. The dispute concerning the second and further respondents' dismissal was referred to the CCMA for conciliation. When conciliation failed to produce a resolution of the dispute, the union referred the dispute to the Labour Court for adjudication.

The Labour Court

[11] In the Labour Court the parties agreed to separate issues and to defer the issue of relief. The parties agreed that the Court had to decide whether or not the second and further respondents' dismissal was automatically unfair. The dispute came before Ngcamu AJ. One of the issues that the Labour Court was called upon to decide was whether or not the second and further respondents were SATAWU members when the strike commenced on the 18th December 2003. For reasons that will be apparent later I think that the question should be whether or not they were members of SATAWU at the time that the union issued the strike notice.

[12] The Labour Court found that the second and further respondents were members of SATAWU. It further found that they were, therefore, entitled to participate in the strike and that their participation in the strike was protected. The Labour Court also concluded that the second and further respondents' dismissal for participation in the strike was automatically unfair. Thereafter the Labour Court proceeded to order the appellant to reinstate the second and further respondents. It is common cause between the parties that, whatever the outcome of this appeal, the order of reinstatement made by the Labour Court should be set aside because that Court had been asked not to make that order at that stage. The Labour Court subsequently granted the appellant leave to appeal to this Court against its judgment. Hence this appeal.

The appeal

[13] In the appellant's written heads of argument Counsel who drew the appellant's heads, who is not the same Counsel as the Counsel who appeared for the appellant before us, submitted that the main issue raised by the appeal was whether or not employees who are not members of the trade union that referred the dispute which gave rise to the strike to conciliation are entitled to participate in the strike that such a union subsequently calls in respect of such dispute. This included a submission that employees who are not members of the trade union which referred the dispute to conciliation cannot take part in the strike that ensues unless they, too, refer that dispute to conciliation themselves or unless somebody or a union refers the dispute to conciliation on their behalf. Mr Gauntlett, who appeared for the appellant before us, did not pursue this point and, in my view, correctly so. The reason why Mr Gauntlett did not pursue this point is probably that it goes completely against established authorities both in the Labour Court and in this Court (See **Afrox Ltd v SACWU & others (1) (1997) 18 ILJ 399(LC)** , **Chemical Workers Industrial Union v Plascon Decorative Inland (Pty)Ltd (1999) 20 ILJ 321 (LAC), SACTWU v Free State and Northern Cape Clothing Manufactures' Association (2001) 22 ILJ 2636 (LAC)** and **Early Bird Farm (Pty)Ltd v Food and Allied Workers Union & others (2004) 25**

ILJ 2135 (LAC)). Mr Gauntlett pursued a much more narrower point. I shall deal with that point shortly. However, before that, I must deal with the issue of whether or not the second and further respondents were members of SATAWU at the relevant time.

Were the second and further respondents members of SATAWU at the time of the issuing of the strike notice?

[14] Both before the Court below and this Court one of the issues between the parties was whether or not the second and further respondents were members of SATAWU when members of SATAWU acquired the right to strike. As I have already said, the Court a quo found that they were. In this regard Counsel for the appellant attacked this finding of the Court a quo as unjustified by the evidence.

[15] In her judgment Khampepe ADJP has dealt quite thoroughly with the question whether the Court below was correct in its finding that the second and further respondents were members of SATAWU at the relevant time. She has concluded that the finding made by the Court below is unjustified by the evidence and finds that the second and further respondents were not members of SATAWU at the relevant time. I entirely agree with this conclusion as appears from what I say below.

[16] In par 23 of its judgment the Court a quo even said, among other things, in connection with the procedure to obtain SATAWU membership:

> "**The procedure is that the application form must be completed and submitted to the local office bearers who must submit it to the regional secretary. The application must be accompanied with the subscription fee. The application should be recommended by the General Working Committee to the Regional Executive Committee. The constitution does provide that those whose applications have been accepted should be informed in a particular manner.**"

The Court a quo pointed out in par 24 of its judgment that the

appellant requested the agendas and minutes of meetings of the Regional Working Committee, the Regional Executive Committee and those of the Central Executive Committee of SATAWU covering the relevant period when the second and further respondents' applications for SATAWU membership could have been dealt with, if there were any. The agendas and minutes that were requested seem to have been provided. Mr du Preez, who gave evidence on behalf of the appellant in the Court below and who was the National Human Resources Manager of the appellant at the time of the strike, testified that he went through the agendas and minutes that were supplied by SATAWU and could not find anything to suggest that any decision was ever taken by any of the relevant committees of SATAWU to either recommend or approve or accept any applications by the second and further respondents for membership. His evidence in this regard was not challenged under cross - examination nor was it contradicted by any other evidence.

[17] The Court a quo made the finding that the second and further respondents were members of SATAWU despite the fact that it could not point to any evidence before it that the procedure prescribed by SATAWU's constitution for the processing of applications for membership had been followed in respect of any applications for membership that the second and further respondents may have made. This was also despite the fact that there was no evidence before it that any structure of SATAWU had made any decision to recommend or approve or accept any application for membership that may have been made by the second and further respondents as is required by SATAWU's

constitution.

[18] The Court a quo said that no reason was given for the appellant's decision to return to SATAWU stop order forms which had been transmitted by fax to it in January 2004. The Court a quo said that there was nothing wrong with those stop order forms and, by implication, they should not have been returned to SATAWU. The Court a quo then said: "**In the light of this I am unable to accept that the 63 applicants were not members of SATAWU.**" This statement by the Court a quo gives the impression that the Court a quo forgot that what would have conferred SATAWU membership on the second and further respondents would not have been the acceptance of the stop order forms by the appellant but it would have been the taking by the relevant structure of SATAWU of a positive decision to approve applications for membership made by the second and further respondents if they ever made such applications at the relevant time. Very strangely, SATAWU did not lead any evidence that any of the procedures set out on its constitution for the conferment of membership were ever followed in respect of the second and further respondents nor did it lead evidence that any of its structures ever approved any applications for membership that may have been made by the second and further respondents at the relevant time.

[19] There can be no doubt whatsoever that at the time that SATAWU issued its strike notice and during the period of the strike no decision was ever taken by any structure of SATAWU to recommend or approve or accept any application for SATAWU membership that may have been made by the second and further

respondents to SATAWU. In the absence of such decision, the second and further respondents could not have been members of SATAWU at the time SATAWU issued the strike notice in this case or during the strike. Submitting applications for membership could not by itself confer membership on them.

[20] Before I move on to another issue, I need to say something about SATAWU's stance in the Court below and in this Court that the second and further respondents were its members during the strike. SATAWU knew that to acquire its membership an employee was required by its constitution to apply for membership and that that application had to be processed in a certain way and had to be recommended and ultimately approved or accepted by a certain committee authorised by the constitution to do so and the person concerned must then be informed of that decision. SATAWU knew from a certain stage prior to the commencement of the trial in the Court below that the relevant committee of SATAWU had not made any decision to approve any application made by the second and further respondents for membership of SATAWU at any stage before the end of the strike. Despite its knowledge of this factual position, SATAWU instructed its lawyers to assert that the second and further respondents were its members during the strike or refrained from instructing its lawyers that the second and further respondents were not its members during the strike. I take a very dim view of this way of conducting litigation by SATAWU. It is completely unacceptable. I hope that SATAWU's leadership will look into how this came about and take the necessary steps to deal with it and to make sure that nothing of this kind occurs in the future.

[21] In the light of the finding that at the relevant time the second and further respondents were not members of SATAWU, I need to proceed to then consider the contention that, because the second and further respondents were not members of SATAWU, they were not entitled commence striking on the 18th December 2003 and to continue to take part in the strike up to the 2nd January *2004 on the strength of the strike notice of the 15th December 2003*.

Were the second and the further respondents entitled to commence striking on the 18th December 2003 and to continue with the strike up to the 2nd January 2004 on the strength of SATAWU's strike notice of the 15th December 2003?

[22] Counsel for the appellant submitted that in this case the terms of the strike notice that SATAWU gave to the appellant were such that the proposed strike was limited to a strike by SATAWU members and not a strike by employees of the appellant who were not members of SATAWU.

[23] Counsel for the appellant argued that the second and further respondents, not being members of SATAWU, fell outside the category of workers which the strike notice told the appellant would commence striking on the 18th December 2003. The strike notice issued by SATAWU on the 15th December 2003 has been quoted above. However, because of the importance of its contents I shall quote it again. It said: "**We intend to embark on strike on 18 December 2003 at 08h00**" (my underlining).

[24] Counsel for the appellant relied upon the use by SATAWU of the word "**we**" at the commencement of the sentence in the strike notice to submit that the strike notice was to the effect that members of SATAWU intended to embark on a strike on the 18th December 2003 at 08h00. He submitted that the use of the word "**we**" in the sentence could not refer to persons who were not SATAWU members. Counsel's submission was that the effect of the use of the word "**we**" by SATAWU in the strike notice was that employees who were not SATAWU members were not included among those who, in terms of the strike notice, would commence striking on the 18th December 2003.

[25] Counsel for the respondents' answer to this contention was that a union cannot in law competently restrict the right to strike of any employee of the employer by limiting the strike notice to certain employees who otherwise could go on strike. He submitted that in effect what the union may say in its strike notice in regard to which employees will commence a strike on the day given in the strike notice is irrelevant. He argued that all that is required is that a strike notice be given to the employer which tells the employer when the strike would commence. He submitted that, where a union said in a strike notice that A, B and C would embark upon a strike on a certain day, D, E and F could also commence striking on the day given in the strike notice even though the strike notice did not include them among the employees who will commence striking on the day in question. He submitted that in commencing striking in those circumstances D, E and F could do so without the

giving of any other strike notice that covers them. I asked him whether in a case where a union said in a strike notice that its members would commence a strike on a certain day, employees who were not members of that trade union would be entitled to also go on strike on the day given in the strike notice without any further notice having to be given. Counsel for the respondents' answer to this question was in the affirmative.

[26] The respondents' Counsel did not dispute the correctness of Mr Gauntlett's contention that the use by SATAWU of the word "**we**" at the beginning of SATAWU's strike notice was a reference to SATAWU's members. It is difficult to think of any basis upon which Counsel for the respondents could have conceivably argued that "**we**" in that strike notice meant any employees other than those employees who were members of SATAWU at the time. Counsel for the respondents simply argued, as already indicated above, that, as long as SATAWU had given a strike notice, any employee of the appellant, irrespective of whether he or she was a member of SATAWU, was entitled to take part in the strike even if that employee fell into a category of employees which the strike notice said would not take part in the strike. Counsel for the respondents' submission was that it is not competent in law for a union to exclude any employees from commencing a strike at a time given in a strike notice.

[27] For the above contention Counsel for the respondents relied heavily, if not exclusively, on the judgment of the Labour Court in **Afrox Ltd v SA Chemical Workers Union & others (1) (1997) 18 ILJ 399 (LC)** and on the judgments of this Court in **Chemical**

Workers Industrial Union v Plascon Decorative (Inland) (Pty)Ltd (1999) 20 ILJ 321 (LAC), SACTWU v Free State & Northern Cape Clothing Manufactures' Association (2001) 22 ILJ 2636 (LAC) and **Early Bird Farm (Pty)Ltd v Food and Allied Workers Union & others (2004) 25 ILJ (LAC).** In so far as Counsel for the respondents relied upon these decisions in support of the submission that the second and further respondents did not need to refer the dispute to the CCMA for conciliation before they could commence striking, he was right. However, in so far as he relied upon these decisions in support of the contention that, despite the fact that in its strike notice SATAWU had effectively said that it was SATAWU members who were going to commence striking on the 18th December 2003, employees who fell outside the terms of the strike notice in that they were not members of SATAWU were entitled to also commence striking on the 18th December 2003 on the strength of SATAWU's strike notice, he misconstrued those decisions. .

[28] The issue in the Afrox case was whether or not, where a trade union had a dispute with an employer which directly affected its members employed in a particular branch and the union had complied with all the statutory requirements necessary for a protected strike to take place in respect of such a dispute, members of that union employed in another branch of the same company but not directly affected by the dispute, also had a right to take part in such a strike. At 403I in Afrox I, then sitting as an Acting Judge in the Labour Court, concluded that "**once a dispute exists between an employer and a union <u>and the statutory requirements laid</u>**

down in the LRA to make a strike a protected strike have been complied with, the union acquired the right to call all its members out who are employed by that employer out on strike and its members so employed acquire the right to strike (my underlining)**.**" In that case the Court was not called upon to decide the effect of the issuing by a trade union of a strike notice the content of which was formulated in certain terms which is what the issue is in the present case.

[29] The issue in the Plascon Decorative case was whether members of a trade union based in a bargaining unit other than the one which was directly affected by a particular dispute were entitled to take part in a strike relating to a dispute directly affecting other members of the union who were in another bargaining unit. In that case it was common cause between the parties that the procedures which the union had complied with rendered the strike a "**protected strike**" (par 3 of the judgment). The issue was not whether the strike notice that had been issued covered the non – bargaining unit members of the union in that case. Nor was it whether or not it was competent for a trade union to limit or exclude some of its members or some of the employees from the group of employees who would commence striking on the day given in the strike notice. The question was in that case whether the fact that the employees belonged to a different bargaining unit made any difference in law with regard to their right to take part in the strike. It was held, quite correctly, that that fact did not make any difference. As to what the issue was in the Plascon Decorative case, reference can be made to paragraphs 6, 21 and 29 of Cameron JA's judgment. As far as the other two cases are concerned,

namely, the SACTWU case and the Early Bird case, also in none of them was the issue whether or not by what it says in the content of a strike notice, it is competent for a trade union to limit the number of employees or categories of employees to commence a strike on the day specified in such strike notice.

[30] The argument that employees employed by the same employer, irrespective of the bargaining unit or branch in which they were employed, need not refer to conciliation a dispute that has already been referred to conciliation by their co – employees or their union before they can take part in the strike relating to that dispute is based on the understanding that the employees who are not directly affected by the dispute take part in the strike in support of the demands of their colleagues who are directly affected by the dispute and those demands are part of the dispute that has already been referred to conciliation. No purpose would be served by a second referral of the dispute to conciliation in such a case.

[31] If the employees not directly affected by the dispute giving rise to the strike sought to strike in respect of their own demands which were separate from those of the employees who are directly affected by the dispute that has been referred to conciliation, they would need to first refer their dispute to conciliation and, at the relevant time, issue a strike notice before they could acquire the right to strike. This is so because it would be a different dispute. Provided that this distinction is appreciated, the argument that employees who are not directly affected by a dispute that has already been referred to conciliation need not refer the same dispute to conciliation before they can take part in a strike relating

to such a dispute is, with respect, correct. However, this argument cannot be invoked in respect of the requirement that a notice of the commencement of a strike must first be given to the employer before employees can commence striking. The reason for this lies in the fact that the requirement that a dispute be referred to conciliation and the requirement that a notice of the commencement of a strike be given have different purposes.

[32] The purpose of the requirement that a dispute be referred to conciliation is to give the parties to the dispute an opportunity to resolve the dispute through conciliation or mediation. It is a cooling – off period for the parties to the dispute to reflect on the dispute and how it can or should be resolved without the need for industrial action. In **Ceramic Industries Ltd t/a Betta Sanitary Ware v National Building and Allied Workers Union (2) (1997) 18 ILJ 671 (LAC) at 677B – D** this Court said through Froneman DJP about the purpose of a strike notice required by sec 64(1)(b) of the LRA:

> **"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. The 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 s 64(1)(b) were not complied with.**"

Realising that the strike that the union may have been threatening might occur is now a certainty, the employer may, after receiving the notice of the commencement of the strike, decide to accede to

the union's demands to avoid the strike or he may decide to face the strike but to take such measures as he may deem necessary to deal with the strike and or to take such measures as he may deem necessary to protect his business or to minimise the impact of the strike on his business, including the employment of temporary replacement labour.

[33] It seems to me that the issue that needs to be decided at this stage is the question whether or not it is competent in law for a trade union, by what it says in a strike notice, to limit the number or categories of employees of the targeted employer who will commence striking on the date given in the strike notice. This is a matter for the construction of sec 64(1)(b) of the LRA. This provision will be quoted later in this judgment.

Interpretive context

[34] Before one can attempt to establish the correct interpretation of sec 64(1)(b), it is important to bear in mind the constitutional and statutory context in which sec 64(1)(b), like any other provisions of the LRA, must be interpreted. In this regard certain provisions of both the Constitution and the LRA are relevant.

[35] Section 23(1) of the Constitution – which is part of the Bill of Rights in the Constitution – provides that "**[e]veryone has the right to fair labour practices**". Sec 23(2)(c) provides that "**(e)veryone has the right to strike"**. Sec 23(4) provides that every trade union and every employers' organisation has the right:

"**(a) to determine its own administration, programmes and activities**;

b) to organise; and

c) **…….”**

Sec 23(5) provides that every trade union, every employer’s organisation and employer has the right to engage in collective bargaining and national legislation may be enacted to regulate collective bargaining. The LRA is such legislation.

[36] Sec 39(1) of the Constitution reads thus:

“**(1) When interpreting the Bill of Rights, a court, tribunal or forum –**

a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

b) must consider international law; and

c) may consider foreign law.

Section 39(2) of the Constitution provides that “**[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights**.”

[37] Section 232 of the Constitution provides that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Section 233 deals with the application of international law. It reads:

“**When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.**”

[38] The provisions of s 1 and s 3 of the LRA must also be taken into account in interpreting sec 64(1)(b). Section 1 of the Act states the purpose of the LRA. It provides that the purpose of the LRA is '**to advance economic development, social justice, labour peace and democratisation of the workplace**'. It seeks to achieve this purpose by fulfilling the primary objects of the LRA.

The primary objects of the LRA are set out in sec 1 as the following:

"**(a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;**

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

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

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

and

(ii) formulate industrial policy; and

d) to promote –

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

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

(iv) **the effective resolution of labour disputes".**

As can be seen above, one of the primary objects of the LRA is the promotion of orderly collective bargaining.

[39] The provisions of sec 3 of the LRA are of paramount importance in the construction or interpretation of the LRA. They enjoin everyone who applies the LRA to interprete its provisions to give effect to its primary objects, to interprete its provisions in compliance with the Constitution and also to do so in compliance with the public international law obligations of the Republic.

Sec 3 of the LRA provides as follows:

"**Any person applying this Act must interpret its provisions:**

a) to give effect to its primary objects;

b) in compliance with the Constitution;

c) in compliance with the public international law obligations of the Republic."

[40] It is important to note that, unlike those cases in which the literal theory of interpretation applies, a person applying provisions of the LRA need not first find that the language of the statute is not clear or is ambiguous or that giving provisions of the LRA the ordinary or natural meaning will lead to an absurdity before he can interprete provisions of the LRA in such a way as to give effect to the primary objects of the LRA. In my view the effect of sec 3 of the LRA is that whenever one seeks to interprete any provision(s) of the LRA, one is required to always give effect to the primary objects of the LRA and to always give an interpretation that will also be in compliance with the Constitution and with the public international law obligations of the Republic. This does not mean that one disregards the language chosen by the legislature to formulate the statutory provision. However, it does mean, in my view, that where adherence to the literal meaning of the statutory provision would not give effect to or promote the purpose or object of the provision and there is another meaning or interpretation that can be given to the provision which would promote, or give effect to the, purpose of the statutory provision, effect must be given to the interpretation that gives effect to the purpose of the provision even if this means departing from the ordinary or literal or grammatical meaning of the words or provision. Accordingly, before you settle on a particular interpretation of any provisions of the LRA, sec 3 requires you to stand back and ask yourself the questions: does this interpretation give effect to any one or more of the primary objects of the LRA? Is this interpretation in compliance with the Constitution? Is this interpretation in compliance with the public international law obligations of the Republic? If the interpretation that is proposed does not give effect

to the primary objects of the LRA or any one of the primary objects of the LRA or if it is not in compliance with the Constitution or with the public international law obligations of the Republic, that interpretation should be rejected and an interpretation should be sought which will comply with the injunction in sec 3 of the LRA.

[41] It is theoretically possible that one may have an interpretation of a provision of the LRA that gives effect to the primary objects of the LRA but is not in compliance with either the Constitution or the public international law obligations of the Republic or both. In such a case, quite clearly the requirement for an interpretation that complies with the Constitution will prevail. It is not necessary in this case to consider what should happen where an interpretation complies with the Constitution, gives effect to the primary objects of the LRA but is not in compliance with the public international law obligations of the Republic or vice versa.

[42] It is necessary to point out that the requirement of notice of industrial action is recognised internationally. Internationally, the requirement that industrial action be preceded by the giving of notice of such action is considered acceptable provided such requirement does not place a substantial limitation on the right to strike. (see Ben - Israel: Industrial Labour Standards 118). Some of the countries which subject the exercise of the right to strike to the procedural requirement of a prior strike notice are Denmark, Finland, Israel, the Republic of Slovenia, the Netherlands, Spain, Namibia, Swaziland, certain jurisdictions of Canada, England, Norway, Australia, Ghana, USA, Zimbabwe and Botswana.

Purposive construction

[43] It has been held that the approach that must be adopted in construing any provisions of the LRA is purposive construction. (See **BSA v COSATU & Another (1997) 18 ILJ 474(LAC) at 479A – B; CWIU v Plascon Decorative (Inland) (Pty) Ltd (1999) 20 ILJ 321(LAC); NEHAWU v University of Cape Town (2003) 24 ILJ 95 (CC)).** I am inclined to think that this is correct. However, should purposive construction have shades of meanings which might suggest that there are certain circumstances under which one should not have regard to the purpose of the legislation that is being interpreted, that cannot apply to the interpretation of the LRA because sec 3 does not contemplate cases when, in interpreting a provision of the LRA, one would be free to interprete it in such a way as not to give effect to the primary objects of the LRA, in such a way as not to comply with the Constitution and in such a way as not to comply with the international obligations of the Republic.

[44] The fact that purposive construction is the approach to interpretation that must be used each time a provision of the LRA is interpreted means that there must be a clear understanding of:

(a) what purposive construction is?

(b) how purposive construction differs from other theories of statutory interpretation

(c) what the rules are which govern purposive construction, and,

(d) what the scope of application of purposive construction is?

[45] Lourens du Plessis: *Re-Interpretation of Statutes*, 2002 Butterworths explains purposivism thus at 96:

"**Purposivism attributes meaning to a legislative**

> **provision in the light of the purpose that it seeks to achieve in the context of the instrument of which it is part. Where clear language and purpose are at odds the latter prevails**."

With regard to how one determines the purpose of a statutory provision, Du Plessis states that **"(a)ccording to the classical version of purposivism in the common law tradition, the so-called mischief rule in Heydone's case, the purpose of enacted law is to suppress mischief**" and **"(a) court interpreting a provision is constrained to ask four questions**." Du Plessis lists the four questions as being:

a) what was the common law before the enactment of the statutory provision?

b) what were mischief and defect for which the common law did not provide?

c) what is the remedy that Parliament resolved to use to rectify the position or "**to cure the disease**"?

(d) what was the true reason for the remedy chosen by Parliament.

[46] If there is no clear understanding of the issues referred to above about purposive construction, there is a great danger that purposive construction will not be used in the interpretation of the provisions of the LRA and instead different theories of statutory interpretation will be used when it is intended to use purposive construction. It is, therefore, necessary that attempts be made to obtain answers to these questions. Of course, one cannot deal with all these questions about purposive construction in a single judgment. I, therefore, do not propose to do so in this judgment. However, courts are going to

need to address these questions as our labour law develops so as to ensure that everybody has the same understanding of what purposive construction is and what the rules are which inform it. In this case I only propose to refer and discuss briefly some of the cases, both in English law and in South African law which have applied purposive construction. By choosing these cases I do not mean that they are the only ones that have applied purposive construction. I have chosen them simply because they come to my mind immediately. I shall start with English law.

[47] Those who are familiar with patent law seem to take it as settled that the term "**purposive construction**" was coined by Lord Diplock. Lord Diplock used the term "**purposive construction**" in a landmark decision of the House of Lords relating to the construction of patent claims, namely, Catnic Components Limited and Another v Hill and Smith Limited [1982] R.P.C. 183 (HL), a decision the popularity of which went far beyond the United Kingdom. For convenience I shall refer to this decision simply as "**Catnic**" or "**the Catnic decision**". The popularity of that decision, which was concurred in by the rest of the Law Lords in that case, certainly contributed significantly to the popularisation of the doctrine of purposive construction. Catnic introduced the use of purposive construction in the construction of patent claims in English patent law but was subsequently followed in other jurisdictions such as South Africa, Canada, Hong Kong, Australia and New Zealand (see Binnie J of the Supreme Court of Canada in Free World Trust v Electro Sante Inc., [2000] 2 S.C.R. 1024 par 39.)

[48] Prior to the Catnic decision the construction of patent claims in English law was based on literalism which, not infrequently, produced results that were quite unacceptable (see Lord Hoffmann in Kirin – Amgen Inc v Hoechst Marion Roussel Ltd [2005] All ER 169 (HL) at 184 par 27 to 185 par 29.). According to Lord Hoffmann in the Kirin – Amgen case the Catnic decision of the House of Lords represents the House of Lords' solution to the problem created by literalism standing in the way of the construction of patent claims giving fair protection to the patentee. He said that the House of Lords abandoned literalism (see par 42 in Kirin – Amgen) in favour of purposive construction.

[49] Although many of those familiar with patent law may have come across the use of the term "**purposive construction**" by Lord Diplock for the first time in the Catnic case, Catnic was not the first case in which Lord Diplock used that term. Prior to Catnic, he had already used it about ten years earlier in Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) [1971] All ER 850 (HL). Accordingly, it is appropriate to say a thing or two about that case and purposive construction.

Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) [1971] All ER 850 (HL)

[50] At the outset I must point out that in Kammins' case Lord Diplock's speech, unlike in Catnic, was not concurred in by the rest of the Law Lords who sat in that matter. That case dealt with the UK's Landlord and Tenant Act, 1954. Sec 24(1) of that Act made provision for an application to be made to Court by a tenant or landlord for an order that effectively would renew or extend a lease in certain circumstances. Sec 29(3) of that Act provided that "**no application under subsection (1) of section 24 shall be entertained unless it is made not less than two nor**

more than four months after the giving of the landlord's notice under section 25 of this Act or, as the case may be, after the making of the tenant's request for a new tenancy."

[51] As can be seen, the language of the provision of sec 29(3) was clear. The prohibition was also clear and did not provide for any exception. Lord Diplock effectively read an exception into the provision. He said in effect that, for the purposes of that case, the statutory provision could be said to have been made for the benefit of the landlord. He went on to say that, where a party for whose benefit a provision had been enacted did not object to the non-observance of the time frames stipulated in the statutory provision he waived his right to object and in such a case the provision should be read to allow such an exception. Lord Diplock held that the Landlord had not objected to such application being brought to Court outside the stipulated timeframe, and that, therefore, the prohibition did not apply. At 880 Lord Diplock said:

> "**A conclusion that an exception was intended by parliament, and what that exception was can only be reached by using the purposive approach. This means answering the question: what is the subject- matter of Part ll of the Landlord and Tenant Act, 1954? What object in relation to that subject matter did Parliament intend to achieve? What part in that achievement of that object was intended to be played by the prohibition in section 29(3)? Would it be inconsistent with achievement of that object if the prohibition were absolute? If so, what exception to or qualification of the prohibition is needed to make it consistent with that object?"**

At 881 he went on to say:

> "**This is the construction which has been uniformly applied by the courts to the unqualified and unequivocal words in statutes of limitation which prohibit the bringing of legal proceedings after the lapse of a specified time. The rule does not depend on the precise words of prohibition which are used. They vary from statute to statute. In themselves they contain no indication that any exception to the prohibition was intended at all. It is thus impossible to arrive at the terms of the relevant exception by the literal approach. This can be done only by the purposive approach, viz, imputing to Parliament an intention not to impose a prohibition inconsistent with the objects which the statute was designed to achieve, though the draftsman has omitted to incorporate in express words any reference to that intention**."

I now turn to a brief discussion of the Catnic decision of the House of Lords.

<u>Catnic Components Limited of Another v Hill & Smith Limited [1982] R.P.C 183 (HL)</u>

[52] As I have already intimated above, Catnic's significance relates to the construction of patent claims. The patent in that case related to galvanised steel lintels to be used in the construction of buildings. Lintels are described as structural members which are put over openings, for example door and windows, to support the building above. In Catnic the patent claims stated that the lintel should have "**a second rigid support member <u>extending vertically</u> from or from near the rear edge of the first horizontal plate"** (underlining supplied). In the defendant's product in that case the rigid support member was inclined about 8° off vertical and, was, therefore, not "**extending vertically**" as required by the terms of the claims. It fell outside the literal terms of the claims. Accordingly, there was no textual infringement of the plaintiffs' patent claims.

[53] In Catnic the question was whether or not the defendant's product infringed the patentee's claims even though it did not extend "**vertically**" in accordance with the express terms of the claims. If literalism was applied in construing those claims, in all probability it would have been found that the defendant's product did not infringe the patentee's claims because its rigid support member did not extend "**vertically**" but was inclined 8° off vertical. This would be so in the case of a certain manner of the application of literalism and the doctrine of pith and marrow which was meant to be used to avoid some of the injustices that could flow from an application of literalism in the construction of patent claims. In this regard I have in mind the application of literalism such as one finds in the majority decision in Van der Lely N.V. Bamfords Ltd [1963] R.P.C. 61 (HL). However, having regard to Lord Reid's dissents in the Van der Lely case and in Rodi & Wienenberger A G v Harry Showell Ltd [1969] R.P.C. 367 (HL), I think that he probably would have found infringement using the doctrine of pith and marrow even before the introduction by the Catnic decision of purposive construction in the construction of patent claims.

[54] In the Catnic decision Lord Diplock found that the defendant's product infringed the patentee's claims. To reach that conclusion he turned his back on literalism which had reigned supreme for quite sometime in the construction of patent claims in English law and said that a new approach had to be adopted which he called: "**purposive construction.**" In his oft-quoted passage on purposive construction in the context of the construction of patent claims, Lord Diplock said:

> "**My lords, a patent specification is a unilateral statement**

> **by the patentee, in words of his own choosing, addressed to those likely to have a practical interest in the subject matter of his invention (i.e 'skilled in the art'), by which he informs them what he claims to be the essential features of the new product or process for which the letters patent grant him a monopoly. It is those novel features only that he claims to be essential that constitute the so – called 'pith and marrow' of the claim. A patent specification should be given a purposive construction rather than a purely literal one derived from applying to it the kind of meticulous verbal analysis in which lawyers are too often tempted by their training and indulge. The question in each case is: whether persons with practical knowledge and experience of the kind of work in which the invention was intended to be used, would understand that strict compliance with a particular descriptive word or phrase appearing in a claim was intended by the patentee to be an essential requirement of the invention so that any variant would fall outside the monopoly claimed, even though it could have no material effect upon the way the invention worked".**

The essence of purposive construction in the construction of patent claims, as explained by Lord Diplock in Catnic, is that claims should be construed so as to determine the intention of the patentee as understood by the notional addressee with regard to the essential integers of a patent claim.

[55] Fundamental to the use of purposive construction in the Catnic case was that Lord Diplock also asked the question as to why the

patentee would have intended that his claims should be limited to a rigid support member that was strictly vertical and not inclined 8° off vertical. Lord Diplock said at 244 lines 13 – 18:

> "**No plausible reason has been advanced why any rational patentee should want to place so narrow a limitation on his invention. On the contrary, to do so would render his monopoly for practical purposes worthless, since any imitator could avoid it and take all the benefit of the invention by the simple expedient of positioning the back plate a degree or two from the exact vertical.**"

From this passage it is clear that, when Lord Diplock could not find any plausible reason why the patentee should have wanted to place as narrow a limitation on his invention as was being suggested by the defendants in that case, he held that the patentee did to intend to place such a narrow limitation on his invention. Indeed, he pointed out in effect that the patentee could not have intended such a limitation because it would have rendered his monopoly worthless.

Kirin-Amgen Inc v Hoechst Marion Roussel Ltd [2005] All ER 169 (HL)

[56] In Kirin - Amgen Inc the House of Lords re-affirmed purposive construction as the correct approach to be adopted in the construction of patent claims. In the Kirin - Amgen case, Lord Hoffmann made quite a few statements which may be taken to throw light on purposive construction – at least within the context of the construction of patent claims. He said in part at 185 par 30:

> "**It came to be recognised that the author of the**

> **document such as a contract or patent specification is using language to make a communication for a practical purpose and that a rule of construction which gives his language a meaning different from the way it would have been understood by the people to whom it was actually addressed is liable to defeat his intentions.**"

In the same paragraph Lord Hoffmann referred to a passage in Lord Diplock's judgment in the Antaios case [1985] A.C. 191 at 201 where Lord Diplock had the following to say about the construction of a charterparty:

> "**I take this opportunity of re-stating that if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that feints business common sense, it must be made to yield to business common sense.**"

[57] In par 32 of his speech Lord Hoffmann inter alia said:

> "**Construction is objective in the sense that it is concerned with what a reasonable person to whom the utterance was addressed would have understood the author to be using the words to mean. Notice, however, that it is not, 'the meaning of the words the author used' but rather what the notional addressee would have understood the author to mean by using those words. The meaning of words is a matter of convention, governed by rules, which can be found in dictionaries and grammars what the author would have been understood to mean by using those words is not simply a matter of rules. It is highly sensitive to the context of, and**

> **the background to, the particular utterance. It depends not only upon the words the author has chosen but also upon the identity of the audience he is taken to have been addressing and the knowledge and assumptions which one attributes to the audience.**" (par 32)

[58] In par 33 p. 185 – 186 Lord Hoffmann said that what "**lies at the heart of 'purposive construction' is the fact that the notional addressee reads the specification 'on the assumption that its purpose is to both describe and to demarcate an invention – a practical idea which the patentee has had for a new product or process - and not to be a text book in mathematics or chemistry or a shopping list of chemicals or hardware.**" It seems to me that what Lord Hoffmann meant here is that the insight which lies at the heart of purposive construction is to read a document, be it a statute or contract with a clear appreciation of its true purpose. Actually, after saying that the purpose of a specification is no more nor less than to communicate the idea of an invention, Lord Hoffmann continued and said in par 33: "**An appreciation of that purpose is part of the material which one uses to ascertain the meaning.**"

[59] In par 34 Lord Hoffmann emphasised the role of language in purposive construction. With regard to purposive construction, in the construction of patent claims Lord Hoffmann emphasised what the question always is. In this regard he referred to the same question as formulated in Catnic. He then continued:

> "**And for this purpose, the language [the patentee] has chosen is usually of critical importance. The conventions of word meaning and syntax enable us to express our**

meaning with great accuracy and subtlety and the skilled man will ordinarily assume that the patentee has chosen his language accordingly."

Seaford Court Estates Ltd v Asher 1949 All ER 155 (CA).

[60] As early as 1949 Denning LJ adopted an approach to interpretation which was a departure from literalism which the English courts used (see Denning LJ in Seaford Court Estates Ltd v Asher 1949 All ER 155 (CA). In the Seaford case Denning LJ, inter alia said, in connection with a judge's task when a statute came up for consideration:

"**In the absence of [Acts of Parliament drafted with divine prescience and perfect clarity] a judge cannot simply fold his arms. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy and then supplement the written word so as to give 'force and life' to the intention of the legislature.**"

Later, Denning LJ inter alia said that a judge should do as the Legislature would have done if it had come across the situation before him. Denning LJ's approach to interpretation as found in the Seaford case was later severely criticised by Lord Simonds in **Magor & St Mellons v Newport Corporation [1951] All ER 839 (HL)** at 84 as the usurpation of the legislative function under the guise of interpretation.

Bulmer Ltd and Another v J Bollinger SA and others [1974] 2

All ER 1226 (CA)

[61] In **Bulmer Ltd and Another v J Bollinger SA and others [1974] 2 All ER 1226 (CA)** Lord Denning MR called for the English courts to adopt a new approach to interpretation which he believed was used by the European Court of Justice and other European courts. A reading of Lord Denning MR's judgment in Bulmer's case does not suggest that the approach he was calling for had any material difference from the one he had sought to use in Seaford's case. Speaking of English judges and the approach to interpretation that he believed they should use, Lord Denning MR inter alia said at 1237g:

> "**They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent.**"

James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) [1977] 1 All ER 518 (CA)

[62] In **James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) [1977] 1 All ER 518 (CA)** Lord Denning MR, once again advocated the adoption by the English courts of the approach to interpretation which he believed was used by the European Courts. He said that in terms of that approach "**the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it.**" He said that "**[the European judges] ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation?**"

[63] A careful reading of the cases of Kammins Ballrooms, Catnic and Kirin–Amgen, which expressly used purposive construction, reveals that purposive construction is not only invoked if there is ambiguity in the statutory provision being interpreted. In Catnic and Kirin-Amgen the language of patent claims was clear and unambiguous. The statutory provision in the case of Kammins Ballroom was also quite clear. Nevertheless, the interpretation adopted by Lord Diplock in the two cases and by Lord Hoffmann in Kirin-Amgen departed from the clear language of the statute or patent claims in order to give effect to the purpose or intention to the statute or of the patentee. Accordingly it can be said that one of the rules of purposive construction is that it can be used even if the language of the statute or document sought to be interpreted is clear and unambiguous. Two Constitutional Court cases in which, in my view, that Court quite clearly applied purposive construction in cases relating to the interpretation of the Labour Relations Act, 1995 are **NEHAWU v University of Cape Town (2003) 24 ILJ 95 (CC) as well as NUMSA and Others v Bader Bop (Pty)Ltd and another 2003 24 ILJ 305 (CC).** Both judgments in Bader Bop quite clearly applied purposive construction.

[64] Writing for a unanimous Constitutional Court in **S v Zuma & others 1995(2) SA 642 (CC)**, Kentridge AJ quoted what Dickson J said in **R v Big M Drug Mart Ltd (1985)18 DLR (4th) 321 at 395-6**. There Dickson J said:

> "**In Hunter v Southam Inc… this court expressed the view that the proper approach to the definition of rights**

> **and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom with which it is associated within the text of the Charter. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore ...be placed in its proper linguistic, philosophical and historical contexts.**"

[65] The cases on purposive construction referred to above suggest that purposive construction is concerned with giving a sensible or reasonable interpretation to statutory provisions or contract or other documents. In this regard I point out that in Catnic Lord Diplock said that the intention of the patentee must be determined on the basis of the understanding of the notional addressee and in Kirin-Amgen Lord Hoffmann said that such notional addressee is taken to be a reasonable person. Obviously, if the intention of the

patentee is to be determined on the basis of the understanding of a reasonable notional addressee, the interpretation of the patent claim must be a reasonable one. Furthermore, in the case of James Buchanan, referred to above, Lord Denning MR said that the question asked by the European Judges was: "**what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation**?" Furthermore, in the Antaios case [1985 A.C. 191 at 201 Lord Diplock himself said that, if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that feints business common sense, it must be made to yield to business common sense. In his article titled: "**Administrative Law in South Africa**" 1986 SALJ 615 at 620 Mureinik puts it thus:

> "**It is true, of course, that purposive interpretation is generally superior to a mechanical application of the ordinary grammatical meaning of words. The essence of the argument why it is true can perhaps be captured by saying that literal interpretation aspires to no more than making sense of a fragment of a statute; but purposive interpretation enjoins the reader to prefer the construction that makes sense, or makes the best sense, of the statute as a whole: Purposive interpretation seeks the construction that makes the statute most coherent.**"

When there are two possible interpretations of a statutory provision or contract or other document one of which is within the literal terms of the statute or other document but does not give effect to or promote the purpose of the statutory provision or

other document and the other promotes or gives effect to or promotes such purpose, even though it is not strictly within the literal terms of the relevant statutory provision or contract or other document, the latter interpretation must be preferred.

[66] When applying purposive construction you ask the question why a particular construction of a statutory provision or other document would have been intended as opposed to another one. Support for this can be found in Catnic's case where Lord Diplock asked the question why the patentee would have intended a very narrow limitation of his invention.

[67] It has been said that "**(t)o arrive at the real meaning. [of a statutory provision] we have according to Lord Coke(Heydon's case (3 Co Rep. 76)) to consider,**

(1) what was the law before the measure was passed;

(2) what was the mischief or defect for which the law had not provided;

(3) what remedy the Legislateor had appointed; and
(4) the reason of the remedy.(See Olley v Maasdorp (1948) (4), S.A.L.R. 667 at 666.)"

(**Hleka v Johannesburg City Council 1949 (1) SA 842 (A) at 852 – 853**). In the light of this it may be necessary to refer to the background to the enactment of the statutory requirement for a strike notice in our law.

<u>The historical background to the statutory requirement for a strike notice</u>

[68] The requirement contained in sec 64(1)(b), (c) and (d) of the LRA for the giving of a strike notice and a lock - out notice was not introduced into our law out of nowhere. There were developments which preceded it. Although the Labour Relations Act, 28 of 1956 – the predecessor to the

current LRA - did not contain a requirement for a strike notice or a lock - out notice, it was during the operation of that Act that certain developments occurred which paved the way for the introduction of a statutory requirement for a strike notice in our law. The first of those developments was the judgment of the Industrial Court in **MAWU v BTR Sarmcol (1987) 8 ILJ 815 (IC)** in which that tribunal criticised the union's conduct in not giving the employer a prior warning of a strike before the workers went on an illegal strike. The court held that this was unfair to the employer.

[69] In 1988 the industrial court criticised another trade union and the workers who had gone out on an illegal strike without giving any prior notice to the employer. (See **BAWU & others v Palm Beach Hotel (1988) 9 ILJ 1016 (IC) at 1023G**). Subsequently numerous decisions were handed down by the industrial court to the same effect. (See **Ray's Forge & Fabrication (Pty) Ltd v NUMSA & others (1989) 10 ILJ 762 (IC) at 773J; SACWU v SASOL Industries (Pty) Ltd & Another (2) (1989) 10 ILJ 1031(IC) at 1037C-E; BAWU & others v Asoka Hotel (1989) 10 ILJ 167 (IC) at 177H-178C; BAWU & others v Edward Hotel (1989) 10 ILJ 357 (IC); MWASA & others v Perskor (1989) 10 ILJ 1062(IC) at 1068-1069D; BTR Dunlop Ltd v NUMSA (2) (1989 10 ILJ 701 (IC) at 707E-H; NTE v SACWU & others (1990) 11 ILJ 43 (N); FAWU v Middevrystaatse Suiwel Ko-operasie Bpk (1990) 11 ILJ 776 (IC); FBWU & others v Hercules Cold Storage (Pty) Ltd (1989) 10 ILJ 457 (IC); Mercedes-Benz of SA (Pty) Ltd v NUMSA (1991) 12 ILJ 667 at 672 (this was an arbitration award and not a judgment of a court); NUMSA & others v Malva (Pty) Ltd (1992) 13 ILJ 1207 (IC) at 1216D-E; CWIU v Reckett Household Products (1992) 13 ILJ 622 (IC); SACWU & others v BHT Water Treatments (Pty) Ltd (1994) 15 ILJ 141 (IC) at 163F-164A; NUMSA & others v Maranda Mining Co Ltd (1995)**

16 ILJ 1155 (IC); FWCSA & others v Casbak Burger Box CC (1996) 17 ILJ 947 (IC) at 955C-I; NUMSA & others v Datco Lighting (Pty) Ltd (1996) 17 ILJ 315 (IC).).

[70] In the years that followed the now defunct Labour Appeal Court, established under sec 17 of the 1956 Act, and the then Appellate Division of the Supreme Court also gave their approval to the notion that it could be unfair to the employer if workers went on strike without giving any notice to the employer. This was in the context of determinations whether dismissals of illegal strikers were unfair where, among other things, they had gone on illegal strikes without any notice or warning to the employer. (**FBWU & others v Hercules Cold Storage (Pty) Ltd (1990) 11 ILJ 47 (LAC); NUMSA & others v MacSteel (Pty) Ltd (1992) 13 ILJ 826 (A) at 835B; NUMSA v Three Gees Galvanising (1993) 14 ILJ 372 (LAC); Doornfontein Gold Mining Co Ltd v Num & others (1994) 15 ILJ 527 (LAC) at 542B).**

[71] In 1990 a technical committee of the National Manpower Commission was established to consider various proposals which had been made for the amendment of the old LRA. That technical committee recommended that there be a statutory requirement for the giving of "**24 hours (or such other period as may have been agreed upon in writing) written notice of the commencement of the strike"** for a strike to be a lawful strike. (See "**Proposals For the Consolidation of the Labour Relations Act**" (1990) 11 ILJ 285).

[72] In 1993 two pieces of legislation were passed which contained

what seems to have been the first ever statutory requirement for a strike notice in the history of South African labour law. They were sec 15(5) of the Education Labour Relations Act, 1993 (Act 146 of 1993)("**the ELRA**") and sec 19(4) of the Public Service Labour Relations Act, 1993 (Act 102 of 1993))"**the PSLRA**"). The ELRA applied to educators/teachers in the public service whereas the PSLRA applied to other civil servants.

[73] As can be seen in the Explanatory Memorandum that accompanied the Labour Relations Bill which preceded the current LRA, the Ministerial Task Team which prepared the LRA included in the Bill a provision requiring the giving notice of industrial action. (See Explanatory Memorandum (1995) 16 ILJ 278 at 302).

[74] In considering the question whether or not by what it says in a strike notice it is competent for a trade union to limit the number or categories of workers who will commence striking on a day specified in the strike notice, I propose to first inquire into the question whether an employer and a trade union can competently conclude a collective agreement which requires different groups of members of such union to commence striking on different days in the event of such union calling a strike. The reason why I begin with such an inquiry is because, if such a collective agreement is competent, it will be easier to deal with the question why a union cannot unilaterally do the same if it can be done by agreement with the employer.

[75] It is necessary to quote the provisions of sec 64(1)(b) of the LRA. Sec 64(1)(b) reads:

"64. Right to strike and recourse to lock – out – (1) Every ***employee*** **has the right to strike and every employer has recourse to *lock – out* if–**

a) ……

b) **in the case of a proposed *strike*, at least 48 hours' notice of the commencement of the *strike,* in writing, has been given to the employer, unless–**

(i) **the *issue in dispute* relates to a *collective agreement* to be concluded in a *council*, in which case, notice must have been given to that *council*; or**

(ii) **the employer is a member of an *employers' organisation* that is a party to the *dispute*, in which case, notice must have been given to that *employers' organisation*; or**

(c) ……

(d)……"

[76] Collective bargaining is normally expected to result in the conclusion of a collective agreement. A collective agreement is defined in sec 213 of the LRA as meaning:-

"**a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand, and, on the other hand –**

a) one or more employers;

b) one or more registered employers'

organisations; or

c) **one or more employers' and one or more registered employers' organisations.**"

SATAWU is a registered trade union. Accordingly, if it concluded a written agreement with the appellant which concerned either terms and conditions of employment or any other matter of mutual interest, that agreement would constitute a collective agreement as defined in sec 213 of the LRA.

[77] An employer who has different departments or categories of employees performing different duties may approach a trade union that seeks recognition as a collective bargaining agent of some of the workers in the workplace and propose that they conclude an agreement part of which would be to the effect that, should such union call a strike, it would give a strike notice of a longer period than the minimum period prescribed by sec 64(1)(b) of the LRA, for example, seven days, in respect of employees in certain departments and would give 48 hours notice of the commencement of a strike as prescribed by the LRA in respect of employees employed in other departments. For convenience I shall refer to those departments which would require a longer strike notice as the "**vulnerable departments**" and the other departments as the "**non-vulnerable departments.**" The employer would want this to be contained in the recognition and procedural agreement between the parties. In return for certain benefits, the union may agree to such a clause.

[78] An agreement regulating the period of a strike notice that must be given by a trade union in the event of a strike is clearly an agreement

concerning a term and condition of employment or a matter of mutual interest. As such an agreement would be in writing and the union that is party to such an agreement would be a registered trade union and the other party would be an employer, such agreement would constitute a collective agreement as defined in sec 213 of the LRA. This being the case, such collective agreement would be binding upon, on the one hand, the employer, and, on the other, the trade union and its members in the light of sec 23 of the LRA. The effect of such a clause in the collective agreement would be that, if the union wished to call its members out on strike who are in the vulnerable departments, it would be obliged to give a longer strike notice than the minimum notice prescribed by sec 64(1)(b) of the LRA. If, however, it sought to call out on strike those of its members employed in other departments, it would be obliged to give a strike notice of the minimum period of 48 hours as prescribed by sec 64(1)(b) of the LRA.

[79] The trade union would be acting in breach of its obligations under the collective agreement with the employer if it gave a strike notice of a shorter period than the one prescribed by the collective agreement in respect of the employees employed in the vulnerable departments. Indeed, if the union gave a 48 hours strike notice of the commencement of a strike by its members employed in the vulnerable departments despite the requirement for a longer strike notice period contained in the collective agreement, the employer would be entitled to an interdict restraining such employees from taking part in such strike prior to the union giving a longer strike notice as required by the collective agreement. In fact the interdict could also restrain the union from calling its members employed in the vulnerable departments out on strike until such time as it has given the longer strike notice prescribed by the collective agreement.

[80] If the union issued a 48 hour strike notice as required by sec 64(1)(b) of the LRA to the effect that only its members employed in the

non – vulnerable departments will commence a strike on the specific date on which, for example, the 48 hour notice period expires, it could not be argued that in such a case the employees employed in the vulnerable departments would also be entitled to commence striking on the expiry of the 48 hour strike notice and that they would not be obliged to wait until a longer strike notice was given in respect of them as required by the collective agreement. Taken to its logical conclusion, Counsel for the respondents' argument is to the effect that in such a case the employees employed in the vulnerable departments would be entitled to commence striking on the strength of the 48 hour strike notice meant for the employees in the non – vulnerable departments despite the fact that in terms of the collective agreement a longer notice period would be required before they could commence striking.

[81] The conclusion to be drawn from the above is that it is competent for a collective agreement as contemplated in sec 213 of the LRA to contain a clause which requires a trade union to give different notices of the commencement of a strike in respect of different categories or groups of employees eg, 48 hours notice of the commencement of a strike for one category of employees and a longer notice of the commencement of a strike for another category of employees. The two notices for the two different categories of employees can be contained in the same document or in two separate documents.

[82] If the principle that it is competent for a trade union, by a collective agreement with an employer, to limit the number of its members

who will commence a strike on a date given in the strike notice is accepted, why would it not be competent for the same trade union to unilaterally limit the number or categories of employees who will commence striking on a certain date? I cannot think of any reason why this cannot be so. The proposition that a trade union cannot do so, if accepted by this Court, would have detrimental consequences for trade unions because it would mean that a trade union which, for strategic or tactical reasons, wishes to stagger its strike in order to optimise or maximise the effect of the strike on the employer would not be able to do so.

[83] What I have done above, apart from discussing the issue of the correct approach to the interpretation of the LRA, is two things. First, I have shown that the cases of Afrox, Plascon Decorative, Early Bird and SACTWU upon which Counsel for the respondents relied to support his contention on the interpretation of sec 64(1)(b) have no application in relation to the requirement for a strike notice as prescribed by sec 64(1)(b) and his reliance thereupon was misplaced. Second, I have shown that as a matter of law it is competent for a trade union and an employer to conclude a collective agreement requiring that differing strike commencement dates be given in a strike notice or in strike notices for different groups of workers. The employees whose strike notice requires them to commence striking on a later date would not be entitled to commence striking on the earlier date given for another group of employees to commence striking. If this is accepted as legally correct, then, in my view, it destroys the very foundation of the contention advanced by Counsel for the respondents because that disproves the respondents' proposition that, if there is a strike

notice that gives notice to the employer of the commencement of the strike by one group of employees given in the notice, employees falling outside the group of workers given in such strike notice would also be entitled to commence striking on the day given in such notice.

[84] The proposition advanced by the respondents' Counsel is based upon the use of literalism in the construction of sec 64(1)(b). It amounts to saying that the text of sec 64(1)(b) requires a "**48 hours notice of the commencement of the strike in writing**" to be given to the employer and, as long as a 48 hours notice of the commencement of the strike in writing has been given to the employer, it does not matter what its implications and consequences are in relation to the purpose of the LRA and of sec 64(1)(b) itself. It reminds one of the majority judgment in **Ebrahim v Minister of the Interior 1977 (1) SA 665 (A)**. In that case there was a statutory provision which said that any citizen of S.A, not being a minor, shall forfeit the South African citizenship if, while outside South Africa, acquired the citizenship of another country other than by marriage. On the literal meaning of that provision a S.A. citizen could get out of the country, fill in the necessary application forms for citizenship of another country and immediately return to S.A so that, when the citizenship of that other country was granted to him, he would be inside the country so that he could argue that when he "**acquired**" the citizenship of the other country, he was inside South Africa and, therefore, that statutory provision did not apply to him. On this interpretation the purpose of that statutory provision could easily be defeated. In fact its purpose could be defeated so easily that it would not be worth

anything. This is the interpretation of the provision that was adopted by the majority in the Appellate Division in the Ebrahim matter. The minority adopted a different interpretation. The minority's interpretation was that it did not matter where the SA citizen happened to be when the citizenship of another country was granted to him as long as he had taken the steps to acquire it while outside SA. In my view this was a clear case where it was important to ask the question: what was the mischief that the section sought to deal with and what was the purpose of the section because, without asking those questions, one can end up attaching so literal a meaning to the provision that the provision ceases to make sense.

[85] The approach to the interpretation of the LRA taken by the majority in **NEHAWU v UCT (2002) 23 ILJ 306 (LAC)** also ignored sec 3 of the LRA and the purpose of sec 197. The result was that they gave sec 197(1) of the LRA a meaning that would completely defeat the purpose of sec 197, namely, the security of employment for employees when there is a change of hands in a business. The minority in that case and, subsequently, the Constitutional Court, gave sec 197 a purposive interpretation which resulted in sec 197(1) being given a meaning that gave effect to that purpose and to the primary objects of the LRA.

[86] In my view the contention advanced by the respondents as to the meaning of sec 64(1)(b) runs contrary to the injunction contained in sec 3 of the LRA with regard to how the LRA should be interpreted. It is an interpretation which, in my view, not only fails to give effect to the primary objects of the LRA, particularly

orderly collective bargaining but also it is an interpretation which, if accepted, would bring about a dispensation that is extremely unfair not only to employers but also to workers because that interpretation would have to also apply to a case where an employer institutes a lockout. Such interpretation will also mean that an employer who has branches throughout the country may give a lockout notice to the effect that he will institute a lock-out only in respect of a small group of employees in some small town and nowhere else and yet on the day in question lock-out all the workers in all branches throughout the country. This will give rise to disorderly and chaotic collective bargaining. In support of this proposition I shall give a few practical illustrations of the implications and consequences of the contention advanced on behalf of the respondents. These examples I give cannot be dismissed on the basis that they do not represent the facts of this case. I say this because in this case we are called upon to give a meaning to a statutory provision and when a Court does that, it is obliged, before deciding upon a meaning of the statutory provision, to think the proposed meaning through carefully and consider what the practical implications and consequences will be of such a meaning in real life. In giving a meaning to a statutory provision a court cannot or should not close its eyes to how such a meaning would affect those to whom it may relate. And if a meaning is going to produce results or has implications which either defeat or may defeat or undermine the purpose of the statute or of the statutory provision, it should be avoided and one should be sought that is either in line with or gives effect to the purpose of the statute or statutory provision. I proceed to give two or so possible scenarios hereunder.

[87] Company ABC (Pty) Ltd employs five thousand employees and it has branches or offices in all nine provinces of the country. Its head office is in Johannesburg. In the different branches of the company some employees are members of various trade unions while others are not members of any trade union. Some unions even have members who are members of the management as well as members who are not in management positions. Some of the employees, including those who are members of other trade unions, are ordinary workers whereas others are professionals or administrative staff.[1] One of the trade unions which has members employed by ABC (Pty) Ltd is DEF and Allied Workers Union ("**DEFAWU**"). Another trade union is GHI and Allied Workers Union ("**GHIAWU**"). DEFAWU is the majority trade union in the company country – wide and has 2700 members in the company. The rest of the trade unions share the balance of the employees as their respective members. GHIAWU only has 50 members out of 150 employees employed by the company in a small town called Nongoma in KwaZulu – Natal. It has 25 members employed by the company in Durban and, inexplicably, 30 members employed by the company in Stellenbosch in the Western Cape. All employees who are members of GHIAWU are cleaners.

[88] A dispute arises between GHIAWU and ABC (Pty) Ltd about an issue labelled as "**rural allowance**" demanded by GHIAWU for its members employed by ABC (Pty) Ltd as cleaners in Nongoma which ABC (Pty) Ltd is not prepared to pay. GHIAWU refers the

1 One trade union that comes to mind which includes in its membership both labourers and professionals is the National Health and Allied Workers Union (NEHAWU). Some of its members are nurses, whereas others are ordinary workers.

dispute to the CCMA for conciliation and the parties thereto are GHIAWU and ABC (Pty) Ltd. The dispute is characterised in the referral as the company's refusal to pay GHIAWU members employed by the company in Nongoma a rural allowance. Obviously this is a matter of mutual interest. Conciliation attempts fail and the CCMA issues a certificate of outcome to the effect that the dispute remains unresolved. GHIAWU then issues to ABC (Pty) Ltd a strike notice that reads: "**Our members who are employed at Nongoma will commence a strike on the 18th December.**"

[89] On the submission made by Counsel for the respondents in this case it would not matter that GHIAWU's strike notice says "**our members who are employed in Nongoma will commence a strike**" on the given date. On his contention:

(a) ABC (Pty) Ltd's employees who are not members of GHIAWU but are either members of other trade unions or are not members of any trade union would be entitled to commence striking on the 18th December in accordance with GHIAWU's strike notice despite the fact that the strike notice said GHIAWU members would commence striking on the day in question and did not say anything about employees who are not GHIAWU members also commencing strike on that day.

(b) ABC (Pty) Ltd's employees who are not employed in Nongoma and are employed elsewhere in the country including Cape Town, Johannesburg, Stellenbosch, etc, would also be entitled to commence striking on the 18th December on the strength of GHIAWU's strike

notice which said that the employees who would commence striking were those employed in Nongoma.

(c) ABC (Pty) Ltd's employees who are not cleaners, including those in management positions, would be entitled to commence striking on the 18th December on the strength of GHIAWU's strike notice which effectively said it is cleaners employed by ABC (Pty) Ltd in Nongoma who are members of GHIAWU who would commence striking on the day in question. I say that the strike notice effectively said that it was cleaners employed in Nongoma who are members of GHIAWU who would commence striking on the day in question because GHIAWU's members employed by ABC (Pty) Ltd in Nongoma are all cleaners.

(d) ABC (Pty) Ltd's employees who are members of GHIAWU but are employed in Stellenbosch would be entitled to commence striking on 18th December despite the fact that GHIAWU's strike notice limited the strike notice to its members employed in Nongoma and these employees are not employed in Nongoma but in Stellenbosch.

One implication of the construction of sec 64(1)(b) advanced by Counsel for the respondents is that where a union's strike notice says that the union's members employed in Nongoma would commence a strike on a certain day, the sudden eruption of strikes in many other places on the day given in the strike notice and which were not contemplated in the strike notice is permissible.

[90] The proposition only needs to be stated in order for its untenability to be revealed. In my view there can be no reasonable basis for the suggestion that ABC (Pty) Ltd, which received a strike notice which said members of GHIAWU employed by ABC (Pty) Ltd as

cleaners in Nongoma would commence a strike on the 18th December, should read such a notice to mean what it did not say, namely, that employees who were not members of GHIAWU would also take part in the strike and that employees who are not employed in its Nongoma branch will also commence with the strike on the 18th December. Accordingly, such a notice would not have served its purpose of enabling the employer to prepare how to minimise the damage that the strike could visit upon his business.

[91] It seems to me that, as a general rule, when a strike notice has been issued, whether or not another one would be required to be issued depends upon whether or not the strike notice that has been issued is sufficiently wide to cover all categories of workers employed by the same employer who may wish to participate in the strike to which the strike notice relates. If it is wide enough to cover a particular group, such group can also take part in the strike without having to give any strike notice. However, if it is not sufficiently wide to cover that category, a strike notice for the commencement of strike by that group of workers is required. What determines whether another strike notice is or is not required is whether or not the strike notice that has already been given to the employer is sufficiently wide to cover the relevant category of workers.

[92] Another way to test the untenability of the respondents' proposition that all employees irrespective of which unions they belong to have a right to commence a strike on the date given in the strike notice issued by one of the unions even if the notice excludes some of the employees is this one. Two trade unions are active among the

employees of the employer. The one union, A, has no procedural agreement of any kind with the employer about strike procedures and needs to only comply with the statutory procedures. The other union, B, has a collective agreement with the employer to the effect that, if its members intend embarking upon a strike, 72 hours written notice of the commencement of the strike must be given to the employer first. This example is very apposite in this case because Mr du Preez testified that the appellant was given assurance by other trade unions in the company which had some of the second and further respondents as their members that their members would not participate in the SATAWU strike. Were those assurance of no legal significance? On the respondents' proposition if union A gives a 48 hours' written notice of the commencement of a strike by its members, employees who are members of union B would be entitled to commence striking on the strength of the 48 hours' notice on the day given in union A's notice.

[93] The difficulty with union B's members commencing a strike on the basis of the 48 hours' notice given by union A is that, when they do that, they will be in breach of their union's collective agreement which in terms of sec 23 of the LRA is binding on them as well, and, in my view, their participation in the strike will be precluded because striking in breach of a collective agreement regulating strikes is unprotected. One of the foundational principles of the LRA is to promote collective agreements. The interpretation of sec 64 (1) (b) of the LRA advanced on behalf of the respondents flies in the face of that principle because it promotes disrespect for collective agreements and the procedures contained therein.

[94] The respondents cannot validly say: but it's different if the other union has a collective agreement that requires a longer strike notice than the one prescribed by sec 64 (1) (b)! They cannot say this because, if it is competent for one trade union to preclude members from commencing a strike on the day given in a 48 hours strike notice issued by another trade union, what is it that is there in law that makes it incompetent for a trade union to frame its strike notice in such a way as to preclude certain categories of its members from commencing a strike on a certain day. And if a union can do that, why can't the employer rely upon what the union has said in its strike notice about which workers or categories of workers will commence a strike on a specified date? I know of no reason.

[95] After the issuing of a certificate of non-resolution of a dispute by the CCMA or after the expiry of the prescribed 30 days period, a union and an employer may come together and conclude an agreement that, if the union does call a strike, certain of the workers (i.e. a skeleton staff) will not take part in the strike so as to continue performing certain duties. A good example of a workplace where this arrangement may be called for is a hospital. The union may consider that it is in its interests to enter into such an agreement about a skeleton staff in order to minimise the inconvenience and harm that the proposed strike may cause to the public or to third parties so as to gain public support or sympathy for its demands. Such an agreement would, if it is in writing, constitute a collective agreement as contemplated by the definition of that term in sec 213 of the LRA.

[96] On my approach, such a collective agreement would be valid and binding on the union and its members, on the one hand, and, on the employer, on the other. On my approach the employees who have been identified as part of the skeleton staff in terms of the collective agreement would not be entitled to abandon their skeleton staff duties and commence striking together with the other employees if subsequently the union issued a strike notice for the commencement of the strike.

[97] On the interpretation of sec 64 (1) (b) advanced by respondents such skeleton staff would be entitled to abandon their skeleton staff duties and join the strike on the day given in the strike notice because on the respondents' interpretation of sec 64 (1) (b) once a union has issued a strike notice any and every employee may commence striking on the day specified in the strike notice. Accordingly, if one takes the respondents' interpretation to its logical conclusion, then there is in our law no place for the use of collective agreements to secure a skeleton staff during a strike because such an agreement would not be worth anything in law and the skeleton staff would be entitled, once a strike notice has been issued, to join the strike as well. In my view this proposition is completely untenable. In my view our law permits collective agreements relating to the provision of skeleton staff during a strike and such agreements, once concluded, are binding on the parties concerned including union members whose union is a party to such a collective agreement.

[98] Another way of putting the question confronting us in this case is to ask the question whether or not a trade union that gives an

undertaking to the employer in its strike notice that only certain categories of employees or some of its members will commence a strike on a specified date is or is not bound by that undertaking. The effect of the interpretation of sec 64 (1) (b) advanced by the respondents is that a union that gives such an undertaking to the employer in its strike notice is not bound by such undertaking and it is free, despite such an undertaking to the employer, to turn around thereafter and instigate those of its members falling outside the strike notice to also commence striking on the day given in the strike notice. The effect of my interpretation of sec 64(1) (b) is that a union is free, if it is so chooses, to limit or not to limit the categories of employees to commence striking on the day given in the strike notice but, if it chooses to limit the categories of employees to commence striking on a certain day, it is bound by that limitation. Accordingly, on my interpretation of sec 64 (1) (b), if a union gave an undertaking to the employer in its strike notice that certain categories of employees will not commence striking on a certain day, it is bound by that undertaking and the employer is entitled to rely on it to make certain decisions relating to the strike or the dispute.

[99] The limitation is not necessarily that the other categories of employees will never participate in the strike until it ends. It is only that they will not commence striking on the day given in the strike notice and this means that they may not commence striking on some other day, if they so wish, in which case a notice of their intention to commence striking must be given before they commence striking on such a day. On my interpretation a union would also be entitled to say in its strike notice that only the

employees (for example its members) employed in certain departments or categories will take part in the strike proposed to commence on a certain day and that employees employed in other departments or categories will not take part in the strike at all. If a union makes such an undertaking in regard to its members, it is bound by it and employees in the excluded categories may not join the strike at any time. On the respondents' interpretation of sec 64 (1) (b) such an undertaking by a trade union would not be binding on the union and its members and the union would be entitled, despite such an undertaking, to later get its members in the excluded departments or categories to join the strike.

[100] Davis JA expresses the view in par 10 of his judgment in this matter that "**… 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**". This view raises the question: what happens then when the group that gave the strike notice is not a significant group? Let us say a company employs 1000 employees. It has a number of trade unions one of which is the majority trade union and has 700 of the 1000 employees as its members. Two other trade unions have 50 and 150 members respectively. The rest of the employees do not belong to any trade union. The union that has 50 members gives a strike notice to the effect that its 50 members will commence a strike on a certain day. 50 employees out of a workforce of 1000 employees is, undoubtedly, not a significant group of workers.

[101] If one took Davis JA's above mentioned view to its logical

conclusion, striking by the rest of the employees (i.e. the significant group) on the strength of the notice covering the insignificant group and without another notice being given covering the significant group, would adversely affect "**orderly industrial relations**." This view suggests that the meaning to be attached to sec 64(1)(b) as to whether it is competent to limit in a strike notice the number or categories of employees who will commence a strike on a day given in a strike notice changes according to the size of the group that issues the strike notice. This suggests that the section means that, if the prior notice has been issued by an insignificant group, another notice must be issued before a significant group can commence striking because, otherwise, if the significant group commences striking without giving a notice of their commencement of the strike, their striking will adversely affect "**orderly industrial relations**," but, if the notice has been issued by a significant group, and an insignificant group seeks to commence striking too, the section means that no additional notice of the commencement of the strike by the insignificant group is required. In my view the meaning of sec 64(1)(b) should not change according to the size of the group that issues the strike notice. Its meaning must be the same in either case. Either it is that by what you say in the strike notice you can limit the categories or numbers of employees who will commence a strike on a given date or it means that you cannot so limit the categories or numbers. When I refer to limiting the categories or numbers of employees who will commence a strike on a particular day, I do not mean that the employees whom the strike notice leaves out will not be able to take part in the strike at any time. I only mean that they cannot commence striking on the strength of

the strike notice that does not cover them. Another strike notice will have to be issued that will cover them before they can commence striking on the day given in such strike notice.

[102] Grogan: Workplace Law, 9th ed, Juta & Co does not deal at all with the issue whether in a strike notice the union issuing the notice can limit the number or categories of employees who will commence striking on the day given in the strike notice nor does he deal with the question whether there are any circumstances when a second notice can be required. Du Toit et al: Labour Relations Law: A Comprehensive Guide, 4th ed, Butterworths deal with the strike notice requirement at 283 – 286. At 286 they express the view that employees who are not members of the union that has issued a strike notice "**may also join the strike, provided they give separate notice of their intention to strike.**" Unfortunately these authors do not substantiate their view in anyway nor do they refer to any authority to support it. Thompson & Benjamin: South African Labour Law, Vol 1 deal with the issue of a strike notice and lock-out notice at AA1 – 313 – 316 but do not deal with the issue under consideration.

[103] Brassey: Employment and Labour Law, Vol III deals with the requirement of a strike notice at A411 – A4, A4 – A13. Although he does not deal with the issue under consideration in this matter, he expresses a view at A4 – 13 that a union must give notice in good faith and it "**cannot mislead the employer by giving a false date [of the commencement] of the strike. If it does so, the notice is vitiated by fraud, will be null and void and there will,**

accordingly, be no compliance with the section." I have previously expressed the view that employees are not obliged to commence a strike on the date given in their strike notice but as from that date the employer is entitled not to use their services and may use those of, for example, temporary replacement workers. They can commence their strike a day later or at any other time provided it is within a reasonable time. That is before they can be said to have waived their right. What I do wish to say, which is linked to Brassey's view that a union "**cannot mislead the employer by giving false information ….",** is that the proposition advanced by Counsel for the respondents and accepted by my Colleagues has as one of its implications or results that a trade union may deliberately mislead the employer in its strike notice. The implications of the respondents' proposition include that a trade union can say in its strike notice that only its 50 members employed in the Nongoma branch of the company will commence a strike on a given date well-knowing that in fact 5000 employees (including those who are not its members) employed in every city and small town in the country will commence striking on that day. On the respondents' proposition this is permissible in our law and the union's conduct is permitted by sec 64(1)(b). How this could conceivably be correct as a matter of law in a dispute resolution dispensation such as ours which seeks to promote orderly collective bargaining is difficult to understand.

[104] In the light of all the above it seems to me that the legal position is that the content of a strike notice is of critical importance in the determination of which employees or categories of employees acquire the right to commence a strike on the day given in a strike

notice. The content of a strike notice is of critical importance for conveying to the employer concerned the information that sec 64(1)(b) requires to be contained in a strike notice. The employer depends largely on the content of that notice for important decisions to make in relation to the proposed strike such as the decision whether he is going to accede to the union's demands or whether he will make a final offer of settlement of the dispute before the commencement of the strike so as to avoid the strike or whether he will make certain plans including arrangements to employ temporary replacement workers for the duration of the strike and, if so, how many and in which workplaces, in order to minimise the impact of the strike on his business.

[105] If the content of a strike notice tells the employer that the workers who will commence a strike on a certain date are members of a particular union which forms 10% of the workers but on the appointed date 90% of the workforce including workers who are not members of that trade union take part in the strike, that will be contrary to the strike notice contemplated by sec 64 (1)(b) of the LRA. It seems to me that the legal position is that in order of an employee to acquire the right to commence a strike on a certain day he must first be covered by a strike notice in respect of the commencement of the strike on that day. If he is not covered by a strike notice, he is not entitled to commence striking on that day. Whether or not an employee is covered by a particular strike notice depends upon the contents of the strike notice and the context in which the notice is issued. The contents of a strike notice may be formulated in such a way that the notice contemplates only members of the union issuing the strike notice commencing a strike

on the day specified in the strike notice. It may contemplate only employees in a particular branch or city or province or it may contemplate employees who are its members employed by the company throughout the country commencing a strike on the day given in the strike notice. Whatever the union issuing the strike notice chooses, it must make the notice sufficiently clear to enable the employer to know which employees are covered by the strike notice and will, therefore, commence a strike on the given date. This does not necessarily mean that the union should furnish the employer with names of the workers who will take part in the strike. It only means that the content of the strike notice must be such that the workers who are covered by the strike notice must be reasonably identifiable by the employer upon receiving the notice either by their names or their job categories, union membership or workplace or departments in which they are employed or places where they are employed or by some other information.

[106] The interpretation of sec 64(1)(b) must not be undertaken in isolation. Appropriate regard must also be had to sec 66(2) and sec 77 of the LRA. Before the interpretation of sec 64(1)(b) advanced by the respondents is accepted, it must be remembered that the same interpretation may have to be given to sec 66(2) and sec 77(1)(d) of the LRA. Sec 66(2) provides for the giving of a notice for a secondary strike. Sec 77(1)(d) provides for the giving of a notice of protest action to NEDLAC. Once that is done, particularly in regard to sec 77, there may be disastrous consequences for the country in the case of a country-wide protest action. Sec 77(1)(d) of the LRA requires a trade union or Federation of trade unions seeking to call a protest action to give at

least 14 days notice before the commencement of a protest action to NEDLAC of its intention to proceed with the protest action. If one applies the respondents' contention to sec 77(1)(d), it would mean that a small unknown registered trade union can serve a notice of protest action on NEDLAC indicating that employees employed in one depot in some small town will take part in a protest action from a certain day and on that day hundreds of thousands of workers from different companies in all cities and towns of the country belonging to various trade unions would go out to the streets and take part in the protest action.

[107] Whatever steps NEDLAC could take or advise to be taken in anticipation of the protest action would be confined to the employer in the small town specified in the notice of protest action. Accordingly, the countrywide protest action would take NEDLAC and numerous employers throughout the country by surprise because NEDLAC would not have been able to give them any warning based on the contents of the notice of protest action. According to the respondents' contention in regard to sec 64(1)(b), such a result would be acceptable and permissible in terms of the LRA.

[108] If one were to apply the respondent's contention to a notice of a secondary strike, it would mean that a small group of employees in a branch of a company based in some small town would give their employer a notice of the commencement of a secondary strike by them in support of a group of employees in a neighbouring company but on the day of the commencement of the secondary strike, employees of the company in many cities, towns and

villages throughout the country could erupt into strike action on the strength of the notice that excluded them. The secondary employer would be completely taken by surprise at the eruption of strikes in places not mentioned in the secondary strike notice and far away from the small town in which the secondary strike was supposed to be confined.

[109] At this stage I wish to revert to the fact that an important factor which Lord Diplock took into account in using purposive construction to decide the Catnic case was why the patentee would have intended the narrow limitation which was inherent in the interpretation of his claims advanced by the defendants. Lord Diplock found that he could not think of any reason and, instead, said in effect that the patentee could not have intended such a limitation on his monopoly because it would have rendered his invention or monopoly worthless. Let me apply that in the present case. In this case the respondents' contention is to the effect that in enacting sec 64(1)(b) the Legislature intended that a trade union can give a strike notice to an employer that gives wrong information about the number of workers or categories of workers who will commence a strike on a date given in the strike notice. For example the union can say only the workers based in the Nongoma branch of the company will commence a strike on a certain day but actually it intends that all workers employed by the company in all cities and towns throughout the country will commence striking on the given day.

[110] The respondents argue that sec 64(1)(d) permits the other employees not contemplated in the strike notice to also commence

striking on the day given in the strike notice on the strength of the strike notice issued in respect of other employees. Bearing in mind the question asked by Lord Diplock referred to above, we must ask the question why the Legislature would have intended that, where a strike notice issued to an employer, informed the employer that employees A, B and C will commence a strike on certain day, employees D, E and F would also be entitled to commence a strike on the same day even though no notice of their commencement of the strike has been given? I can think of no reason why the Legislature would have intended that. On the contrary I think that the Legislature could not have intended that because that would undermine, if no defeat, the very purpose of the statutory requirement of a strike notice. I think the interpretation that must be given to sec 64(1)(b) must either be consistent with or promote or give effect to the purpose of the section. In this case SATAWU's strike notice said in effect SATAWU members would commence striking on the 18th December but the respondents argue that non-SATAWU members could commence striking on that day as well on the strength of such strike notice.

[111] Both Khampepe ADJP and Davis JA seem to suggest that, if employees who are not directly affected by a dispute giving rise to a proposed strike are not required to refer the dispute to conciliation before they can join the strike, there is no reason why another strike notice is said to be required before they can commence striking. The suggestion is based on Afrox, Plascon-Decorative, Early Bird and SACTWU. The answer to this is that the considerations which apply to the requirement for the referral

of a dispute to conciliation are not the same as those which apply to the requirement for the issuing of a strike notice. A good example is that a group of workers who are not members of a union which is in dispute with the employer would as a general rule not be party to such a dispute, and if, you are not party to a dispute, you cannot refer such a dispute to conciliation. You cannot refer someone else's dispute to conciliation – at least not without authority from such a party. You have no locus standi in such a matter. So, as a matter of law such employees would not be able to refer other employees' dispute to conciliation. And yet there can be no doubt that, if they want to help their co-employees in the latter's dispute with the employer, they are entitled to participate in the strike, subject to all legal requirements being satisfied. However, when it comes to the requirement of notice, it cannot be said that they have no locus standi to issue a strike notice if the one previously issued did not cover them. As long as they propose to commence striking, they have locus standi to issue a strike notice if they are not covered by one issued earlier.

[112] The approach I am taking here is in line with the approach underlying the procedural requirement for a protected secondary strike as provided for in sec 66 of the LRA. When employees employed by one employer wish to support employees employed by another employer by striking, sec 66 of the LRA governs the position. Sec 66 does not require such employees to refer the other employees' dispute to conciliation before they can strike but it does require that a notice of such secondary strike be given before such employees can embark upon the secondary strike. This is indicative of the fact that it is not foreign to the LRA that workers

who are not directly affected by a dispute underlying a (proposed) strike need not refer such a dispute to conciliation if they want to also strike to support those who are directly affected by the dispute but are, nevertheless, required to issue a strike notice. There is, therefore, nothing incongruous with Afrox, Plascon Decorative, Early Bird and SACTWU in taking the view that a strike notice covering the respondents was required before they could commence striking even though they were not required to refer the dispute to conciliation.

[113] In this case the interpretation of sec 64(1)(b) that I have chosen, in my view, gives effect to orderly collective bargaining which is one of the primary objects of the LRA, is not in conflict with the Constitution and cannot possibly be in conflict with any public international law obligations of the Republic. In this regard I have had regard to the Freedom of Association and Protection of the Right to Organise Convention No 87 of 1948, the Right to Organise and Collective Bargaining Convention No 98 of 1948 and the Freedom of Association Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO, 4th (revised) ed (ILO, Geneva, 1996) and there is nothing therein which is in conflict with the interpretation I have chosen.

[114] In conclusion I reject the construction of sec 64(1)(b) of the LRA advanced by Counsel for the respondents as a construction that, contrary to the injunction in sec 3 of the LRA, promotes not only disorderly collective bargaining but will also usher in an era of chaotic collective bargaining in our labour dispute resolution

system.

[115] In the circumstances the appeal must be upheld. With regard to costs I am of the view that the requirements of the law and fairness dictate that no order as to costs should be made in this matter. The appellant and SATAWU continue to have a relationship in respect of at least those of the appellant's employees who are members of SATAWU.

[116] In the premises I would make the following order:

1) The appeal is upheld.
2) No order as to costs is made on appeal.
3) The order of the Labour Court is set aside and for it the following order is substituted:

"**(a) It is hereby declared that the second and further applicants were not members of the first applicant at the time of the issuing of the strike notice on the 15th December 2003 nor were they such members during the strike that commenced on the 18th December 2003 and ended on the 2nd January 2004.**

(b) **It is hereby declared that the second and further applicants' participation in the strike from the 18th December 2003 to the 2nd January 2004 was unprotected.**

(c) **The dismissal of the second and further applicants by the respondent for participation in the strike on the**

18th December 2003 to the 2nd January 2004 was not automatically unfair.

(d) Leave is hereby granted to any party to approach the registrar with a request that this matter be set down for the continuation of the trial on other issues if any still remain to be adjudicated.

(e) Should the request referred to in (d) above be made to the Registrar, the Registrar is directed to give the matter high priority in the light of the long period that has lapsed since the dismissal of the second and further applicants.

(f) If either party wishes to pursue the matter, the parties are required to apply their mind to the issue whether it should continue before Ngcamu AJ who heard the matter previously or whether it should or can proceed before another Judge and advise the Registrar in writing of their respective positions in this regard."

ZONDO JP

KHAMPEPE, ADJP

[117] This is an appeal, with the leave of the court, against the judgment and order of the Labour Court, in which the dismissal of the individual employees on 18 November 2004 by the appellant was found to be automatically unfair in

terms of section 187(1)(a) of the Labour Relations Act no 66 of 1995 ("the Act").The Labour Court further granted the order reinstating the employees with back pay.

[118] There are two crisp issues to be determined in this appeal. The first issue relates to whether the individual employees who participated in the strike on 18 December 2003 were members of the First Respondent at the time of their participation in the strike. The second issue relates to whether the individual employees, who were not members of the First Respondent which had complied with the pre-strike procedures in terms of section 64(1) of the Act, were entitled to lawfully participate in the ensuing strike.

[119] The facts are largely common cause and are briefly recited here only to contextualize the issues and to put them in a proper perspective.

FACTUAL BACKGROUND

[120] The appellant is an aviation logistics company which provides services on the ramps and runways of South Africa's six major airports. Approximately 2 196 employees are in its employment. Approximately 1 157 of these employees are in permanent employment whilst the balance constitute contract workers. Of the 1 157, approximately 725 (70%) are members of the First Respondent.

[121] The First Respondent is a majority trade union and is the recognised collective bargaining agent of the workers employed by the appellant. An agency shop agreement is in force. On 13 November 2003, the First Respondent referred a wage dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") for conciliation in terms of Section 64(1)(a) of the Act.

[122] On 15 December 2003, the CCMA issued a certificate to the effect that the dispute between the First Respondent and the appellant remained unresolved. On that day the First Respondent issued a strike notice to the appellant advising it of its intention to embark on a strike action on 18 December 2003 at 08h00.The notice was couched in the following terms:

"We intend to embark on strike action

on 18 December 2003 at 08h00."

[123] Pursuant to that notice, a strike duly commenced on 18 December 2003 and ceased only on 2 January 2004.

[124] What is notable is that not only the members of the First Respondent

participated in the strike but the individual employees (further respondents) also participated. These employees were subsequently dismissed by the company for unauthorised absenteeism following their participation in the strike which the employer viewed as unlawful.

[125] The First Respondent thereafter referred the dispute concerning the fairness of the individual employees' dismissal to the CCMA. As conciliation became unsuccessful the matter laid before the Labour Court for adjudication.

[126] On 15 June 2006 the Labour Court made the following principal findings:

10.1 It held that the individual employees were members of the First Respondent at the time of their participation in the strike action.

10.2 It also held that the Act did not require individual employees to be members of the First Respondent which had complied with the pre strike procedures in terms of the Act in order for them to lawfully participate in the strike.

10.3 The Act did not require the individual employees to be members of the First Respondent in order for them to lawfully participate in the strike.

10.4 The strike was protected in respect of the individual employees and their dismissals were accordingly automatically unfair.

[127] The appellant is challenging the findings of the Court below.

I now turn to deal with the first issue before us.

Were the individual employees, members of the First Respondent at the time of their participation in the strike?

[128] In terms of the pre-trial minute, the court below was required to decide:

"*4.2 ... whether* [the individual employees] *met the criteria for membership as stipulated in the constitution of* [SATAWU] *prior to engaging in the strike action on 18 December 2003*."[2]

Section 9.3 of the Constitution of the First Respondent stipulates the procedure through which First Respondent membership is conferred.

[129] The procedure to be followed for First Respondent's membership in terms of the Constitution is replete with requisite steps to be taken by various organs of the First Respondent at various stages of the consideration of the relevant application and the requisite recommendations to be taken into account in the final determination of the application.

[130] The application procedure as set out in SATAWU's Constitution provides as follows:

"***Application procedure***

9.3.1 *Applications from eligible workers for membership must be submitted to the LOB's* [Local Office Bearers] *having jurisdiction over the area in which the applicant is employed. The LOB's must submit the application form to the Regional Secretary having jurisdiction over the area in which the applicant is employed.*

9.3.2 If there is no functioning LOB's then the application must be submitted directly to the Regional Secretary. If there is no functioning Regional Secretary then the application must be submitted to the General Secretary or any person or body designated by the General Secretary.

9.3.3 *The application must be made in the prescribed form and include the subscription fee set out in paragraph 10.1. The CEC* [Central Executive Committee] *must determine the prescribed application form*

.

9.3.4 *The RWC* [Regional Working Committee] *must recommend to the REC* [Regional Executive Committee] *that it either enrol the applicant as a member or reject the application.*

9.3.5 The REC must consider the recommendations of the RWC.

9.3.6 *If there is no functioning RWC or REC, the CEC or such other body as the CEC may appoint must consider the application*. …"

[131] It is common cause that not a shred of evidence was led on behalf of the individual employees on what steps they had taken in order to properly comply with

2 Record Vol 1 p 59 para 42.

the requisite procedure for membership as stipulated in the constitution. Equally no evidence was led on their behalf that they had been duly appointed in terms of the Constitution as members of the First Respondent. The only evidence led on behalf of the individual employees was that membership applications and stop order forms were handed over to the Appellant after the strike had commenced.

[132] Du Preez on behalf of the Appellant also testified that in order to prepare for trial, the appellant had requested copies of the agendas/minutes of meetings for the period 1 January 2003 until 30 June 2004 in regard to SATAWU's RCW, REC and CEC

[133] The central feature of his evidence was that upon inspection of these documents, he was unable to find any information evincing the individual employee's compliance with the procedures for membership. He was therefore unable to ascertain, whether such membership had been conferred in terms of the Constitution. This evidence was not challenged by the Respondents and remained uncontroverted.

[134] The court below however found that the individual employees were members of the First Respondent and its reasoning was stated as follows:

> " … The common cause fact is that the stop order forms were sent to the respondent. That, in my view, could only happen when the First Respondent has accepted the applicants as members. The applications for membership were completed on various dates between November 2003 and January 2004."[3]

[135] In this appeal, Mr Gauntlet, who appears on behalf of the Appellant, attacked the court below's finding that the individual employees were First Respondent's members on the ground that no evidence was presented that the individual employees had complied with the Constitution.

[136] Mr Van der Riet who appears on behalf of the Respondents submits that the court below was correct in accepting that the stop order forms were adequate proof that the individual employees' membership had been approved. He further submitted that it was inconceivable that the First Respondent would furnish stop order forms to the Appellant if the applications for membership of the individual employees had not been approved.

[137] It would seem to me that the court below lost sight of the question it was directed to consider in terms of the pre-trial minute, which was simply whether the individual employees had complied with the procedure set out in the First Respondent's Constitution. That consideration required the First Respondent to prove the procedure followed in terms of clause 9 of its Constitution.

[138] It is plain that as the individual employees were relying on the existence of

3 Record Vol 12 pg 1032 para 24

their membership, they bore the *onus* of establishing that their application for membership had been submitted and considered in terms of the Constitution. The elementary principle that he who avers must prove, is such a well-recognised principle in regard to the burden of proof that no authority need be cited.[4] In *casu,* the application procedure, set out in the Constitution, stipulates specific procedures that must be fulfilled upon submission of applications for membership from eligible workers to the Local Office Bearers (LOB's). It further stipulates the requirements that must be fulfilled by the various organs of the First Respondent before the application is finally determined.

[139] In the court below, the First Respondent and the individual employees did not lead any evidence, even obliquely, in support of their contention that the relevant employees' applications had been considered and approved in terms of the Constitution at the time of their participation in the strike. My view in this regard is further fortified by the fact that the court below ostensibly accepted that some of the relevant applications for membership were completed well after the commencement of the strike on 18 November 2003(Own emphasis). In this regard it observed that "*The applications for membership were completed on various dates between November 2003 and January 2004*." On the court's own observation, the issue of when the application forms were submitted by the respective individual employees was obfuscatory to say the least. This is so because if some applications were completed after the strike had commenced, it would be inconceivable that the relevant applicants would have been admitted as members of the First Respondent in terms of the Constitution on or before 18 November 2003 when the strike action commenced.

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4 Hoffman Zeffert in *The South African Law of Evidence* 4th edition Chapter 20 page 495; 509 See also Pillay v Krischna 1946 AD 946 @ 952.

[140] Moreover, it is common cause that the stop order forms were submitted to the Appellant after the strike had already commenced. Ineluctably the stop order forms could not, in themselves, have established that the relevant employees were members of the First Respondent or evinced that the relevant provisions of the First Respondent's Constitution had been complied with, prior to or at the time of their participation in the strike on 18 November 2003.

[141] For these reasons, I find that the Respondents failed to discharge the *onus* of proving that the individual employees were members of the First Respondent in terms of the Constitution at the time of their participation in the strike. In the result, the court's finding that the individual respondents were members of the First Respondent at the time of the strike is, with respect, wrong and should be reversed.

I now turn to deal with the intricate issue of whether the individual employees lawfully participated in the strike action on 18 November 2003.

"**Were the individual employees, employed in the same bargaining unit, entitled to lawfully participate in the strike action?"**

[142] It will be convenient at this stage to set out in broad outline the constitutional legal framework within which this issue must be comprehended.

[143] Section 23(2) (c) of the Constitution confers upon every worker the right to strike.

[144] Section 36 of the Constitution permits limitation of this right only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

"*(a) the nature of the right;*

b) the importance of the purpose of the limitation;

c) the nature and extent of the limitation;

d) the relation between the limitation and its purpose; and

e) *Less restrictive means to achieve the purpose.*"

"***Interpretation of Bill of Rights***

Section39 of the constitution provides that:

[(1) when interpreting the Bill of Rights, a court, tribunal or forum –

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

[145] Section 213 of the Labour Relations Act ("*the Act*") defines the strike to denote:

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

[146] Section 64(1) of the Act grants to every employee the right to strike. The right to strike is however not absolute. It accrues to an employee only if certain conditions as set out in that section are fulfilled.

[147] Section 64(1) reads as follows:

> "*Every employee has the right to strike and every employer has recourse to lock-out if –*
>
> *a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and –*
>
> *(i) a certificate stating that the dispute remains unresolved has*

been issued; or

(ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; and after that –

(b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer, ..."

[148] The key issue raised in the appeal is whether employees, who are not members of the First Respondent which has followed pre-strike procedures set out in section 64, are precluded from lawfully participating in the ensuing strike, unless they themselves separately followed the pre-strike procedures in the Act. The Act is silent on who must refer the dispute to the CCMA and who must give notice of the strike to the employer.

[149] In this regard Mr Gauntlet argued that on a proper construction of Section 64, an employee only acquires the right to strike if;

33.1 the employee or someone acting on his behalf (alternatively, the other party to the dispute, namely, the employer) has referred the dispute to the CCMA;

33.2 the CCMA has issued a certificate of non-resolution or 30 days has elapsed; and after that

33.3 the employee or someone acting on his behalf gives notice to the employer of the proposed strike.

[150] He therefore contended that in respect of employees who are not members of the First Respondent that has followed pre-strike procedures, there would have been no referral of a dispute to the CCMA and no notice of industrial action to the employer. These employees would not have satisfied the prerequisites of section

64(1) and are proscribed by the Act from exercising their right to strike.

[151] The cardinal question that arises is whether the provisions of section 64 require non-unionised employees or members of minority unions who are employed by the same employer to refer the dispute to the CCMA and to give notice of the strike action to the employer, notwithstanding that the issue in dispute has already been conciliated albeit by other parties to the dispute, and notice has been issued by the majority union before they can lawfully participate in a lawful strike action. The consideration of that question is inevitably one of construction.

[152] There are certain elementary principles of construction to be observed in the interpretation of the provisions of the Act, from which we will not depart.[5]

[153] Mr Gauntlet and Mr Van der Riet both submitted, correctly so, and consistent with these principles that in order to arrive at the correct interpretation of section 64(1) regard must be had to the purpose of the Act in general as well as to the specific purpose of the section.

[154] The primary objects of the Act are: to give effect to and regulate fundamental rights; to give effect to International Labour Organisation obligations; to provide a framework for and to promote orderly collective bargaining; to promote employee participation in decision making at the workplace and to promote the effective resolution of labour disputes. The overriding purpose of the Act is to advance economic development social justice, labour peace and the democratisation of the workplace. It is trite that the right to strike is an extension of the bargaining process.

[155] Section 3 of the Act contains a further interpretive injunction. It provides that the Act must be interpreted to give effect to its primary objects (*National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another*)[6]. There is a wealth of judicial authorities in which the purpose of section 64(1)'s procedural

5 See Chemical Workers Indusrial Union v Plascon Decorative (Inland) (PTY) (Ltd)(1999) 20 ILJ321(LAC)@326 para18 for a comprehensive list of aothorities

See: *Business South Africa v Congress of South African Trade Union & other* (1997) 18 ILJ 474 (LAC) at 476F-478I; *Ceramic Industries t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union* (1997) 18 OLJ 671 (LAC) at 675E-I; *Carephone (Pty) Ltd v Marcus NO & others* (1998) 19 OLJ 1425 (LAC) para [8].

6 2003 (3) SA 513 (CC).

requirements has been succinctly and authoritatively decided. These decisions clearly demonstrate that the procedural purpose of this section is to compel the parties to attempt to resolve the dispute through negotiations before resorting to industrial action (*Afrox Ltd v SACWU and Others*;[7] *Transportation Motor Spares v National Union of Metalworkers of SA and Others;*[8] *Plascon Decorative (supra)* 329B-C);[9] *Early Bird Farm (Pty) Ltd v FAWU and Others*;[10] The academic writers, Helen Seady and Clive Thompson In "*Labour Relations Act 66 of 1995: Strikes and Lock-Outs*"[11], are also of the view that:

> "*Conciliation is not intended as just another perfunctory step on the way to winning the licence for action. It is the process sponsored by the Act to promote the adjustment of competing interests and industrial peace*."

[156] Mr Gauntlet raised several arguments on why the individual employees were required to refer the dispute to conciliation in terms of section 64(1)(a) and why they were also required to issue notice in terms of section 64(1)(b).The golden thread that runs throughout the woven tapestry of his arguments, is that unless these requirements were satisfied, no meaningful conciliation would take place as the employer would not know the identity of all the parties with whom it is negotiating and would not enter the conciliation process with its eyes wide open ; it would not be in a position to determine the potential scale of the impeding strike. It was contended that such an employer would not be able to make appropriate decisions as to who of the employees intended to embark on a strike if it were not informed of their identities and would therefore be unable to take contingency arrangements to protect its business.

[157] In my view, the question that arises is whether the individual employees were required to refer the same wage dispute with the Appellant for conciliation, notwithstanding that the First Respondent had already referred the dispute to the CCMA. In this regard one has to be mindful that the dispute which had been referred

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7 [1997] 4 BLLR 375 (LC).
8 (1999) 20 ILJ 690 (LC).
9 [1998] 12 BLLR 1191 (LAC).
10 [2004] 7 BLLR 628 (LAC).
11 Part AA of Thompson & Benjamin "*South African Labour Law Volume 1*".

by the First Respondent for conciliation **directly** affected the individual employees as they were in the same bargaining unit. (Own emphasis) Notably the issue in dispute over which the individual employees went on strike against the same employer was the same dispute which had already been referred for conciliation.

Purpose of sec 64(1)

[158] In determining these questions, one must be mindful that firstly, the purpose of section 64(1)'s procedural requirements only obliges employees to initially explore possible resolution of their dispute through negotiations by a statutory conciliator before exercising the right to strike. The right to strike accrues to an employee only after the conditions set out in the Act have been complied with.

[159] Secondly Section 64(1) (a) only requires the "*issue in dispute*" to be referred to the CCMA whilst section 213 defines the issue in dispute as "*the demand, grievance or the dispute that forms the subject matter of a strike* ". In *Plascon Decorative*[12] it was held that the broad terms of the definition of "*strike*" correspond with the definition of "the issue in dispute". The court found that that offered no identification of the parties in dispute and therefore imposed no limitation on what they may be. It would seem to me that on the basis of that decision, it would not be necessary for the non-unionised employees or members of minority unions of the Appellant to refer the wage dispute for conciliation. Once a union refers the wage dispute for conciliation and the dispute is not resolved within the stipulated time, all the employees who are in the bargaining unit (whether unionised or non- unionised) of the same employer and have an interest in the dispute, are entitled to participate in the strike., provided the union has issued a strike notice.

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12 Supra.

[160] There is a further flaw in the argument presented by the Appellant. The notion that no meaningful conciliation takes place when the employer does not know the identity of all the parties and is therefore rendered incapable to properly determine the potential scale of the impending strike, is in my view, not compelling as it rest on a very shaky foundation. It presupposes that the referral made on behalf of members of a trade union, ordinarily expose such an employer not only to the identity of all the members of the First Respondent but to the determination of the total numbers of employees that are likely to participate in the strike.

[161] The problem is that it is not so. The wealth of judicial authorities in this regard is clearly for the proposition that an employer is not entitled to the identities of the parties to the dispute. The case, which is dispositive of this argument is that of *Afrox Ltd v SACWU and Others*[13] in which Zondo AJ, as he then was, enunciated the fundamental principle that where members of a trade union employed in one branch of a company or in one bargaining unit are entitled to strike in support of a dispute between themselves and their employer, their colleagues employed by the same employer in another branch or in another bargaining unit also have a right to participate in that strike in respect of that dispute without having to make a separate referral of the dispute to conciliation.

[162] The principle enunciated in *Afrox* was confirmed by this Court in *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Limited*[14] para 29 in the following terms:

> "*The Issue in the present case is whether non-bargaining unit employees, whose conditions of service the strike demand did not directly affect, can 'embark' on an otherwise protected strike. That parallels the question Zondo AJ dealt with in Afrox Ltd v S A Chemical Workers Union and Others, where workers employed by the same employer at different plants embarked on strike action. Zondo AJ concluded … that 'once a dispute exists between the employer and a First Respondent and the statutory requirements laid down in the Act to make a strike protected have been complied with, a First Respondent acquires the right to call all its members who are employed by*

13 Supra.
14 Supra.

> *that employer out on strike and its members so employment acquire the right to strike'*."

[163] In *Early Bird Farm Ltd v Food and Allied Workers Union and Others*[15] *this Court* confirmed the proverbial principle established in Afrox Ltd and expressed these sentiments in regard to that inveterate principle:

> "the principle established in Afrox and other case is that once a *union has complied with the requirements of s 64 by referring a dispute to conciliation it is not necessary to refer the same dispute again to conciliation when other members of the same union who are employed by the same employer want to joint the strike in respect of the same dispute which is protected. They can join the strike even if they are not directly affected by the dispute as long as the dispute was referred to conciliation. This is the legal position as correctly pronounced in Afrox, Plascon Decorative and Free State and Northern Cape Manufacturers Association.*"

[164] There is nothing in the cases cited above that supports the proposition that an employer is entitled to know the identity of the employees who are entitled to participate in the protected strike. What is instructive, as Mr Van der Riet has submitted, is that where the employer employs union members and only some of them have an interest in the outcome of the dispute, the employer is in no better position to know the identity of all the members of the union likely to participate in the strike since all the members of the First Respondent employed by same employer are entitled to participate in the strike.

[165] It accordingly follows that such an employer is in no better position to determine the potential scale of the impending strike. The nub of the question is, when regard is had to the contention relied upon by the Appellant, whether the Act can be construed to require non-unionised employees to refer the same dispute for conciliation merely on the basis that the referring union has no mandate to act on their

15 Supra.

behalf. A review of authorities in this regard clearly states that once a dispute has been referred for conciliation, the same dispute cannot be referred to conciliation for the second time. I have elsewhere in this judgment cited the cases of *Afrox, Plascon Decorative, Early Bird Farm, SACTWU v Free State and Northern Cape Clothing Manufacturers Association* [2002] Vol 1 BLLR 27 (LAC) para 32[16] in which this inveterate principle was expounded following the relevant section's exegeses by this Court. In *Transportation Motor Spares v National Union of Metalworkers of South Africa and Others* (1990) 20 ILJ 690 (LC)[17] Zondo JA reasoned that:

> "*The legislature wanted to ensure that, before a strike can be resorted to, various steps would have to be taken to try and avoid it because of the harm and pain it may inflict. There is a possibility that conciliation can help avoid that. Once attempts through conciliation to avoid a strike have failed, and the workers are determined to strike, before the strike can commence the legislature gives the employer the last opportunity to avoid the strike or to prepare for it.*"

[166] Whilst the facts in these cases did not directly relate to the issue of non-unionised employees or members of minority unions, there is in my view, no justification for not extending the same reasoning - employed by this court for unarguably such a considerable period - to non-unionised employees for the reasons which are cited hereunder.

[167] The golden thread that runs through the reasoning in these cases is the fundamental recognition of **the purpose of the procedural requirements of section 64(1); that is, before the employees can exercise the constitutional right to strike they must attempt to avoid the strike through negotiations by statutory conciliators. In my view this rational makes it palpably clear that once that step has been taken, it would be futile to refer the same dispute for conciliation as the purpose of referral would have been already served**.

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16 Supra.
17 Supra.

[168] **The logic, in my view, behind this reasoning is a very sound one. It recognises the fundamental purpose for the referral which relates not to the identity of the employees but to the necessity to comply with the conditions set out in section 64(1) before the constitutional right to strike can be exercised**

[169] The Constitutional Court, in the case of *State v Zuma*[18], has emphasised that a constitutional right conferred without express limitation should not be cut down by reading implicit restrictions into them (see Cameron JA in *Plascon Decorative supra)*[19]. This Court has not once departed from that constitutional interpretative caution. In *Plascon Decorative*, Cameron JA cautioned against reading into section 64(1) limitations upon the right to strike which are not specifically provided for in the Act. In *Early Bird Farm (Pty) Limited,*[20] this Court again heeded this salutary interpretative approach. In the context of this case, I can conceive of no justifiable basis for departing from the well established principles enunciated in the cases referred to herein above and for negating a salutary interpretive approach which seeks to assert the constitutional right to strike and enhance collective bargainig. In my view it can hardly have been the intention of the legislature to treat employees differently. Such a distinction in terms of applicable procedures to be satisfied by employees that have a constitutional right to strike, would defeat the objects of the Act which is to attain industrial and economic peace and promote collective bargaining. I deal with this issue further in this judgment.[21]

[170] In the light of the above, we hold a firm view that there is no legal basis for

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18 [1995] Vol 2 SA (1) (CC) at 651 para 15.
19 Supra.
20 Supra.
21 See paras 54-58.

reading into section 64(1), limitations upon the right to strike of non – unionised employees[22] which are not expressly provided for in the Act. In our view, where the majority union has referred a dispute for conciliation and the dispute directly affects other non- unionised employees and/ or members of minority unions in the bargaining unit, it is not necessary for the latter to refer that dispute for conciliation separately. The construction contended for by the Appellant would impose limitations on a constitutional right for which the legislature did not intend. Such a construction would amount to treating employees of the same employer differently on issues which are at the heart of collective bargaining and may sow the seeds of both disorders which the primary object of the Act seeks to obviate.

[171] To require non-unionised employees to separately refer the dispute, would place a limitation to a constitutionally protected right with no textual justification: It would further mean that the legislature intended to draw a distinction in the application of procedures set out in section 64(1) between members of the First Respondent and other employees which would constitute an absurdity. If the legislature intended to distinguish between the procedures to be satisfied by different categories of employees employed by the same employer before the strike may be lawful, it would have explicitly expressed itself in that regard in the Act and it has clearly not done so.

STRIKE NOTICE

[172] As already stated herein above, it is the contention of the Appellant that on a proper construction of section 64(1)(b), the individual employees were required to issue separate strike notices and that their failure to do so precluded them from participating in the protected strike action.

[173] In support of its contention in this regard, the appellant sought further reliance on the academic writings of Du Toit and Others in Labour Relations Law,[23] wherein it was stated:

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22 Members of minority unions included.

23 4th Edition page 286.

> "*Once notice of a strike has duly been given, a union is entitled to call out on strike all its members employed by the employer and not only those members who are in dispute with the employer. This includes employees outside the bargaining unit and/or in different operations as long as they are implied by the same employers. Employees who are not union members may also join the strike, provided they give separate notice of their intention to strike*."

Lamentably, there is paucity of reasoning for this conclusion. The learned authors adopt that conclusion without providing any basis therefore. Their stance goes against the grain of authorities from which the seminal principles by *inter alia* Zondo JP and Cameroon JA were enunciated with such clarity and to date stand as good authority for our developing Labour Law jurisprudence. In the result, I do not find the proposition and concomitant argument compelling.

[174] The court below, upon an examination of this issue, found that to require non-unionised employees to issue separate notices would be too technical and constitute an absurdity which the legislature could not have contemplated. We agree. It is instructive that the appellant argues on one hand that the section properly construed, requires employees who are unaffiliated to a union to issue a strike notice in order to comply with section 64(1) (b) procedures whilst on the other hand it states that:

> "*… All that is required is that someone has followed the pre-strike procedures on behalf of those who intend to strike. It is not the appellant's contention that each individual must separately follow these procedures*".

This argument is inherently contradictory.

[175] Given the above, I conclude therefore that on a proper construction of sec 64(1) of the Act, all employees – non-unionised employees or members of minority unions- are entitled to lawfully participate in the industrial action, as long as the majority union has referred the strike for conciliation in terms of sec 64(1)(a) and a section 64(1)(b) notice has been issued, by the majority union.

175.1. There is no provision in the Act that expressly prohibits participation by employees in a strike action. Importantly Section 64 does not qualify an employee to strike. Quite to the contrary, it spells out the conditions which must be satisfied before a right to strike can be exercised.

175.2 I have already alluded to an important constitutional principle of interpretation; that when one construes the provisions of the Act, one must adopt an interpretation which is more consistent with the Constitution. In this regard the right to strike is one that the Constitution has conferred upon all the employees. The effect of the interpretation contended for by the appellant would limit participation of non-unionised employees or members of minority unions, who are directly affected by and have a material interest in the wage dispute from exercising their right to strike in circumstances where the conditions set out in sec 64(1) have been satisfied, without any obvious justification and would result in an absurdity that the legislature would not have contemplated.

175.3 Having regard to the above, I am of the view that, on a proper construction of section 64(1) (b), the employer is only entitled to notice of the commencement of the strike and it is not entitled to be informed of the identity of the employees who will participate in the strike. Given that view, the finding of the court below that the dismissal of the individual employees on 18 November 2003 by the respondent was automatically unfair in terms of section 187(1)(a) of the Act, should be confirmed.

THE RELIEF ORDER

[176] Mr Gauntlett and Mr Van der Riet have drawn our attention to the fact that the court below made an order, at the request of the parties, that the issue of damages would be postponed *sine die*.[24] We agree with the submission that the order reinstating the individual respondents with back pay was, in the circumstances, an obvious error that should be set aside.

[177] In the result, the following orders are made:

24 Vol 12 page 1025.

1. The order of the court below, that the individual employees were members of the First Respondent (SATAWU) when they participated in the strike action is reversed and is replaced with the following:

"*The individual employees were not members of the First Respondent*" (SATAWU) when they participated in the industrial action on 18 November 2006.

2. The Relief Order is set aside.

3. Save for the above, the appeal is dismissed.

4. The requirements of the law and fairness dictate that there should be no order as to costs.

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S S V KHAMPEPE
ACTING DEPUTY JUDGE PRESIDENT

AUTHORITIES

1. Statutes considered:

1.1 *The Constitution of the Republic of South Africa;*

1.2 The Labour Relations Act: section 64(1).

2. *Afrox Ltd v SA Chemical Workers Union & Others* (1) (1997) 18 ILJ 399 (LC).

3. *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 ILJ 321 (LAC).

4. *SACTWU v Free State & Northern Cape Clothing Manufacturers' Association* [2002] 1 BLLR 27 (LAC).

5. *Early Bird Farm (Pty) Ltd v Food & Allied Workers Uniont & Others* (2004) 25 OLJ 2135 (LAC).

6. *Labour Relations Law* (4ed) (Du Toit *et al* Lexis Nexis Butterworth (2003) @ 286.

7. *The South African Law of Evidence* 4th edition (Hoffman & Zeffert) pg 495-509.

8. *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union* (2) (1997) 18 OLJ 671 (LAC).

9. *Business South Africa v Congress of South African Trade Unions* (1997) 18 ILJ 474 (LAC).

10. *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* 2003 (3) SA 513 (CC).

11. *S v Zuma* 1995 (2) SA 642 (CC).

12. *Transportation Motor Spares v National Union of Metalworkers of SA and Others* (1999) 20 OLJ 690 (LC).

13. *Public Service Association of SA v Minister of Justice and Constitutional Development and Others* (2001) 22 OLJ 2302 (LC).

14. *Pillay v Krishna* 1946 AD 496 & 952.

DAVIS JA:

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[178] I have enjoyed the significant advantage of reading the judgment prepared by Khampepe ADJP and subsequently that of Zondo JP. For reasons that follow, I agree with the approach adopted by my colleague Khampepe ADJP and the order that she proposes.

[179] The main difference between the judgments of Khampepe ADJP and

Zondo JP turns on their respective approaches to statutory interpretation. The critical reasoning in the judgment of Khampepe ADJP is to be found in paragraph 54 of her judgment which reads thus:

> "*To enquire non-unionised employees to separately refer to dispute would place a limitation to a constitutionally protected right with no textual justification: It would further mean that the legislature intended to draw a distinction in the application of procedures set out in section 64(1) between members of the First Respondent and other employees which would constitute an absurdity. If the legislature intended to distinguish between the procedures to be satisfied by different categories of employees employed by the same employer before the strike may be lawful, it would have explicitly expressed itself in that regard in the Act and it has clearly not done so."*

[180] Section 64(1) of the Labour Relations Act 66 of 1995 ("the Act") reads thus:

> ***"****Every employee has the right to strike and every employer has recourse to lock-out if-*
>
> *a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and -*
>
> *(i) a certificate stating that the dispute remains unresolved has been issued; or*
>
> *(ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council of the Commission; and*

after that-

b) in the case of a proposed strike, at least 48 hours' notice of the commencement of the strike, in writing, has been given to the employer,…"

[181] The key issue raised in this appeal was whether employees, who are not members of the first respondent which had followed the procedures set out in section 64, were precluded from lawfully participating in the strike unless they had separately followed the procedures set out in section 64. In short was there a requirement that they provide their employer with a separate notice of their proposed intention to commence a strike.

[182] Zondo JP carefully examines the notice which was provided by the first respondent. That notice expressly stated 'we intend to embark on strike on 18 December 2003 on 08h00'. The learned judge president is thus correct that the use of the word 'we' by first respondent connoted an intention on the part of its members to embark on a strike on 18 December 2003.

[183] But the key question remains: were employees who were not members of the first respondent precluded from lawfully participating in the same strike without providing a separate notice? Expressed differently, does section 64(1) of the Act impose an obligation, whether expressly or by implication, to non members of first respondent to provide appellant with a separate notice?

[184] Zondo JP contends that in order to interpret the Act one must:

"*always give an interpretation that will promote the primary objects of the LRA, that will also be incompliance with the*

constitution and with the public international law obligation of the republic. Accordingly, before you settle on a particular interpretation of any provision of the LRA, … it requires you to stand back and ask you the question, does this interpretation give affect to any one or more of the primary objects of the LRA is it in compliance with the constitution and with the public international law obligations of the Republic?" para 28.

In my view, this approach needs some refinement. Interpretation must always begin with the words employed in the statute. Indeed the very purpose of the traditional rules of statutory interpretation was to attempt to control the context of the words which were so employed by the legislature. The golden rule of interpretation, for example, attempted to restrict meaning to the 'ordinary meaning' of the words employed in the provision and authorised a departure under very strict circumstances. Further, this aim was pursued by restricting the sources of meaning, that is to restrict the range of resources to which the interpreter could access so as to gain meaning to the context of the words so employed; that is, the long title, the preamble and the headings were regarded as permissible aids to construction but then only in the case of ambiguity .In this way, courts attempted to attain closure of the text by producing a result which reflected only one statutory message.

[185] With the advent of constitutional democracy, the responsibility of the statutory interpreter became more complex. A broader contextual approach was mandated. Context had to include core constitutional values ,the historical background of the statute, its purpose mediated

through the aims of the constitution as well as the relevant social ,political and economic context and, where necessary, international law. But this approach did not mean that the words of the statute can be ignored. The judicial interpreter commences with the text and then seeks to engage in a dialogue with various contextual pointers, both pro and anti, the initial conclusion at which she arrives. .

[186] This is not always an easy task. Take this case. Section 3 of the Act provides that the interpretation must give effect to the primary objects of the Act ,being compliance with the Republic of South Africa Constitution Act 108 of 1996 (the constitution) as well as with the Republic's international law obligations. Section 27 (2) of the constitution provides that every worker has a right to strike. This provision would favour the interpretation contended for by respondents in this case but Zondo JP trumps this set of considerations by giving prominence to an objective of the Act as set out in section 1, namely to promote orderly collective bargaining .The learned judge president the fortifies the critical importance of this objective by the use of a series of hypotheticals, which, in my view are distinct from the facts of this case. He concludes that the interpretation contended for by respondent would give rise to disorderly collective bargaining, accordingly the interpretation of section 64 (1) as advanced by respondent is in violation of the primary objects of the act and constantly cannot be adopted.

[187] By contrast, if the court starts with the wording of section 64 which , in turn gives effect to section 27 of the constitution, are that is a right to strike, the following question arises : whether the reading of section 64(1)(b) to mean that notice connotes the provision of a notice of the commencement of the strike without having to encompass every participant therein does violence to the words of the provision or to the overall purpose of the Act which in essence is to give effect to the provisions of section 27 of the constitution. 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 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, as I have already mentioned, must be the starting point of the enquiry. Nor does it appear to me that the ILO jurisprudence particularly around Convention 87 provides any clear support to appellants. With regard to the ILO, James Atleson et al International Labour Law (2008) and regarding the approach to statutory interpretation, JR De Ville Constitutional and Statutory Interpretation (2000) at 60 – 69.

[188] Much mention is made in this case of analogous precedent. In Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd (1999) 20 ILJ 321 LAC at 327 Cameron JA (as he then was) described the issue in that case as whether non bargaining unit employees could strike even where their conditions of services were not directly affected. That problem paralleled the question Zondo AJ (as he then was) dealt with in Afrox Ltd v SA Chemical Workers Union & others (1) (1997) 18 ILJ 399 (LC) where workers employed by the same employer in different plants embarked on strike action. Zondo AJ concluded that:

> "*Once a dispute exist between an employer and a union and the statutory requirements laid down in the Act to make a protective strike to be complied with, the union requires a right to call all its members who are employed by that employer out on strike and its members so employed require the right to*

strike". At 403I

> If Cameron JA, who, correctly in my view, approved of this dictum, found that workers who fell outside the bargaining unit could go on strike, notwithstanding that the collective bargaining dispute did not involve them, then it is a logical extension to conclude that, if that process did not result in disorderly bargaining, neither does the case when the additional striking workers form a part of the same bargaining unit but are not members of the union. There really is little conceptual distinction.

[189] In my view, there is no linguistic basis by which to restrict the ambit of section of 64(1)(b) and thus limit the right to strike in the manner contended for by appellant. Accordingly, I agree with the order proposed by Khampepe ADJP.

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DAVIS JA

Appearances

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DATE OF JUDGMENT	14 MAY 2009