IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA106/13

In the matter between:

PUTCO (PTY) LIMITED **Appellant**

and

TRANSPORT AND ALLIED WORKERS

UNION OF SOUTH AFRICA

(On behalf of its members) **First Respondent**

SOUTH AFRICAN ROAD PASSENGER

BARGAINING COUNCIL **Second Respondent**

Heard: **04 November 2014**

Delivered: **05 May 2015**

Summary: Strike and lock-out – parties deadlocking on wages negotiation – unions issuing a strike notice and employer locking-out all employees including union members who were not a party to the wage negotiations – dispute of facts raised in the affidavits as to whether union's members non-party to the wages negotiation also on strike – court *a quo* rejecting parties' submissions that matter be referred to oral evidence – Appeal – dispute of facts of this nature could not be decided on papers - matter ought to have been referred to oral evidence in order to resolve the factual dispute as to whether union's members on strike. *Plascon-Evans* rule restated. Lawfulness

of lock-out – union contending that lock-out not applicable to it because it was not a party to the wage negotiations – lock-out like strike essential to the process of collective bargaining and should be treated alike – union's members benefiting from the wage negotiations – employer entitled to lock-out all employees irrespective of their participation in the strike in order to compel them to accept the demand in respect of the wage negotiations. Appeal upheld with costs - Labour Court's judgment set aside and substituted with an order that the application is dismissed.

Coram: Musi JA, Murphy *et* Dlodlo AJJA

JUDGMENT

MUSI JA

[1] This is an appeal against the judgment of the Labour Court (Moshoana AJ) wherein the court *a quo* ordered the appellant to discontinue with the lock-out against the first respondent's members. The court *a quo* dealt with two consolidated matters. Both involved the first respondent, as the applicant, seeking similar relief, separately, against the appellant and Algoa Bus Company (PTY) LTD. Algoa did not lodge an appeal against the court ***a quo's*** order.

[2] The first respondent approached the court *a quo* on an urgent basis, seeking, *inter alia,* an order interdicting the appellant from continuing to lock-out members of the first respondent who were in its employ.

[3] The appellant carries on business as a passenger bus operator. It provides public passenger bus services in terms of contracts with the Gauteng Provincial Government and other commercial contracts. It is also a member of the Commuter Bus Employer's Organisation (COBEO) which is an employer's organisation member of the South African Rail Passenger Bargaining Council (SARPBAC). The other employer representative member at SARPBAC is the South African Bus Employer's Association (SABEA).

[4] The first respondent is the Transport and Allied Workers Union of South Africa (TAWUSA). TAWUSA, South African Transport and Allied Workers Union (SATAWU) and Transport Omnibus Workers' Union (TOWU) were the employees' representatives at the SARPBAC. The first respondent resigned from the SARPBAC with effect from 21 December 2010. The first respondent was, at all relevant times, trying to revive its membership of the SARPBAC. The first respondent represented approximately 26% of the employees of the appellant while SATAWU represented approximately 46% and the TOWU and another union 27%.

[5] Collective bargaining on wages and other conditions of employment occurred at the SARPBAC. The last collective agreement entered into at the SARPBAC, prior to the dispute germane to these proceedings, was in April 2012. It is common cause that the first respondent did not participate in the 2012 wage negotiations and that it did not sign the resultant collective agreement.

[6] It is also common cause that the 2012 collective agreement was extended by the Minister of Labour to other employers and employees in the industry in terms of Section 32(2) of the Labour Relations Act 66 of 1995 (the Act),[1] from 9 July 2012 to 31 March 2013.[2] The period was further extended until 31 July 2013.[3]

[7] Wage negotiations in 2013, at the SARPBAC deadlocked. SATAWU and TOWU gave notice on 17 April 2013 that they would commence with a protected strike on 19 April 2013.

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[1] The relevant part of section 32 of the Act reads as follows:
"(1) A *bargaining council* may ask the *Minister* in writing to extend a *collective agreement* concluded in the *bargaining council* to any non-parties to the *collective agreement* that are within its *registered scope* and are identified in the request, if at a meeting of the *bargaining council*-
(a) one or more registered *trade unions* whose members constitute the majority of the members of the *trade unions* that are party to the *bargaining council* vote in favour of the extension; and
(b) one or more registered *employers' organisations*, whose members employ the majority of the *employees* employed by the members of the *employers' organisations* that are party to the *bargaining council*, vote in favour of the extension.
(2) Within 60 days of receiving the request, the *Minister* must extend the *collective agreement*, as requested, by publishing a notice in the *Government Gazette* declaring that, from a specified date and for a specified period, the *collective agreement* will be binding on the non-parties specified in the notice."
[2] See Government Notice No R482 of 29 June 2012.
[3] See Government Notice No R247 of 5 April 2013.

[8] In response to the strike notice, the appellant gave notice to the recognised trade unions, including the first respondent, on 19 April 2013 of its intention to lock-out all employees in the bargaining unit with effect from 21 April 2013. Non-union employees in the bargaining unit were also informed of the impending lock-out. The notice reads as follows:

> '**Subject Notice of Intention to lock-out all members in the bargaining unit**
>
> In response to the strike notice issued, the Company hereby gives 48 hours' notice of its intention to lock-out all employees in the bargaining unit from all of PUTCO Limited's workplaces in support of the employer wage proposals in the wage negotiations in the South African Road Passenger Bargaining Council.' [Original emphasis.]

[9] On 18 April 2013, the first respondent addressed a letter to the appellant wherein it requested the appellant to ensure the safety of its members and indicated that it intends to engage with employers' organisations represented at the SARPBAC to better the conditions of its members in the bus passenger industry.

[10] Pursuant to a telephonic discussion between the appellant's, Mr Malherbe and the General Secretary of the first respondent, Mr Mankge, Malherbe wrote an e-mail to Mankge wherein he explained that the lock-out notice was sent to all unions represented at the appellant, the SARPBAC and that it was "posted at all Putco Business Units."

[11] In response to Malherbe's e-mail, Mankge wrote the following e-mail:

> 'We refer to your email of even date and wish to record the following.
>
> 1. In terms of the letter for Sarpbac dated 19th April 2013, Transport and Allied Workers Union of South Africa is not currently a member of the bargaining Council therefore Transport and Allied Workers Union of South Africa and its members are therefore not party to the dispute that gave rise to the lock-out, in the circumstances, Transport and Allied Workers Union of South Africa members are not currently on strike.

2. In the circumstances you have implemented an unlawful lock out against our members; you are therefore not entitled to impose any lock-out conditions on our members in your employ.

3. Our members will continue to tender services as usual and will not sign any new conditions which you seek to impose by way of unlawful lock-out.

4. We are readily available to meet with you at short notice to discuss the improvements of our members' conditions of employment.

5. Copy of this letter will be forwarded to all employers, whether or not they have implemented a lock out against our members at this stage. This will be done in order to remind all employers in the industry, in order to remind them of the fact that Transport and Allied Workers Union of South Africa and its members are not party to dispute that gave rise to a lock out.'

[12] There are factual disputes in relation to what transpired on 18 and 19 April 2013 at the different Business Units. According to the appellant, Mr Jock Guimaraes, the General Manager at the appellant's Commuta Business Unit in Soweto, had a meeting with two of the first respondent's shop stewards (Mr Jabu Qasha and Mr Charles Phungwayo) on 18 April 2013 and they informed him that they called the first respondent's head office and were informed that the first respondent's members should support the strike as it was about money.

[13] The appellant further alleged that on 19 April 2013, Mr Paul Berning, the Operations Manager at Lekoa Transport Trust, a Business Unit of the appellant, met with Messrs Makanyane and Mohlakoena, who are the first respondent's shop stewards at Lekoa, and they informed Berning that the first respondent's members had decided to participate in the strike for safety reasons. The appellant further alleged that at its Ipelegeng Transport Trust Business Unit not a single driver, including approximately 60 members of the first respondent, reported for work on 19 April 2013. No confirmatory affidavits by Berning, Guimaraes or any other person with first-hand knowledge were provided.

[14] The first respondent denied all the appellant's allegations. It alleged that when workers reported for work on 19 April 2013 at the Commuta Bus Depot, Guimaraes insisted that the workers should sign an undertaking that they are entering the premises for work purposes only. The first respondent's members signed the undertaking. When SATAWU members saw that TAWUSA members are signing the undertaking they also signed.

[15] The first respondent further alleged that Berning turned workers away when they reported for duty on the Monday.[4] The deponent to the replying affidavit provided confirmatory affidavits but it is not clear which parts of the replying affidavits are being confirmed. I say this because no affidavits by the people who are specifically mentioned in the answering affidavit were filed.

[16] Despite the first respondent's submission that the factual disputes are unresolvable on the papers and its request that the matter be referred to oral evidence, the court *a quo* resolved the factual dispute in the first respondent's favour. It concluded that there was no need to refer the matter to oral evidence because the factual disputes are capable of being resolved on the papers. The court *a quo* found that the appellant bore the *onus* to show that members of the first respondent were on strike. It therefore found that members of the first respondent were not on strike.

[17] The court *a quo* had regard to the definition of lock-out and said the following:

> 'This presupposes that the employees should have refused to accept a demand of the employer. Logic dictates that one cannot compel somebody who is not resisting or one who does not present a counter-demand.'

It concluded that "a lock-out must be directed to (sic) employees with a demand."

[18] The court *a quo* was also of the view that the appellant did not show what demand, if any, it wanted the first respondent's members to accept. It concluded that section 64(1)(c) of the Act contemplated that the lock-out notice should be given to any trade union that is a party to the dispute. The

[4] The replying affidavit states that the incident happened on Monday 19 April 2013. This must be a mistake because the Monday was 22nd April 2013.

court *a quo* reasoned that TAWUSA was not a party to any dispute and therefore its members may not be locked-out.

[19] Mr Myburgh on behalf of the appellant, submitted that the court *a quo* was wrong in rejecting the appellant's version. He argued that the facts as presented by the appellant were uncontested and that the court *a quo* should therefore have found that the members of the first respondent had joined the strike.

[20] The court *a quo*, in resolving the factual disputes, said the following:

> '[32] At Ipelegeng and Lekoa Trust it is alleged that shop stewards informed that they would participate in a strike for safety reasons, I am not sure whether this seeks to elevate safety reasons as a demand. Otherwise if it means that employees' life and limb is threatened, then it cannot be strike notice to my mind. A further allegation is made that on 19 April 2013 not a single driver reported for work and have not reported at Ipelegeng(sic) if they did not-fearing for their lives(sic), it cannot be said that they are or were on strike. However what remains clear is that Putco rejected the tender of service on 19 April 2013. The allegations were seriously contested owing to the lockout notice I must accept without hesitation the applicant's version that Guimaraes requested them to sign declaration. I also should accept the version that Berning turned employees away…
>
> [33] In any event, the respondent on this point bears the onus to show that the applicant's members were on strike it is a positive fact that the respondent must prove in order to avert an allegation of unlawful lockout on Plascon rule, the issue ought to be decided in the applicant's favour I do not agree with Memani that this issue ought to be referred to oral evidence I therefore reject an allegation of strike in this case too. That leaves the piggyback argument in this matter too.'

[21] I do not share Mr Myburgh's view that the facts as alleged by the appellant were uncontested. They were contested, albeit very tersely. The factual disputes relating to whether the members of the first respondent were on strike were indeed incapable of being resolved on the papers. The manner in

which the court *a quo* dealt with the disputed facts fortifies my view that the matter ought to have been referred to oral evidence in order to resolve the factual dispute as to whether members of the first respondent were on strike.

[22] The appellant alleged that the shop steward at Lekoa informed Berning that members of the first respondent decided to participate in the strike for safety reasons. I fail to understand what the court *a quo* meant by stating that it was not "sure whether this seeks to elevate safety reasons as a demand." The appellant stated a factual conversation between Berning and the two shop stewards of the first respondent. It was not stated as a demand by any of the parties. It was also not mentioned as a "strike notice" as the court *a quo* seems to suggest. There was in any event no need for the members of the first respondent to issue a strike notice.[5]

[23] With regard to Ipelegeng, the appellant alleged that none of the drivers, including 60 of the first respondent's members, reported for duty on 19 April 2013. There was no allegation that the workers at Ipelegeng feared for their lives and therefore did not report for duty.

[24] The first respondent alleged that Berning turned its members away, on 19 April 2013, when they reported for work whereas the appellant alleged that the workers did not turn-up at all. In an attempt to resolve this factual dispute the court *a quo* found that following:

> 'Owing to the lock-out notice I must accept without hesitation the applicant's version that Guimaraes requested them to sign declarations…I also should accept the version that Berning turned employees away.'

[25] There is, with respect, no link between the lock-out notice and the signing of the declarations. The first respondent's case was that on the Friday its members were asked by Guimaraes, at the Commuta Bus Depot at Selby to sign the declarations, which they did and were allowed to work. It must be recalled that the lock-out was to commence on Sunday 21 April 2013 at 09H00. The lock-out notice was issued on 19 April 2013. It is therefore more plausible that they were asked to sign the declarations that they entered the

[5] See *SATAWU v Moloto NNO* (*Moloto*) 2012 (6) SA 249 (CC) at para 45.

premises to work because of the strike and not “owing to the lock-out notice”. The court *a quo* gave no reasons why it accepted the version of the first respondent that Berning turned the workers away. This it did contrary to the trite test to be applied where factual disputes arise in motion proceeding wherein final relief is sought.[6]

[26] The court a *quo*, wrongly had regard to the *onus* in motion proceedings. In *National Director of Public Prosecution v Zuma*,[7] the following was said:

> ‘[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.
>
> [27] The court below imposed an onus on the NDPP to prove a negative. This appears from the finding that it 'was not convinced that [Mr Zuma] was incorrect' in relation to political meddling (para 216). It reasoned that the question whether there had been political meddling fell within the peculiar knowledge of the NDPP and was difficult for Mr Zuma to prove; and so, it held, less evidence would suffice to establish a *prima facie* case (paras 168 - 169). This rule of evidence, namely that if the facts are peculiarly within the knowledge of a defendant the plaintiff needs less evidence to establish a prima facie case, applies to trials. In motion proceedings the question of onus does not arise and the approach set out in the preceding paragraph governs irrespective of where the legal or evidential onus lies. In applying the 'rule',

[6] See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635 D.
[7] 2009 (2) SA 277 (SCA).

> the court omitted to determine whether the NDPP had failed to adduce evidence on the particular issues; it used the 'rule' in spite of evidence to the contrary; and it did so in instances where no answer was called for because the allegations were either not incorporated into the founding affidavit or were inadmissible. Finally, the court failed to have regard to another C principle, namely that the more serious the allegation or its consequences, the stronger must be the evidence before a court will find the allegation established'.[8] [Footnotes omitted.]

[27] The resolution of the factual dispute in favour of the appellant would have had disastrous consequences for the first respondent. Likewise, a resolution in favour of the first respondent had put paid to one part of the appellant's case. It is clear that the consequences of accepting one version above the other were indeed significant and serious. The court *a quo* clearly needed more and stronger evidence to make the finding that it did. The hearsay evidence was not enough. It is not clear whether the court *a quo* applied the provisions of section 3 of the Law of Evidence Amendment Act 45 of 1988.

[28] I am of the view that the appellant was also supposed to adduce stronger evidence for its contention that members of the first respondent were on strike. The fact that members of the first respondent told Guimaraes that they supported the strike is no indication that they are actually striking. One can support a strike without necessarily participating in it. The fact that some members of the first respondent did not report for duty for fear of their lives cannot be constructed as participation in the strike. The appellant alleged that 60 members of the first respondent did not report for duty on 19 April 2013 at Ipelegeng whereas the first respondent alleged its members were turned away. The appellant's evidence was based on hearsay because no confirmatory affidavit by Berning was supplied. The appellant's evidence was just not strong enough to warrant a finding that members of the first respondent were on strike. The first respondent's stance, in its letter to the appellant, was that its members were not on striking. The contrary was not communicated to the appellant by the first respondent. In my view, the court *a quo* should have referred this issue to oral evidence. The fact that a matter

[8] *National Director of Public Prosecution v Zuma* at paras 26 and 27. Footnotes omitted.

was brought on an urgent basis is no bar against referring it to oral evidence. My conclusion on the other issues in dispute militates against referring the matter back to the court *a quo* to hear oral evidence.

[29] The Act contains an important interpretive instruction in section 3 thereof which reads:

> 'Any person applying this Act must interpret its provisions –
>
> (a) To give effect to its primary objects;
>
> (b) In compliance with the Constitution; and
>
> (c) In compliance with the public international law obligations of the Republic.'

[30] The purpose of the Act is stated in section 1 as:

> 'to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of *this Act*, which are-
>
> (a) To give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996; [Para. (a) substituted by s. 1 of Act 6 of 2014.]
>
> (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 sectorial level;

(iii) Employee participation in decision-making in the workplace; and

(iv) The effective resolution of labour disputes.'

[31] Section 23 of the Constitution of the Republic of South Africa 1996 (Constitution) reads as follows:

'(23) (1) Everyone has the right to fair labour practices.

(2) Every worker has the right-

(a) To form and join a trade union;

(b) To participate in the activities and programmes of a trade union; and

(c) To strike.

(3) Every employer has the right-

(a) To form and join an employers' organisation; and

(b) To participate in the activities and programmes of an employers' organisation.'

[32] There is a constitutional right to strike, but there is no right to lock-out. The exclusion of the right to lock-out was explained in the first certification case where the Constitutional Court[9] stated that:

'A related argument was that the principle of equality requires that, if the right to strike is included in the NT, so should the right to lock out be included. This argument is based on the proposition that the right of employers to lock out is the necessary equivalent of the right of workers to strike and that therefore, in order to treat workers and employers equally, both should be recognised in the NT. That proposition cannot be accepted. Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively

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

> with employers. Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lockout). The importance of the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out. The argument that it is necessary in order to maintain equality to entrench the right to lock out once the right to strike has been included, cannot be sustained, because the right to strike and the right to lock out are not always and *necessarily equivalent*.'[10] [Footnote omitted and own emphasis]

[33] Brassey also points out that lock-outs are not equivalent to strikes and puts it thus:

> 'That the two [the lock-out and the strike] should be treated differently is not purely a matter of historical accident or political expediency. Formally they may seem symmetrical, but in practice they play very different roles. When employers want to change terms of employment, they do not reach for the lock-out; provided they negotiate to impasse first, they can implement the changes unilaterally. Then, if the workers refuse to accept the changes, the law gives their employer the right to retrench or dismiss them. If they refuse to leave the premises, the law provides a range of sanctions that range from judicial interdicts to the police baton. The strike in contrast, is the only means, short of resignation, by which workers can change their lot. It is the way they fend off exploitation and give teeth to the demands that they make at the bargaining table. For them it is a vital necessity, for the employers just an optional extra. By giving collective rights only to workers the law seems to favour then at the expense of their employers. Those who believe in the free interplay of market forces would be quick to condemn this as wrong. What they forget, however, is how much employers are favoured by the legal and social institutions of our society.'[11]

[10] At para 66.
[11] Brassey M "Sam's Missile: Entrenching Industrial Action in a Bill of Rights" *EL* (1993) 10-28.

[34] Creamer agrees with Brassey and points out that the inclusion of the right to strike and the exclusion of a right to lock-out in the Constitution amounts to a decisive shift towards an asymmetrical approach to the regulation of industrial action, based on the understanding that treating strikes differently from lock-outs would bring greater substantive parity to the collective bargaining relationship.[12]

[35] The approach to follow when interpreting a provision that seeks to limit the right to strike was succinctly set out in *Moloto* where Yacoob ADCJ said the following:

> 'As mentioned earlier, the right to strike is protected in the Constitution as a fundamental right without express limitation. Also, constitutional rights conferred without express limitation should not be cut down by reading implicit limitations into them, and when legislative provisions limit or intrude upon those rights they should be interpreted in a manner least intrusive of the right, if the text is reasonably capable of bearing that meaning.'[13] [Footnote omitted.]

[36] The approach adopted in relation to interpreting a fundamental right without express limitation cannot be employed when interpreting the provisions of the Act relating to lock-outs.

[37] Strikes and lock-outs are primarily regulated in Chapter IV Act. The provisions of Chapter IV of the Act were summarised as follows in *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* (*CWIU*):[14]

> 'Strikes and lock-outs are regulated by chapter IV (ss 64 – 77) of the LRA. Section 64(1) provides in general terms that every employee has the right to strike and every employer has the right to lock-out, subject to certain conditions. These are set out in paras *(a)* to *(d)*, read with subsections (2) and (3). They comprise an attempt at conciliation in regard to the issue in dispute (para *(a)*), and notice (paras *(b)*, *(c)* and *(d)*). Section 65 is headed Limitations

[12] Creamer K "The meaning and Implications of the Inclusion in the Constitution of a Right to Strike and the Exclusion of a lock-out Right: Towards Asymmetrical Parity in the Regulation of Industrial Action" *ILJ* (1998) 19(1) 1-20.
[13] At para 53.
[14] (1999) 20 ILJ 321 (LAC).

on right to strike or recourse to lock-out. It provides that no person may take part in a strike or lock-out or in any conduct in contemplation or furtherance of a strike or lock-out if (in summary terms) a collective agreement prohibits it, the issue in dispute is arbitrable or justiciable, or (subject to exceptions) the person is engaged in an essential or a maintenance service.

Secondary strikes are dealt with in s 66. In terms of s 66(1), in s 66, secondary strike means a strike, or conduct in contemplation or furtherance of a strike, that is in support of a strike by other employees against their employer but does not include a strike in pursuit of a demand that has been referred to a council if the striking employees have a material interest in that demand. Section 66(2) prohibits participation in a secondary strike unless the strike that is to be supported complies with the provisions of ss 64 and 65 (para *(a)*); notice has been given (para *(b)*) and the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer (para *(c)*).'"[15]

[38] Section 64 is important for the resolution of the dispute in this matter. It provides:

'**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) 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-

[15] At para 17.

(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) in the case of a proposed *lock-out*, at least 48 hours' notice of the commencement of the lock-out, in writing, has been given to any *trade union* that is a party to the *dispute*, or, if there is no such *trade union*, to the *employees*, unless the *issue in dispute* relates to a *collective agreement* to be concluded in a *council*, in which case, notice must have been given to that *council*; or

(d) In the case of a proposed *strike* or *lock-out* where the State is the employer, at least seven days' notice of the commencement of the *strike* or *lock-out* has been given to the parties contemplated in paragraphs (b) and (c).

(2) If the *issue in dispute* concerns a refusal to bargain, an advisory award must have been made in terms of section 135 (3) *(c)* before notice is given in terms of subsection (1) *(b)* or *(c)*. A refusal to bargain includes-

(a) A refusal-

(i) To recognise a *trade union* as a collective bargaining agent; or

(ii) To agree to establish a *bargaining council*;

(b) A withdrawal of recognition of a collective bargaining agent;

(c) A resignation of a party from a *bargaining council*;

(d) A *dispute* about-

(i) appropriate bargaining units;

(ii) Appropriate bargaining levels; or

(iii) Bargaining subjects.

(3) The requirements of subsection (1) do not apply to a *strike* or a *lock-out* if-

(a) The parties to the *dispute* are members of a *council*, and the *dispute* has been dealt with by that *council* in accordance with its constitution;

(b) The *strike* or *lock-out* conforms with the procedures in a *collective agreement*;

(c) The *employees strike* in response to a *lock-out* by their employer that does not comply with the provisions of this Chapter;

(d) The employer locks out its *employees* in response to their taking part in a *strike* that does not conform with the provisions of this Chapter; or

(e) The employer fails to comply with the requirements of subsections (4) and (5).

(4) Any *employee* who or any *trade union* that refers a *dispute* about a unilateral change to terms and conditions of employment to a *council* or the Commission in terms of subsection (1) *(a)* may, in the referral, and for the period referred to in subsection (1) *(a)*-

(a) Require the employer not to implement unilaterally the change to terms and conditions of employment; or

(b) If the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.

(5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of *service* of the referral on the employer.'

[39] Lock-out is defined in section 213 of the Act as:

'"**lock-out**" means the exclusion by an employer of *employees* from the employer's workplace, for the purpose of compelling the *employees* to accept

> a demand in respect of any matter of mutual interest between employer and *employee*, whether or not the employer breaches those *employees'* contracts of employment in the course of or for the purpose of that exclusion.'

[40] The purpose of and the procedural requirements for a protected strike or lock-out are similar. They both serve as deadlock breaking mechanisms when the process of collective bargaining fails to live up to its purpose; which is for the parties to enter into a collective agreement.[16] In terms of section 23(5) of the Constitution, every trade union, employers' organisation and employer has the right to engage in collective bargaining. In *NUMSA and Others v Bader Bop (Pty) Ltd and Another* (*Bader Bop*),[17] it was said that the right to strike is an important component of a successful collective bargaining system.[18] The inclusion of the employer's recourse to lock-out in the Act is indicative of the fact that the legislature recognised and accepted that the employer's recourse to lock-out is equally an important component of an effective collective bargaining system. The Constitutional Court also recognised the importance of industrial action as a deadlock breaking mechanism. In *Bader Bop,* it said:

> 'Where employers and unions have the right to engage in collective bargaining on a matter, the ordinary presumption would be that both parties would be entitled to exercise industrial action in respect of that matter.'[19]

[41] In analysing the definition of lock-out, Zondo JP (as he was then) stated that a lock-out has three essential elements, namely:

> *(a)* There must be an exclusion of employees by the employer from the employer's workplace, and,
>
> *(b)* The purpose of the exclusion of employees from the workplace-must be to compel them to accept the employer's demand, and,
>
> *(c)* The demand must be in respect of any matter of mutual interest between employer and employee.[20]

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[16] *Equity Aviation Service (Pty) Ltd v SATAWU and Others* (2009) 30 ILJ 1997 (LAC) at para 76.
[17] 2003 (3) SA 513 (CC).
[18] At para 13.
[19] At para 43.
[20] *Technikon SA v National Union of Technikon Employees of SA* (2001) 22 ILJ 427 (LAC) at para 15.

[42] He went on to state that the exclusion of employees must be for an authorised purpose. He said:

> 'In the light of the above it goes without saying that, for a lock-out to exist, the exclusion of employees from the employer's workplace, must be for the authorised purpose. The authorised purpose is to compel the employees to accept the employer's demand in respect of a matter of mutual interest between employer and employee. This does not mean that there cannot be an exclusion of employees from premises for a purpose other than the purpose in the definition of a lock-out. An employer has a right at common law as owner or lawful occupier of premisses (sic) to refuse employees entry into the workplace where the purpose of their coming into the workplace is not to perform their duties. Also if, after employees have entered the workplace, they refuse to work, the employer would be entitled to exclude them from the workplace.'[21]

[43] Mr Memani on behalf of the first respondent, argued that since TAWUSA was not a party to the dispute that had arisen at the SARPBAC, and since TAWUSA had not declared any dispute with PUTCO the lock-out against TAWUSA members was unlawful. He submitted that section 64(1)(c) requires that the employer must give notice of the intended lock-out to any trade union that is a party to the dispute, since TAWUSA was not a party to any dispute, a lock-out may not be instituted against it. He pointed out that section 64(1)(b) only requires that notice must be given to the employer without requiring that the employer must be a party to dispute.

[44] Mr Myburgh on behalf of the appellant argued that an employer party to a bargaining council should be entitled to lock-out employees who are members of a non-party union because the non-party union members have a material interest in the outcome of the dispute; the lock-out would promote collective bargaining at sectoral level and it would give effect to the majoritarian principle which is at the heart of the collective bargaining dispensation.

[45] The court *a quo* accepted Mr Memani's arguments and found that the wage demand or offer was not made to the respondent but at the bargaining council

[21] At para 16.

where the respondent was not represented. Before discussing the submissions of the parties I pause to set out the manner in which the parties negotiated at the SARPBAC.

[46] Collective bargaining on wages and other conditions of employment occurred at the SARPBAC. The last collective agreement entered into at the SARPBAC, prior to the dispute germane to these proceedings, was in April 2012. It is common cause that TAWUSA did not participate in the 2012 wage negotiations and that it did not sign the resultant collective agreement.

[47] On 29 June 2012, the collective agreement was extended in terms of section 32(2) of the Act to the employees and employers in the industry[22] from 9 July 2012 to 31 March 2013. The period was further extended until 31 July 2013.

[48] Clause 2.2 and 2.3 of the Constitution of the SARPBAC read as follows:

> '2.2 This Constitution and all agreements concluded under the auspices of SARPBAC shall apply and be binding on:
>
> 2.2.1 Employers' Organisations an Trade Unions that are party to SARPBAC, as well as members of these Parties.
>
> 2.2.2 All eligible Employees in the employ of members of the above Employers' Organisations regardless of any Union affiliation.
>
> 2.3 Agreements concluded under the auspices of SARPBAC shall also apply and be binding upon all other parties and/or individual to whom the operation of a collective Agreement concluded under the auspices of SARPBAC is extended in terms of section 32 of the Act.'

[49] It is therefore clear that collective agreements entered into under the auspices of the SARPBAC were binding on all eligible employees in the employ of the employer's organisations and to those parties and or individuals to whom it was extended in terms of section 32 of the Act.

[22] Section 32(2) of the Labour Rations Act 66 of 1995 reads as follows:
"(2) Within 60 days of receiving the request, the *Minister* must extend the *collective agreement*, as requested, by publishing a notice in the *Government Gazette* declaring that, from a specified date and for a specified period, the *collective agreement* will be binding on the non-parties specified in the notice."

[50] It is clear that when the parties negotiated until impasse was reached; their intention was to enter into a collective agreement that would be binding on all employees and employers within the industry. All the parties were aware that the will of the majority would prevail during the negotiations. This is in sync with the general scheme of the Act. In *Kem-Lin Fashions CC v Brunton and Another,*[23] it was said that:

> 'The legislature has also made certain policy choices in the Act which are relevant to this matter. One policy choice is that the will of the majority should prevail over that of the minority. This is good for orderly collective bargaining as well as for the democratisation of the workplace and sectors. A situation where the minority dictates to the majority is, quite obviously, untenable. But also a proliferation of trade unions in one workplace or in a sector should be discouraged. There are various provisions in the Act which support the legislative policy choice of majoritarianism. Some of them are s 14(1); 16(1); 18(1); 25(1) and (2); 26(1) and (2); 32(1) (a) and (b); 32(3) (a), (b), (c) and (d) and 32(5); 78(b)).'[24]

[51] Although the will of the majority prevails, the minority would benefit if the negotiations yield positive results. Likewise the minority would be prejudiced or disadvantaged if the negotiations do not yield any fruit. The same would apply if the majority decides to strike and the strike puts enough pressure on the employer so that the latter accepts the workers' demands. The minority would benefit from the fruits derived from the strike. Should the minority be spared when the employer decides to lock-out its employees?

[52] Mr Memani seems to conflate the requirements in section 64(1)(a) with those in section 64(1)(c) of the Act. Whether the employer is entitled to lock-out employees is a question which must be answered by construing section 64(1)(a) and thereafter section 64(1)(c) of the Act to discern whether the notice was properly given.

[54] When parties who are engaged in collective bargaining cannot reach agreement in order to conclude a collective agreement, they have the right to

[23] (2001) 22 ILJ 109 (LAC).
[24] At para 19.

resolve the impasse by way of industrial action. Before resorting to lock-out or strike, the dispute must be referred to a council or the CCMA for conciliation. A certificate of non-resolution indicating that the dispute remains unresolved should have been issued by the council or the CCMA or a period of 30 days should have elapsed since the referral was received by the council or the CCMA. Only after the above requirements have been satisfied may the party intending to embark on a strike or lock-out give notice to the other party of its proposed industrial action.

[55] In the case of a lock-out, the employer must give at least 48 hours written notice of the commencement of the lock-out. The written notice must be given to any trade union that is a party to the dispute, or if there is no trade union, to the employees unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must be given to the council as well.

[56] In this matter, the parties could not reach an agreement in the SARPBAC. After satisfying the requirements in section 64(1)(a) of the Act, the majority unions issued a proper and valid strike notice. Mr Memani did not take issue with the fact that there was compliance with section 64(1)(a) of the Act – by the employer and the employees' parties. The first respondent also accepted that the majority unions issued a proper strike notice. The first respondent argued that the lock-out notice was improperly issued to it. Although, in my view, this case is not about giving notice to a non-party union – because notice was given – but rather whether a lock-out can be instituted against a non-party union, I will now briefly deal with the notice requirement.

[57] The purpose of a strike notice was discussed in *Moloto* wherein the Constitutional Court cited with approval Helen Seady and Clive Thompson's description of the purpose of a strike notice. They stated that:

> "The purpose of the [strike] notice would seem to be four-fold:
>
> - *settlement brinksmanship*. The notice tells the other party that words are about to escalate into deeds, and by that token offers a last-gasp and pressure-cooker invitation to settle;

- *more orderly industrial action*. Industrial action is inherently volatile. A lead-in notice affords some opportunity to regulate the event, for instance through agreed or imposed picket rules;

- *damage limitation*. Strikes (in particular) are intended to cause financial loss, but a notice requirement checks some of the more gratuitous associated damage. For instance, an employer working with perishable goods can take steps to protect stock once it knows that action is imminent;

- *health and safety considerations*. In the case of certain operations, an orderly wind-down of production might prevent or limit health and safety risks to employees and the public."

The Supreme Court of Appeal accepted this description and correctly added another purpose to the list — the protection of the striking employees whose conduct is rendered lawful by a proper strike notice.'[25]

[58] The notice requirements for a strike being similar to those of a lock-out, the description also holds true for lock-out notices. In *CWIU,* this Court accepted the argument that the purpose of section 64(1)'s procedural requirements is to compel employees (and employers) to explore the possible resolution of their dispute through negotiations before exercising their right to strike (or recourse to lock-out).[26] The lock-out notice therefore serves essentially two purposes, firstly, it allows the parties a last opportunity to reach an agreement in order to avert the lock-out and secondly, it allows the employees to make contingency plans in anticipation of the lock-out. I will return to this issue later.

[59] The lock-out notice in this matter stated that the employer intends to lock-out all employees in the bargaining unit in support of the wage proposals of the employer tabled at the SARPBAC. The lock-out is therefore about the wage proposals which were not accepted at the SARPBAC – where the first respondent did not enjoy representation but the SARPBAC's decisions would be binding on the first respondent.

[25] *Moloto* at para 25.
[26] At para 27.

[60] "Issue in dispute" in relation to a strike or lock-out, means the demand, the grievance, or the dispute that forms the subject matter of the strike or lock-out.[27] In *Moloto,* it was said that:

> 'The regulatory scheme of the Act and the provisions of s 64 envisage only one strike in respect of one 'issue in dispute' or 'dispute'. The definite article, 'the', before the words 'issue in dispute' and 'dispute' in s 64(1)*(a)* and before the second use of the word 'strike' in s 64(1)*(b)* makes this clear. '(T)he strike' in s 64(1)*(b)* can only be in relation to 'the [unresolved] dispute' of s 64(1)*(a)*. And if there can only be one strike in relation to one dispute, there seems to be little in language or logic to suggest that more than one notice in relation to the single strike is necessary.'[28]

[61] The lock-out in 64(1)(c) can also only be in relation to the unresolved dispute in section 64(1)(a).

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

[63] The definition of lock-out in the Act does not state that it should only be directed at striking employees. The definition is clear and unambiguous that a lock-out "means the exclusion by an employer of employees from the employer's workplace…"[29] The employer can therefore exclude all employees - striking and non-striking – who do not accept the employer's demand, from the workplace when it decides to institute a lock-out.

[27] See section 213 of the Act.
[28] At para 65.
[29] Section 213 of the Act.

[64] The employer may, as part of its strategy to put pressure on its employees to accept its demand, decide to lock-out all employees in order to achieve a systematic consecutive group or individual capitulation. As the one group capitulates and accept the employer's demand; pressure would be put on the other group/s or individuals to do the same. The more employees as individuals or a group accept the demand the less effective the strike might become thereby forcing the remaining employees to accept the employer's demand. Striking workers will not receive a salary during the strike. Union funds would be drained whilst those employees who have decided to accept the demand would be able to work and receive their salaries. The lock-out would exert economic pressure on the union to accept the employer's demand.

[65] Members of the first respondent could decide to join the strike at any time without giving notice to the appellant. In my view, it would be unfair to expect the appellant not to institute a lock-out against them whilst they refuse to accept its demand. Those employees can strategically decide to strike at a time that could cause serious economic damage to the employer. The employer would be caught by surprise and would not be able to make contingency arrangements. The employer should, in my view, be able to act proactively against them.

[65] Creamer illustrates how a lock-out can be used by employers to exert economic pressure on unions and to reduce economic pressure on the employer. He states:

> 'As most of these challenges turn on the regulation of employer lock-out action, it is important to draw a distinction between 'offensive' and 'defensive' lock-outs. Defensive lock-outs involve the closure of an employer's premises or the shutting down of its operations during industrial action initiated by workers. Such action strengthens the employer's bargaining position as it has the effect of increasing the economic costs of industrial action for workers who had engaged in a go-slow or work-to-rule action rather than on a full-blown strike action. Furthermore, where employees included in the lock-out were not party to the original industrial action this places increased pressure

on the representatives of the striking workers to reach agreement with the employer.

Offensive lock-outs (also known as 'pre-emptive lock-outs') amount to an employer initiated form of industrial action where the premises are locked and workers are excluded and prevented from working. This enables an employer to put pressure on workers to accept the terms and conditions of service which it is offering in the collective bargaining process. This amounts to an attempt to compel workers to accept certain new terms or to agree to the variation of existing terms. The offensive lock-out also enables the employer to influence the timing of industrial conflict, which can prove strategic in increasing the cost to workers of disagreements in the bargaining process and reducing the economic pressures of such disagreements for employers. For example, the costs of industrial action are much reduced for employers if the action takes place outside of periods of peak production or demand.'[30]

[66] If an employer's entitlement to lock-out its employees is limited to striking employees only, it would blunt the employer's weapon. Firstly it would mean that an employer would not be able to cease operations and shut down its premises because there are non-striking workers who are not prepared to accept the employer's demand. Secondly, in a pre-emptive lock-out, the non-striking employees would have to be paid whilst they do not accept the employer's offer, thereby making it costly for the employer who may not employ replacement labour. The non-striking workers would actually be pressurising the employer to capitulate.[31]

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

[30] Creamer *supra* at page 17. See *Technikon* SA *supra* where Zondo JP warns against the fixation of using the terms offensive and defensive lock-out at para 30.
[31] Section 76(1)(b) reads as follows: " An employer may not take into employment any person--
(b) for the purpose of performing the work of any *employee* who is locked out, unless the *lock-out* is in response to a *strike*."

[68] A lock-out which is aimed at all employees in the bargaining unit, promotes collective bargaining at sectoral level and seeks to give effect to the majoritarian principle which is at the heart of the collective bargaining dispensation. The Act also has a bias in favour of collective bargaining at sectoral level. One of the objects of the Act is to promote collective bargaining at sectoral level.[32] Majoritarianism is also preferred by the Legislature.[33]

[69] It is accepted that a bargaining council is the representative of the industry over which it has jurisdiction, and that as long as a dispute that has been dealt with at the bargaining council remains unresolved, all employees that fall under the scope of the bargaining council and have a material interest in the demand over which impasse was reached may strike. Strikes against non-party employers in the context of a bargaining council dispute are permitted.[34] I can see no reason why, by parity of reasoning, the same should not hold true for lock-outs.

[70] In my view, the appellant acted lawfully when it locked-out members of the first respondent. I now turn to finalise the issue of the notice.

[71] Mr Memani submitted that the fact that the Act stipulates that the notice must be given to any trade union that is a party to the dispute means that a lock-out notice may not be given to a trade union that is not a party to the dispute; therefore a lock-out cannot be directed at a union that is not a party to the dispute. I have already found that the first respondent was a party to the dispute because its interests at the SARPBAC were represented by the majority unions, based on the majoritarian principle and the Constitution of the SARPBAC. There was only one dispute between the employer parties and the employees parties. The resolution of the dispute in the employee parties' favour would have benefited the first respondent's members as well. The employer complied with the definitional and legislative requirements for a protected lock-out. The notice requirement has nothing to do with the

[32] See section 1(d) (ii) of the Act.
[33] See section 32 of the Act. See also *Kim-Lin Fashions* supra.
[34] See *Tiger Wheels Babelegi (Pty) Ltd t/aTSW International v NUMSA and Others* [1999] 1 BLLR 66 (LC) at paras 23 and 24, *Plastics Convertors Association of SA v Association of Electric Cable Manufacturers of SA and 4 Others* [2011] 11 BLLR 1095 (LC) at para 23.

employer's entitlement to lock-out, but is a further procedural requirement to warn the employees about the implementation of the employer's decision.

[72] In *Moloto* the Constitutional Court said, in an *obiter dictum*, that:

> 'The applicants accepted that, in relation to lock-outs, the express provisions of s 64(1)*(c)* of the Act require notice only to a trade union, if there is one at the workplace, and not to non-unionised employees as well. To hold otherwise would, in relation to s 64(1)*(c)*, mean that the express wording would have to be disregarded. There is no need to do that either to fulfil the purposes of the Act.'[35]

[73] The minority was however of the view that the provisions of 64(1)(c) must mean that notice should be given to a trade union where there is one and separately to non-unionised employees as well.[36]

[74] Mr Memani argued that the majority view is incorrect and invited us to pronounce on the issue. We do not have to decide this issue because, in this matter, the appellant gave notice to all the unions, including the first respondent, all the non-unionised employees and to the council.

[75] In *United Transport & Allied Trade Union/SA Railways & Harbours Union and Others v Autopax Passenger Services (SOC) Ltd and Another,*[37] the Labour Court considered a similar matter and disagreed with the conclusion of the court *a quo* in this matter. In my view, the conclusion of the Labour Court in the *Autopax* matter is correct. The appeal ought to succeed.

[76] The appellant requested that costs should follow the cause and that we should order the first respondent to pay the costs including the costs consequent upon the employment of two counsel. Mr Memani did not proffer any argument against Mr Myburgh's request. This matter was sufficiently complex and important to warrant the employment of two counsel. In my view, the dictates of fairness and the law require that such costs order be made.

[77] I therefore make the following order:

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[35] At para 87.
[36] At para 36.
[37] (2014) 35 ILJ 1425 (LC).

1) The appeal succeeds.

2) The order of the court *a quo,* in respect of PUTCO Limited, is set aside and replaced with the following:

"The application is dismissed with costs".

3) The first respondent is ordered to pay the costs of the appeal, such costs to include those consequent upon the employment of two counsel.

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Musi JA

Murphy et Dlodlo AJJA concur in the Judgment of Musi JA

APPEARANCES:

FOR THE APPELLANT:	Advocates Myburgh SC, Ngcukaitobi and Raizon Instructed by Bowman Gilfillan INC
FOR THE FIRST RESPONDENT:	Adv. Memani Instructed by Medupi Lehong INC