IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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

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

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

In the matter between:

**NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA** Applicant/Appellant

and

**TRENSTAR (PTY) LTD** Respondent

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## APPLICANT/APPELLANT'S PRACTICE NOTE

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### The names of the parties and the case number

1. This is set out in the case heading above.

### The nature of the proceedings

2. An application for leave to appeal to the Constitutional Court against Orders in the Labour Court and the Labour Appeal Court and, if leave is granted, for the appeal to be upheld.

**Issues that will be argued**

3. Whether this court has jurisdiction.

4. Whether it is in the interests of justice for leave to appeal be granted.

5. Whether the court should decline to hear the matter on the grounds of mootness.

6. Whether the interpretation contended for by the Applicant is correct and whether it is in the interests of justice to resolve a situation of conflicting judgments of the Labour Court with regard to the proper interpretation of Section 76(1)(b) of the Labour Relations Act, 1996.

**An indication of the portions of the record that are necessary for the determination of the matter.**

7. Volume 1, pages 1 – 43, pages 87 – 93.

8. Volume 2, no pages are necessary.

9. Volume 3, pages 219 – 293.

## An estimate of the duration of oral argument

10. Three hours.

## Summary of the argument

11. Section 76(1) of the Labour Relations Act, 1996 ("the LRA") prohibits the use of replacement labour during a lock-out subject to two exceptions set out in two subsections. It is the interpretation of the exception set out in sub-section 76(1)(b) that has given rise to the present dispute and application for leave to appeal. The prohibition against using replacement labour applies unless the lock-out is in response to a strike.

The section reads:

"**76 Replacement labour**

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

(a) to continue or maintain production during a protected strike if the whole or a part of the

employer's service has been designated a maintenance service; or

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

The Applicant contends that, upon a proper interpretation of the section, the right to use replacement labour terminates once the employees tender to return to work i.e., to stop striking, and even though the employer may continue to enforce a lock-out to compel the employees to accept its demands, the right to use replacement labour ceases once the employees tender to return to work. That situation arose and the Applicant brought an application to interdict the Respondent from using replacement labour during a lock-out that continued after the Applicant's members employed by the Respondent tendered to return to work. The Applicant relied on labour court authority to this effect, namely SACCAWU v Sun International (2016) 37 ILJ 215 (LC) para 19.

The labour court dismissed the application for the interdict. The judgment in the labour court against which leave to appeal is sought based its order on a different interpretation to that of the SACCAWU judgment, finding that the right to use replacement labour persists because the words “is in response to a strike” in s76(1)(b) merely qualify the kind of lock-out where replacement labour may be used and so, whether or not the employees are *de facto* striking or not is not relevant. In the result, even once the strike stopped the lock-out did not change its character as a lock-out where replacement labour could be used. The employer could and did continue to use replacement labour to strengthen the power of the lock-out even though the employees were no longer on strike. This resulted in the inevitable capitulation of the employees who ended the lock-out by acceding to the employer’s demand.

The interpretation that is challenged confers a disproportionate advantage in the bargaining power dynamic in favour of the employer that will inevitably result in capitulation to the employer’s demands by the employees. It is a damper on the right to strike in s23 of the

Constitution. Being so disproportionate it is not a sensible and businesslike interpretation, and it conflicts with the purposes of the LRA as set out in the objectives dealt with in section 1 of the LRA and indeed in conflict with the purpose of s76(1)(b), which is to prohibit the use of replacement labour in the absence of a strike.

The finding by the Labour Court in this matter as to what the section means is in direct conflict with the SACCAWU judgment in the same court on the meaning of s76(1)(b).

In the present case the Court, while aware of the other judgment upon which reliance was placed in the argument by the Applicant, did not address the SACCAWU judgment or explain why it was not being followed. No reason for distinguishing it or disagreeing with it is set out in the judgment.

There is a conflict between two judgments of the Labour Court. It is in the interests of justice for the Constitutional Court to resolve the conflict having regard to the area of law involved and the general public interest. It is contended that

it is in the interests of justice for that to be done even though the underlying dispute was resolved by the capitulation of the employees following the judgment of the labour court in the matter and is moot.

The jurisdiction of the court is engaged because the dispute involves the interpretation of a provision of the LRA in the chapter dealing with strikes and lock-outs. It is also engaged because the dispute concerns an arguable point of law of general public importance.

There are good prospects of success and it is in the interests of justice, notwithstanding the mootness of the underlying dispute, for the Constitutional Court to grant leave to appeal.

The interpretation advanced by the Applicant is more consistent with the Constitution and is the interpretation to be preferred.

The appeal should accordingly be upheld, and an order made that the application ought to have succeeded had the

Labour Court interpreted the section correctly as was done in the SACCAWU judgment and it ought to have followed that judgment.

**List of authorities on which particular reliance will be place during oral argument**

- SACCAWU v Sun International [2015] ZALCJHB 34; (2016) 37 ILJ 215 (LC)

- Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 18

- Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd 2009 (1) SA 337 (CC) at para 46

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12 September 2022