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

APPLICANT/APPELLANT'S WRITTEN ARGUMENT

Contents Page No.

Nature of the application

1. The National Union of Metalworkers of South Africa, a registered trade union (hereinafter called "NUMSA") acting in a representative capacity on behalf of its members that are employed by Trenstar Pty Limited, the abovenamed respondent, seeks the leave of the Constitutional Court to appeal against judgments and orders of both the Labour Court[1] and Labour Appeal Court ("the LAC")[2] and, if leave is granted, for the Constitutional Court to uphold the appeal and set aside the judgments on appeal and confirm the interpretation advanced by NUMSA regarding the meaning of the section in the Labour Relations Act 66 of 1995 (hereinafter called "the LRA") that deals with the circumstances under which an employer who engages in a lockout may utilise the services of replacement labour in response to a strike (s76(1)(b)).

[1] Labour Court judgment, vol 1, p 87 – 93. Now reported as National Union of Metalworkers of SA on behalf of members v Trenstar Pty Ltd (2021) 42 ILJ 555 (LC)
[2] Application for Leave to Appeal, vol 3, p 244 – 249. LAC Judgment Vol. 3, pages 244 – 249 now reported as National Union of Metalworkers of SA on behalf of members v Trenstar Pty Ltd (2022) 43 ILJ 1314 (LAC)

Jurisdiction of the Constitutional Court

Constitutional Matter

2. The dispute concerns the interpretation of a section of the LRA that falls within Chapter IV thereof that deals with strikes and lockouts.

3. It is now well established that the interpretation of the LRA is a Constitutional matter and that the jurisdiction of this court is engaged in terms of s167(3)(b)(i) of the Constitution to such a dispute[3].

Point of law of general public importance

4. Section 76(1)(b) of the LRA precludes an employer from taking into employment any person for the purpose of performing the work of any employee who is locked out, unless the lockout[4] "is in response to a strike[5]".

[3] National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and others [2002] ZACC 27; 2003 (3) SA 1 (CC) at para 14 and Association of Mineworkers and Construction Union and Others v Anglo Gold Ashanti Limited [2021] ZACC 42; (2022) 43 ILJ 291 (CC) at para 27. See too National Union of Metalworkers of SA and others v Aveng Trident Steel (2021) 42 ILJ 67 (CC) at para 33.

[4] **'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. Definition in s213 of the LRA.

[5] **strike'** means 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

5. The legislative meaning to be attributed to the phrase “is in response to a strike” has been interpreted differently in various judgments in the Labour Court.

6. The one line of cases (and the interpretation adopted by the Labour Court in this matter) is that the phrase only defines the nature of the lockout[6] and once the lockout falls into that category its nature does not change and so, even if the employees decide to end their strike, the exemption of the prohibition to employ replacement labour continues to have application for so long as the employer persists in the lockout or the employees capitulate to the employer’s demand.

7. On this interpretation, once the strike stops the collective bargaining balance swings overwhelmingly and disproportionally in favour of the employer, making

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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. Definition in s213 of the LRA.

[6] Judgment of Court *a quo* paras 26 and 27 Vol 1 page 92. See also in this regard Ntimane and others v Agrinet t/a Vetsak (Pty) Ltd [1999] 3 BLLR 248 (LC) para 20. This judgment was expressly disapproved and not followed in SACCAWU v Sun International (2016) 37 ILJ 215 (LC) para 19

capitulation to its demands by the employees highly likely if not inevitable[7].

8. The other line of cases[8] holds that the exception to the prohibition of employing replacement labour ceases to apply once the employees tender to return to work and are no longer on strike[9], their refusal to work has ceased so there is no longer a strike as defined in s213 of the LRA.

9. This interpretation maintains the balance of bargaining power, the proportionality that is necessary and that is generally applicable limiting what would otherwise be disproportionate and unfair power at the disposal of the employer when using the bargaining tool of lockout.

10. This is the line the Applicant contends this Court should favour.

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[7] Recognised in judgment of Court *a quo*: see paragraph 28 Vol 1 page 93. Pillay AJ in NUTESA v Technikon SA [2000] 9 BLLR 1072 (LC) para 12 – If recourse to replacement labour were available to an employer during an offensive lockout the collective bargaining would degenerate into collective begging.

[8] The main judgment being SACCAWU v Sun International (2016) 37 ILJ 215 (LC). It cannot be reconciled with the present case – one of them must be incorrect.

[9] Strike means the partial or complete concerted refusal to work….s213 of the LRA definition of "strike". Once there is no longer a refusal to work there is no longer a strike.

11. Since the differing interpretations cannot both be correct, it is unsatisfactory for there to be contradictory judgments of courts of equal standing. It is accordingly in the interests of justice for the legal question to be resolved by an appeal court.

12. The LAC declined to decide the legal point in this case for the same reason it declined to do so in the Sun International case[10] because, by the time the matters reached the LAC in both cases, the underlying dispute giving rise to the lockout had been resolved and the respective disputes had become moot.

13. The contradictory Labour Court judgments create considerable confusion for trade unions, employers, workers, and the many members of the public at large who are or may become involved in collective bargaining that potentially could lead to strike action and lockouts and it is of general public importance that the point of law be clarified so that collective bargaining parties know their rights.

[10] Sun International Ltd v South African Commercial Catering and Allied Workers Union (2017) 38ILJ 1799 (LAC).

14. The fact that there are contradictory judgments provides evidence of the existence of an arguable point of law.

15. It is submitted that it is of general public importance for clarity to be given by the Constitutional Court on the contentious arguable legal point and, that being so, the jurisdiction of the Constitutional Court is engaged in terms of s167(3)(b)(ii).

Common cause facts

16. NUMSA's members, on about 26 October 2020, embarked upon a strike in support of a demand made by them to the respondent for the payment of a once-off taxable gratuity of R7,500.00 per employee ("the demand")[11].

17. On 20 November 2020 at about 13h25, email correspondence[12] was addressed by NUMSA's attorney of record to the respondent's attorney to inform the Respondent that the Applicant and its members had decided to suspend "the protected strike action which

[11] This is dealt with in paragraphs 7-9 of the founding affidavit Vol1 pages 6-7
[12] Annexure FA2, vol 1, p24. Dealt with in the founding affidavit in paragraphs 13 and 14 Vol 1 page 8

commenced on the 26th October 2020" and to do so with effect from close of business on that day, Friday, 20 November 2020. The email ended by informing the Respondent that the NUMSA members who had been on strike tendered their services and would return to work the following Monday 23 November 2020.

18. Almost immediately after the despatch of the email informing the Respondent that the employees intended returning to work on the Monday following the weekend, and seemingly in response to the said email, the Respondent gave 48 hours' notice of its intention to lock out all NUMSA's members with effect from 7am on the following Monday, 23 November 2020.[13]

19. The demand contained in the notice of lock-out was as follows:

> "The NUMSA members in the TrenStar bargaining unit drop and waive their demand to be paid by the Company

[13] Annexure FA3, vol 1, p25.

a once off taxable gratuity in an amount of R7500 to be paid in addition to the ATB."

20. The Notice of Lockout included a sentence reading: "The Company records that this lockout is in response to NUMSA's strike action and accordingly Section 76(1)(b) is applicable". The Respondent thereby communicated its intention to utilise replacement labour to perform the work of NUMSA's members that were to be locked out in spite of the tender to return to work.

21. NUMSA took the view that this was impermissible on its interpretation of s76 (1)(b) of the LRA.[14]

22. The Respondent remained adamant that s76(1)(b) permitted it to use replacement labour during the lockout on the basis that the lockout was, on its interpretation of the section, in response to the strike.

[14] This finds expression in paragraph 21 of the Founding Affidavit Vol 1 page 10: "As NUMSA's members are no longer on strike, the respondent is clearly not entitled to make use of replacement labour to perform the functions of NUMSA's members while they are locked out of the workplace. Any use of replacement labour by the respondent in those circumstances is patently unlawful and in contravention of the provisions of section 76 of the LRA".

23. There was thus a standoff and NUMSA decided to go to court to secure an interdict premised on its interpretation being the correct interpretation, bolstered in this regard by the judgment in the Sun International case[15].

The history of the litigation

24. NUMSA was of the view that the use of replacement labour by the respondent during the course of the lock-out was unlawful and instituted the application[16] in the Labour Court for an order interdicting the respondent from making use of replacement labour.

25. The interpretation of the said section of the LRA was the issue in the application.

26. The Respondent opposed the application.

27. Whitcher J, dismissed the application in the judgment that is challenged in the present application. Notably, although she was referred to and even mentioned the Sun International

[15] SACCAWU v Sun International [2015] ZALCJHB 34; (2016) 37 ILJ 215 (LC).
[16] Urgent application, vol 1, p1 – 30.

judgment,[17] in her judgment she did not deal with it directly and did not explain why she had declined to follow it.

28. The dismissal of the application meant that the Respondent could lockout and use replacement labour. As a result the employees' bargaining position was rendered impossibly weak forcing them to capitulate completely to bring the lockout to an end and to be able to return to work, which is what occurred.

29. Once the lock-out ended, the relief sought by NUMSA became moot even though the disputed point of law remained a very live issue because the judgment had created a situation where there were two directly contradictory judgments by the Labour Court, each having adopted a different approach to interpretation and having come to diametrically opposite conclusions.

30. NUMSA sought leave to appeal to enable the LAC to resolve the now conflicting decisions of courts of equal standing

[17] Judgment para 89 Vol 1 page 89 with reference to the Applicant's submissions. SACCAWU v Sun International [2015] ZALCJHB 34; (2016) 37 ILJ 215 (LC)

pertaining to the interpretation of section 76 (1)(b) of the LRA which was granted by Whitcher J.

31. The LAC declined to hear the matter on its merits on the grounds of mootness. It relied on and followed the Sun International LAC judgment in declining to hear the appeal on the basis of mootness.

32. This time though the LAC faced a situation where there were two conflicting judgments and the LAC in the earlier one had declined to deal with the appeal on the merits on the grounds of mootness. It was now in the interests of justice for the LAC not to have exercised a discretion to decline to hear for mootness because doing so would allow the confusion that it could clear up to persist unnecessarily.

33. It is submitted that the LAC erred in its approach.

Mootness in relation to the present application

34. It is conceded that the underlying dispute was moot when it came before the LAC and remains moot.

35. It is moot because the employees when faced with the prospect of being locked out by an employer who could replace their labour after they had decided to stop striking gave in to the demand and the lockout ended.

36. The LAC has missed two opportunities of providing clarity on a controversial point of law of general public importance. Allowing the confusion to persist when there is an opportunity for this Court to clarify and resolve the controversy and bring certainty is not in the public interest and there is accordingly a good and sound reason for the Court to hear the appeal notwithstanding mootness.

37. This Court has held that the interests of justice standard applies for determining whether a moot matter should be heard[18].

38. If leave is granted the decision in the appeal would clarify whether an employer can take into employment replacement labour during a lockout when employees who

[18] Association of Mineworkers and Construction Union and Others v Anglo Gold Ashanti Limited [2021] ZACC 42; (2022) 43 ILJ 291 (CC) at para 30.

were on strike cease to be on strike and tender their services. A judgment of this Court will resolve disputes between different courts. The issue is important, controversial and complex.

39. It is submitted that, in the interests of justice, the Court should therefore grant leave to appeal notwithstanding the mootness.

Prospects of Success

40. It is contended that the interpretation of s76(1)(b) of the LRA of the Court *a quo* is incorrect and unconstitutional as it results in unfair labour practices, unfair collective bargaining, impacts on the right to strike and not to strike and is in conflict with the purposes of the LRA as set out in s1 thereof.

41. The interpretation advanced by the Applicant below gives the words of the statute their ordinary meaning, retains the collective bargaining balance and proportionality, accords with the purposes of the LRA, and it is submitted should find favour with this Court and be upheld on appeal.

42. That being so it is submitted that there are reasonable prospects of success and that in the interests of justice leave to appeal should be granted.

Interpretation of s76(1)(b)

43. This court has endorsed as the correct approach to interpretation the explanation of the process set out in paragraph 18 of the Endumeni Municipality case[19] which explains that interpretation is the process of attributing meaning to the words used *inter alia* in legislation, having regard to the context provided by reading the particular provision in the light of the statute as a whole and the circumstances attendant upon its coming into existence.

44. Endumeni explains that consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed. In a situation where more than one meaning is possible each possibility must be

[19] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 18. Approved by this Court *inter alia* in Airports Company South Africa v Big Five Duty Free Pty Ltd and others 2019 (5) SA 1 (CC) para 29; Transport and Allied Workers of South Africa obo Ngedle and others v Unitrans Fuel and Chemical Pty Ltd (2016) 37 ILJ 2485 (CC) para 239

weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the provision. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the relevant background.

45. The context in the present exercise is the Constitution and the entrenched rights to fair labour practices and to strike set out in s23 of the Constitution as well as the statute in which the provision finds itself, being the LRA.

46. The primary objects of the LRA set out in s1 thereof that are material to the present interpretative exercise are the objects to give effect to the fundamental rights conferred by s23 of the Constitution, and to promote orderly collective bargaining and the effective resolution of labour disputes.

47. It is submitted that legislation that negatively impacts the efficacy of strike action, such as an employer's rights under section 76(1)(b) of the LRA, constitutes an infringement of

the constitutionally guaranteed right to strike[20] and must be construed in such a manner as to least impact upon that right. A court should be slow to interpret a provision in a manner that places a damper on that fundamental right when an alternative interpretation would not.

48. Proportionality and balance of the power dynamic in collective bargaining are essential to promote orderly collective bargaining and the effective resolution of labour disputes and give effect to the right to fair labour practices. An interpretation that results in a disproportionate swing in the power dynamic should be avoided if an alternative interpretation would better preserve proportionality and balance in that dynamic.

49. The duty to interpret in accordance with the Constitution applies also where two or more interpretations of a legislative provision are possible. The court must prefer the reading of a statute that 'better' promotes the spirit, purport

[20] As set out in section 23 (2)(c) of the Constitution.

and objects of the Bill of Rights, even if neither interpretation would render the provision unconstitutional."[21]

50. Section 76 (1)(b) reads as follows:

> *"(1) An employer may not take into employment any person-*
>
> *(a) …*
>
> *(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.*"

51. The operative portion of section 76(1)(b), for the purposes of this interpretative exercise, is that part that reads *"unless the lock-out is in response to a strike"*. Once the strike ends common sense and the ordinary meaning of "response to a strike" suggests so too should the exemption allowing replacement labour which is only permitted if it is in response to a strike and that, it is submitted, is the correct

[21] Currie, I & De Waal, J. 2013. *The Bill of Rights Handbook, 6th ed*. at page 58, chapter 3.4. See also Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd 2009 (1) SA 337 (CC) at para 46.

interpretation of the section that should be reached applying the interpretative principles[22].

52. In relation to general context, it is pointed out that there is a good reason for the general prohibition on the use of replacement labour in a lockout as contained in s76(1). The possibility of employing persons to maintain production during a lock-out can place an employer in a virtually unassailable position. There is a disparity in bargaining power between employers and employees who cannot find a replacement employer during a strike. If an employer could use replacement labour at will any demand directed at employees could be followed by a lock-out, resulting in business as usual for the employer and economic pressure exerted exclusively on employees until their inevitable submission[23]. Such a power dynamic is unfair and

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[22] This is the conclusion reached in SACCAWU v Sun International (2016) 37 ILJ 215 (LC) para 19: "I find that the interpretation to be accorded to s 76(1)*(b)* of the LRA is that the statutory right of an employer to hire replacement labour is restricted to the period during which a protected strike pertains, and not after it has ceased".

[23] See *Halton Cheadle Tamara Cohen et al* Strikes and the Law online edition updated September 2017 para 7.10. The learned authors take the view that the employer's entitlement to use replacement labour should terminate once the strikers offer to return to work at para 7.10.2.

disproportionate and appropriately restricted by the general prohibition with very limited exceptions in s76(1).

53. This imbalance and disproportionality is recognised in the LRA and there are only two exceptions to the general prohibition where replacement labour may be used during a lockout namely (a) for the purposes of maintenance services – a sensible exception to avoid physical destruction to any working area, plant or machinery or (b) if the lockout "is in response to a strike".

54. In the strike context where the employees withdraw their labour it is recognised that the balance in the bargaining power exchange is to permit the employer to use replacement labour while the employees are on strike and strikers may in turn picket to dissuade them from doing so. This is a factor that the employees have to balance in their decision to strike.

55. All the limited exemption from the prohibition of using replacement labour in a lockout in s76(1)(b) does, it is submitted, is to permit the existing right to use replacement

labour during the strike to continue if the employer decides to lockout in response to the strike, so as not to disproportionally weaken the employer's bargaining strength if it decides to respond to the strike by engaging in a lockout. If the exemption was not there the bargaining position of the employer would weaken significantly if it decided to lockout in response to a strike and by so doing lost its right to use replacement labour. This would be disproportionate and unfair and that result is avoided by the exemption.

56. Accordingly once the strike and lockout exist side by side there is balance in permitting replacement labour to continue to be available to the employer. This is sensible, businesslike and fair.

57. Once the employees are no longer on strike and tender to return to work, if the employer wishes to persist in the lockout there is nothing preventing it from doing so, but then, it is submitted, because what it is doing in locking out is no longer *de facto* in response to a strike, the exemption should no longer apply. The section is capable of bearing this

meaning and it is the more obvious and logical meaning too. This would produce a sensible, fair and businesslike result. Allowing replacement labour has no purpose if there is no strike so why should the provision be interpreted to allow a lockout with replacement labour to continue if the situation where it was meant to provide protection no longer exists and protection is no longer needed.

58. So, properly interpreted - if there is no longer a strike the exemption should fall away. That would make sense and retain the proportionality and balance built into the design in the LRA of prohibiting the use of replacement labour in a lockout that is not in response to a strike.

59. Once the strike ends, if the employer can continue the lockout with replacement labour the situation reverts to the position where the imbalance is overwhelming, the kind of situation the general prohibition in s76(1) was designed to avoid, and submission to the employer demands would be inevitable. This outcome is grossly unfair, not sensible or logical and is not businesslike in irrationally advantaging the employer and prejudicing the employees. This interpretation

should be avoided, even though it is linguistically possible on the grammar and syntax of the section to interpret the section that way.

60. As is apparent from the different judgments and from what is set out above it is linguistically possible for the phrase to have two different meanings.

61. The first possible meaning of the phrase and the one the Court *a quo* favoured is that it is just descriptive of the nature of the lockout[24], sometimes called a defensive lockout, and once the lockout commences it retains its attributes and is thus always a lockout of the kind where replacement labour may be used. That is also how Landman J interpreted the provision in the *Vetsak* case[25].

[24] "the word strike functions simply to qualify and identify the kind of lockout during which replacement labour may be used." Judgment para 27 Vol 1 page 92

[25] Ntimane and others v Agrinet t/a Vetsak (Pty) Ltd [1999] 3 BLLR 248 (LC); (1999) 20 ILJ 896 (LC) para 17. "The section does not provide that it is rendered inapplicable when the strike in response to which the lock-out was instituted terminates. On the contrary, it seems, on a reasonable interpretation, that the nature of the lock-out as a defensive one, and the concomitant right to employ replacement labour, accrues at the stage the defensive lock-out is implemented and endures until the lock-out ceases." The learned judge in the Vetsak case did not engage in an interpretative exercise expressly, and merely stated that his interpretation was reasonable.

62. The other interpretation that is linguistically possible but the correct one, it is submitted, is that the exemption from the general prohibition on using replacement labour is time and fact based and is dependent on there actually being a strike at the time the replacement labour is used. An actual strike must be occurring for the exemption to apply because on this argument the lockout is in response to a strike only if there is a strike[26]. Note the use of the present tense "is". That is the tense used in section 76(1)(b): "unless the lockout is in response to a strike".

63. On this interpretation even if there was a time when the lock-out was in response to a strike, as soon as the strike ends the lockout is no longer in response to a strike as there is no longer a strike for it to respond to. The prohibition against using replacement labour again applies from the time the strike has ended.

64. This interpretation is much more rational and accounts for the change of circumstance that has occurred by the ending

[26] SACCAWU v Sun International (2016) 37 ILJ 215 (LC) para 19

of the strike. It gives effect to the use of the present tense in the section. It is businesslike and it makes common sense to keep the power dynamic proportional.

65. It is quite arbitrary that an overwhelming advantage should accrue to an employer to enforce its demands by way of possible indefinite lockout because of the ability to make use of replacement labour when the employees are not on strike, merely because they once were. There is just no proportionality in this and the outcome is unfair. An interpretation that has that result should be avoided.

66. The Constitution makes specific provision for the right of an employee to strike. An employer on the other hand has recourse to lockout – one of the bargaining tools open to it. "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 with employers… 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."[27]

67. If embarking on a strike means that the employer can lock out and use replacement labour to enforce its demands even after the strike ends, that meaning will constitute a significant damper on the exercise of the right to strike, which must include the right not to strike. An interpretation that is restrictive and that least interferes with a fundamental constitutional right should be preferred.

68. It is accordingly submitted that the interpretation advanced by the Applicant should prevail as the correct interpretation of section 76 (1)(b).

[27] *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) at paragraph 66.

It is in the interests of justice to grant leave to appeal.

69. The court should grant leave to appeal because there are reasonable prospects of success and the appeal raises a matter of considerable importance in the labour field which is a cornerstone of society and the economy. It raises a matter of general public importance and amongst workers, their trade unions and employers there is a great deal of interest in having the doubt with regard to the correct meaning and application of the use of replacement labour during a lockout resolved, and there is accordingly a real societal benefit in having the constitutional issue decided[28].

70. Such issues are of importance not only to the parties involved who face each other in many workplaces in an ongoing relationship involving collective bargaining, but also to the members of the general public who are engaged in collective bargaining. Accordingly reaching certainty and finality on the interpretation which is the issue in dispute is in the public interest and in the interests of justice warrants a determination by the Constitutional Court.[29]

[28] See for example National Union of Metalworkers of SA and others v Aveng Trident Steel (2021) 42 ILJ 67 (CC) at para 35.
[29] A loose reproduction of the last two sentences of para 35 in Aveng supra.

Judgment of the Labour Court and LAC

71. It is now well established that the interpretation of a constitutional provision in a Statute that is enacted to give effect to a constitutional right is holistic and although the inevitable point of departure is the language of the provision itself this has to be read in context and having regard to the purpose of the provision.[30] In the course of interpretation preference should be given to a sensible meaning rather than one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the provision[31]. The learned judge paid lip service to this approach, but for reasons that follow did not actually apply it.

72. The learned judge appreciated that it fell on her to interpret s76(1)(b) and she highlighted the words "unless the lockout is in response to a strike."[32]

[30] See for example FAWU obo Gaoshubelwe v Pieman's Pantry Pty Ltd (2018) ILJ 1213 (CC) para 186 applying Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18. A judgment that has been applied many times by this Court.
[31] NUMSA v Lufil Packaging (2020) 41 ILJ 1846 (CC) at para 53, also applying Endumeni.
[32] Paras 22 and 23 Vol 1 page 91.

73. She found with respect correctly that the lockout was lawful and appreciated that this was not the issue before her. She found correctly with respect "that the current state of play is that the strike is over because the employees are once again tendering their services".[33]

74. The learned judge mouths the tools of interpretation and the purposive approach having regard to the purposes of the LRA where entrenched rights to fair labour practices and the right to strike are implicated, but it is submitted really limits herself to the linguistic approach, finding that the operative legal precondition for the use of replacement labour is not a strike[34] but a lockout. Not any lockout she finds, but a particular kind of lockout - one that is in response to a strike.[35] The word "strike" she finds functions simply to qualify and identify the kind of lockout during which replacement labour may be used. She states that the contrary reading would render s76(1)(b) nugatory stating that she agrees with the respondent's contention in this

[33] Para 25 Vol 1 page 92. This must be so having regard to the definition of strike in s213 of the LRA, which is referred to in para 26 of the judgment.
[34] Remarkable it is submitted because the right to use replacement labour is in response to a strike.
[35] Para 26 last two sentences Vol 1 page 92

regard, but does not state why this is so. The employer can still lockout if it believes it needs to induce acceptance of its demand. She says that this will lead to an insensible and unbusinesslike result undermining, she says, the clear intention of the section. Unfortunately the learned judge does not explain why this is sensible and businesslike or identify the clear intention of the section.

75. With due respect to the learned judge, if the strike has ended and the power dynamic is now disproportionally in favour of the employer the opposite seems to be true. This outcome is not sensible or businesslike and surely the intention of the section could not be to achieve such a result if there is no strike.

76. The learned judge does not explain how she understands the purpose of the provision and why the purpose that operates when the strike exists continues even once the strike ceases as she says it does. The purpose of the section is of course the critical question that has to be answered and it is the one question that the learned judge does not address in her judgment. She finds that there is a

trigger and once it is pulled that is the end of the story. From then, according to her interpretation, it remains lawful to continue to use replacement labour even if the strike in response to which it is permitted has ended.

77. It is submitted that the learned judge's reasoning is unsound and her conclusion wrong. Since the learned judge was disagreeing with another judgment where the reasoning is, with all due respect to her, fuller and much more compelling and constitutionally based, one would have expected an explanation for the departure or distinguishing of the earlier judgment. There is none. There is no explanation why she chose not to follow the Sun International judgment.

78. In paragraph 28 of the judgment the learned judge acknowledges the obvious, namely that the bargaining position of the employees is weakened considerably by her interpretation, but says that this is what the drafters of the legislation intended by permitting replacement labour in a lockout in response to a strike. The intention to permit a lockout with replacement labour in response to an ongoing strike is not equivalent to an intention to permit a lockout

with replacement labour once that strike has ended and is no longer ongoing. There is no logic in the reason that it is. No explanation is provided as to why this is sensible, businesslike, and achieves the purposes of collective bargaining identified in the LRA, as the learned judge suggests it does.

79. It is submitted that completely weakening the employees' bargaining position merely because they initiated strike action which has ended is not sensible, not businesslike, is disproportionally advantageous to an employer, frustrates the right to strike entrenched in the Constitution, and is not the correct interpretation of the provision.

80. The right of an employer to make use of replacement labour to carry out the work ordinarily done by striking workers diminishes the efficacy of strike action as a bargaining tool, as it minimises the economic harm felt by the employer as a result of the strike action. This is particularly the case if, once strike action has been embarked upon by employees and the employer has instituted a retaliatory lock-out in response thereto, the employer is entitled to continue

making use of replacement labour until such time as the employees are forced to withdraw their initial demand or agree to the employer's demands, irrespective of whether the employees remain on strike or choose to end it.

81. It is accordingly submitted that the interpretation of the learned judge *a quo* was wrong and should be corrected on appeal.

82. The merits and the interpretation issue were not decided by the LAC, who it is submitted should not have declined to hear the appeal, but that is water under the bridge and of no relevance in this appeal where the question of mootness has to be addressed by this Court afresh for it to decide whether this is a reason to decline to entertain the appeal on the merits.

83. For the reasons set out herein, it is submitted that it is in the interests of justice for this Court to hear the appeal even though the main dispute has been resolved, a task that has become necessary and appropriate because the LAC

declined to do so when in the interests of justice it ought to have.

Relief

84. The Applicant accordingly seeks an order allowing it leave to appeal, an order upholding the appeal in a judgment setting out that upon a proper constitutional interpretation of s76(1)(b) of the Labour Relations Act 66 of 1996 (as amended) it is not permissible for an employer who has locked employees out to use replacement labour if the employees tender to return to work and it elects to preclude them from doing so by enforcing a lockout.

85. The court should find that the interpretation accorded to s76(1)(b) of the LRA in SACCAWU v Sun International[36] is correct, namely that the statutory right of an employer to hire replacement labour is restricted to the period during which a strike pertains, and not after it has ceased.

[36] SACCAWU v Sun International (2016) 37 ILJ 215 (LC) para 19.

86. Since the lockout has ended and the dispute moot, the Court should merely declare that had it not been moot it would have found for the Applicant/Appellant.

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12 September 2022