



REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: J 2697/12

In the matter between:

TRANSNET SOC LTD

Applicant

and

SATAWU

Respondent

Heard: 11 October 2012

Delivered: 12 October 2012

Summary: Secondary strike – urgent interdict – application of s 66(2)(c) of LRA.

JUDGMENT

STEENKAMP J

Introduction

- 1] The applicant seeks a rule *nisi* interdicting an imminent nationwide secondary strike by members of the respondent, the South African Transport and Allied Workers Union (SATAWU). SATAWU members have

been engaged in a nationwide primary strike in the road freight industry for the past two weeks. The secondary strike would involve some 42 000 workers. The applicant maintains that it does not conform with the provisions of section 66(2)(c) of the Labour Relations Act.¹

Background facts

2] SATAWU (and three other trade unions) embarked on a nationwide protected strike in the road freight industry on 25 September 2012, some 2 ½ weeks ago. The strike has been marred by numerous incidents of violence. Two days ago, a non-striking truck driver lost his life after a brick had been thrown at his truck and hit him on the head. On 28 September 2012, this court granted a rule *nisi* in the following terms:

2.1 Declaring that the violent conduct of the respondent's members in support of the strike action is unlawful;

2.2 Ordering the respondents:

2.2.1 to issue public statements to the media, calling on members to desist from any unlawful criminal conduct;

2.2.2 to issue public statements to the media, recording their opposition to any violence, intimidation or damage to property in support of strike action.

2.3 Interdicting the respondents and their members:

2.3.1 from obstructing public roads or interfering with the safe flow of traffic on any public road;

2.3.2 from obstructing entrances or exits to any workplace, or interfering with the flow of traffic to and from such premises, unless authorised by picketing rules;

2.3.3 from causing damage to any property including any vehicles;

¹ Act 66 of 1995 (the LRA).

2.3.4 from committing any act of intimidation, violence, including the carrying of any weapons, knopkieries, pangas or other traditional weapons;

2.3.5 from intimidating or otherwise interfering with any person who does not voluntarily participating strike action, including all non-striking employees in the industry;

2.3.6 from committing any acts of public disorder or violence.

- 3] On 5 October 2012 a final order was granted by agreement between the Road Freight Employers Association, SATAWU and another union on the basis that the trade unions would take all reasonable steps, including the issuing of public statements, press releases and advertisements to communicate to their members the terms of the order of 28 September 2012; to unequivocally condemn the use of any type of violence, intimidation or damage to property; and to instruct union officials, shop stewards and union members to do whatever is reasonably necessary to prevent further incidents of violence, intimidation or damage to property.
- 4] SATAWU complied with the terms of this order in so far as it did issue press statements condemning the acts of violence that continued to characterise the primary strike. However, it seems to have had little effect. Acts of violence and intimidation aimed at non-striking truck drivers and other employees have continued apace.
- 5] The employers' organisation has, in principle, reached a settlement with three of the trade unions engaged in the strike. However, SATAWU has not accepted the wage offer and its members are continuing with their strike action ("the primary strike").
- 6] After a number of false starts, SATAWU served a notice of a secondary strike on the applicant, Transnet, on 8 October 2012. The secondary strike is due to commence on 16 October 2012. Transnet employs approximately 63 000 employees across six areas of operations:

6.1 Transnet National Ports Authority

- 6.2 Transnet Port Terminals;
- 6.3 Transnet Rail Engineering;
- 6.4 Transnet Freight Rail;
- 6.5 Transnet Pipelines; and
- 6.6 Transnet Group.

7] The relevant part of the strike notice read as follows:

“You are hereby given seven days notice of our members’, who are employed nationally at Transnet Freight Rail (TFR) and Transnet Port Terminals (TPT), intention to embark on protected secondary strike action. The secondary strike at TFR and TPT will start at 06h00 on Tuesday, 16 October 2012. The strike will endure for one full day at TFR and three full days at TPT.

The secondary strike is reasonable in relation to its possible direct or indirect effect for a number of reasons, including the fact that our members in your employee are responsible for loading and offloading of trucks, containers and ships all of which are critical for the operation of the road freight industry. This will impact on the customers of the primary employers, which may lose customers or credibility. We reserve our rights to explain this more fully later, should it be necessary. Please contact us if you require a copy of our wage demands.”

- 8] As can be seen from the strike notice, the secondary strike is aimed at Transnet Freight Rail (TFR) and Transnet Port Terminals (TPT). The “primary employers” are employers in the road freight industry.
- 9] TFR transports goods and commodities by rail, primarily to and from six main ports. It employs approximately 36 321 employees, of whom 39% (14 158 employees) are members of SATAWU. TPT is responsible for the handling of cargo that is transported through South African ports. It employs approximately 6255 bargaining unit employees, of whom 62% (3878 employees) are members of SATAWU. Its customers are primarily the shipping industry, vehicle manufacturers, agriculture, timber and forest

products, the mining industry and exporters of minerals, metals and granite.

- 10] Transnet seeks to interdict the planned secondary strike on three main grounds. It submits that:

10.1 the strike notice is defective;

10.2 a secondary strike by SATAWU's members will not have any direct or indirect effect on the business of the primary employers; and

10.3 the nature and extent of the secondary strike will be unreasonable in relation to the possible direct or indirect effect of such a strike on the business of the primary employers.

The applicable legal provisions

- 11] Helen Seady and Clive Thompson² have pointed out that, although the Committee of Experts of the International Labour Organisation supports the rights of workers to engage in solidarity action, it recognises the need to limit this right. Other than requiring that the primary strike must itself be lawful, and that national legislation should define the parameters of a sympathy strike and the nature of the relationship between the parties that would justify such a strike, the committee has not attempted to flag further regulation.
- 12] South African labour law specifically recognises and legislates for protected secondary strikes. Section 66 of the LRA regulates secondary strikes:

"66 Secondary strikes

(1) In this section '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

² Seady and Thompson, "Strikes and Lock-outs" in Thompson & Benjamin, *South African Labour Law* (Juta) AA1-329.

employees, employed within the *registered scope* of that *council*, have a material interest in that demand.

(2) No person may take part in a secondary *strike* unless-

(a) the *strike* that is to be supported complies with the provisions of sections 64 and 65;

(b) the employer of the *employees* taking part in the secondary *strike* or, where appropriate, the *employers' organisation* of which that employer is a member, has received written notice of the proposed secondary *strike* at least seven days prior to its commencement; and

(c) 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.

(3) Subject to section 68 (2) and (3), a secondary employer may apply to the Labour Court for an interdict to prohibit or limit a secondary *strike* that contravenes subsection (2).

(4) Any person who is a party to proceedings in terms of subsection (3), or the Labour Court, may request the Commission to conduct an urgent investigation to assist the Court to determine whether the requirements of subsection (2) (c) have been met.

(5) On receipt of a request made in terms of subsection (4), the Commission must appoint a suitably qualified person to conduct the investigation, and then submit, as soon as possible, a report to the Labour Court.

(6) The Labour Court must take account of the Commission's report in terms of subsection (5) before making an order."

13] Carole Cooper³, after an extensive analysis of sympathy strikes or secondary strikes in other jurisdictions, and in the context where the current LRA was still in Bill form, summarised the proportionality test envisaged by section 66(2)(c):

"The requirements concerning the reasonableness of the nature of the

3 Cooper, "Sympathy Strikes" (1995) 16 *ILJ* 759 at 783.

sympathy strike would mean, for instance, the prohibition of a sympathy strike where the primary and secondary strikers work in unrelated sectors or occupations and where, as a result, the secondary strike can have little impact on the primary employer's business. Thus, for instance, the bill aims to prohibit the holding of a sympathy strike by health workers in support of a primary strike by miners with the matter in dispute is nothing to do with the interest of the health workers. As far as the extent of the strike is concerned, this could relate to the length of the strike and its scope both in terms of the area and numbers. It could mean, for instance, that a lengthy sympathy strike, which is causing serious loss to the secondary employer, will fall foul of the section if there is little chance of its having a direct or indirect effect on the primary employer's business. On the other hand, a secondary strike involving a large number of employees or more than one enterprise, because of the possibility of its having the required effect, could be found to be permissible."

- 14] After some earlier confusion, the applicable legal principles were succinctly summarised as follows in *SALGA v SAMWU*⁴:

"In short, whether or not a secondary strike is protected is determined by weighing up two factors - the reasonableness of the nature and extent of the secondary strike (this is an enquiry into the effect of the strike on the secondary employer and will require consideration, inter alia, of the duration and form of the strike, the number of employees involved, their conduct, the magnitude of the strike's impact on the secondary employer and the sector in which it occurs) and secondly, the effect of the secondary strike on the business of the primary employer, which is in essence an enquiry into the extent of the pressure that is placed on the primary employer."

- 15] That judgement was handed down extemporaneously by Van Niekerk J. It was upheld on appeal more than three years later.⁵ The Labour Appeal Court further noted:

"Under the head of proportionality, the court must weigh the effect of the secondary strike on the secondary employer and the effect of the nature

4 [2008] 1 BLLR 66 (LC); (2007) 28 *ILJ* 2603 (LC) para [16].

5 *SALGA v SAMWU* [2011] 7 BLLR 649 (LAC); (2011) 32 *ILJ* 1886 (LAC) para [10].

and extent of the secondary strike on the business of the primary employer. The subsection does not require actual harm to be suffered by the primary employer but that they must be the possibility that it may. The harm that the employer may suffer is not required to be direct. It may be harm that indirectly affects the business of the primary employer. It would, therefore, in every case require a factual enquiry to determine whether or not the possible effect the secondary strike will have on the business of the primary employer is reasonable. The harm that may be suffered by the secondary employer must be proportional to the possible effect the secondary strike may have on the business of the primary employer.”

16] Van Niekerk J also noted in *Clidet No 597 (Pty) Ltd v SAMWU*⁶:

“The legitimacy (or otherwise) of the secondary strike must be determined by determining the nature and extent of the proposed secondary strike, and weighing that against the harm that will be caused to the business of the primary employer. This approach is obviously better suited to employers that stand in a relationship of customer and supplier, all who enjoy a connection by way of a common shareholding or some other nexus that bears on the capacity of the secondary employer to place pressure on the primary employer to resolve its dispute with the union.”

17] However, the LAC in *SALGA v SAMWU*⁷ disagreed that the secondary employer should be able to place pressure on the primary employer:

“There is no requirement in section 66 of the Act that the secondary employer should exert influence on the primary employer or that the secondary employer should have the capacity to exert influence on the primary employer in order to encourage it to compromise or capitulate to the demands of the workers. What section 66 requires is that the secondary strike should have a possible direct or indirect effect on the business of the primary employer and that the nature and extent of the secondary strike should be reasonable in relation to the possible direct or indirect effect on the business of the primary employer.”

6 [2011] 3 BLLR 225(LC) para [8].

7 *Supra* para [16].

Evaluation / Analysis

18] I shall consider the question whether the applicant has made out a *prima facie* case for the relief sought on an interim basis at the hand of these established principles. I shall also consider the effect of the request for the CCMA to conduct an investigation in terms of section 66 (4). These principles have to be considered in the context of an application for urgent interim relief⁸, i.e.:

18.1 a *prima facie* right, though open to some doubt;

18.2 a well-founded apprehension of irreparable harm;

18.3 the absence of an adequate alternative remedy; and

18.4 a balance of convenience in their favour.

In view of the discretionary nature of an interim interdict these requisites are not judged in isolation and they interact.⁹

Mr *Brickhill*, for the respondent, argued that the relief sought is final in effect and that the requirements for a final interdict must be met. I do not agree. The relief sought is couched in the form of a rule *nisi* and it was argued on that basis. I shall therefore consider the application on that basis.

Firstly, I need to consider the applicant's submission that the strike notice did not comply with the provisions of the collective agreement.

The strike notice

19] In terms of s 66(2)(b), no person may take part in a secondary strike unless-

“the employer of the *employees* taking part in the secondary *strike* or,
where appropriate, the *employers' organisation* of which that employer is a

8 *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (A) 267 A-F.

9 *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton & ano* 1973 (3) SA 685 (A) 691 E-G.

member, has received written notice of the proposed secondary *strike* at least seven days prior to its commencement”.

- 20] The procedural requirement is a simple one. Section 66(2)(b) requires no more than that the union must give a written notice of the secondary should at least seven days before it is due to start. It does not prescribe what that notice should contain, aside from when the strike will commence. To that extent, the notice given by SATAWU complies with this provision.
- 21] However, in the present case, the parties have gone further and have concluded a collective agreement which regulates, *inter alia*, secondary strikes. They have chosen to include express provisions which must be complied with before a secondary strike can take place. The provision requires that the trade union should include in the statutory notice required by section 66(2)(b) --

“The grounds on which the union advances that the secondary strike action is reasonable in relation to the possible direct or indirect effect the secondary strike action may have on the business of the primary employer.”

- 22] Mr *Maserumule*, for the applicant, submitted that the reason why this provision was included is that, without it, Transnet would have to second-guess the trade union and speculate whether the secondary strike will comply with section 66(2)(c) of the Act. In the absence of this provision in the collective agreement, he says, the only way that the applicant can establish whether or not it wishes to challenge a secondary strike as not complying with section 66(2)(c) is when it actually launches an application in this Court and even then, only when it receives the answering affidavit from the respondent. By agreeing to the inclusion of this clause in the collective agreement, the parties have made it possible for Transnet to make an assessment of whether or not to challenge the secondary strike upon receipt of the secondary strike notice.

- 23] It is significant that the parties have also elected to treat protest action under section 77 of the LRA in the same manner as a secondary strike. Section 77 requires notice of commencement of protest action to be given to NEDLAC. Clause 23.4 of the collective agreement requires that the union should also give a separate notice to Transnet and that the notice should include, *inter alia*, the nature and extent of the strike as well as its anticipated duration. Section 77 does not require this additional information but the parties have elected to provide for it.
- 24] The parties, in relation to primary strikes, did not made provision for any additional procedural requirements. This seems to demonstrate that the parties intended to deal with primary strikes differently from the way they deal with secondary strikes and protest action.
- 25] Recently, the Labour Appeal Court in *BMW (Pty) Ltd v NUMSA & Others*¹⁰ upheld the principle that where parties have concluded a collective agreement that contains additional procedural requirements for a primary strike, those requirements must be complied with before any strike can take place. The union cannot elect to only comply with the requirements of the LRA. Waglay DJP, for the majority, stated the position as follows¹¹:

“It is common cause between parties that the clause sets out the procedure which the parties need to follow in dealing with the demand... Parties by way of a collective agreement set out certain procedural steps which they will follow in dealing with their demands, grievances, concerns etc . In this respect, appellant is correct to submit that the respondent was obliged to follow clause 8.3 in having its demand addressed.

The respondent, on the other hand, argues that it is not obliged to comply with the procedure set out in clause 8.3 because its demand is one of mutual interest and it is entitled to embark on a strike in support of its demand as long as it does so in compliance with the provisions of the Labour Relations Act 66 of 1995 (as amended) (“the Act”). I disagree. Where parties have concluded an agreement which does not deny any of the parties to the agreement the rights and obligations provided in the Act, I

10 (2012) 33 *ILJ* 140 (LAC).

11 At paras [8] – [11].

see no reason why that agreement cannot be enforced. In fact the Act seeks to promote collective bargaining, particularly at the sectoral level and gives primacy to collective agreements.

A collective agreement concluded between the parties is binding between them. It is a contract that sets the agreed terms between them and as long as what is agreed upon is not in conflict with the applicable legislation or *contra bonos mores* it is binding and enforceable between them.”

- 26] In finding as it did, the majority of the LAC in *BMW (Pty) Ltd* thus overruled *County Fair Foods (Pty) Ltd v FAWU and Others*¹², in which the LAC had previously held in relation to a primary strike that a trade union party to a collective agreement could elect to either comply with the procedural requirements contained in a collective agreement, or those prescribed by the LRA. The minority judgment of Landman AJA in *BMW* expressly relied on the *County Fair* judgment, and the majority, in holding otherwise, albeit without referring to it expressly, overruled it.

- 27] The approach in *BMW* seems to be consistent with that adopted by the LAC in *North East Cape Forests v SAAPAWU*¹³, where it upheld the principle that parties can regulate strike related processes in terms of a collective agreement.

- 28] The obligation to hold parties to the terms of collective agreements which regulate secondary strikes was recognised by the Labour Court in *Chubb Guarding SA (Pty) Ltd v SATAWU*¹⁴. In that case, the parties had concluded a collective agreement that provided for a “cooling off period” before union members could embark on a secondary strike, which was

12 [2001] 5 BLLR 494 (LAC).

13 (1997) 18 ILJ 971 (LAC) at 977-978.

14 [2005] 11 BLLR 1062 at 1064.

additional to the notice period required by the LRA. In upholding the employer's contention that the collective agreement was binding and that the union and its members were bound to observe its terms before the strike could commence, the Court observed as follows¹⁵:

"In my view, where there is an additional requirement of reasonableness in the case of the secondary strike, with its limitations, a collective agreement should be respected by both parties particularly when the secondary strikers are so disproportionally higher in number than the primary strikers, even if there is a *nexus* between the two companies in question. Reasonableness could also be inferred from the actual conduct of employees in respecting the relevant and applicable collective agreements.

...

Here was a procedure that had to be followed, to which the union and the employer have agreed upon, in a collective agreement. It provides for a cooling-off period, which is a wise route to follow before crippling an employer with whom employees have no direct dispute. If there is a *nexus* between the two businesses, the employees may strike. But before the provisions of clause 13 have not yet been complied with in full, workers may not go on strike. This strike action is therefore delayed until there is such compliance."

29] The collective agreement between Transnet and SATAWU requires that the union should state its reasons for believing that the secondary strike will be protected.

30] In its notice of 8 October 2012, SATAWU stated:

"The secondary strike is reasonable in relation to its *possible direct or indirect effect* for a number of reasons, including the fact that our members in your employ are responsible for loading and off loading of trucks, containers and ships all of which are critical for the operations of the road freight industry. This will impact on the customers of the primary employers, which may lose customers or credibility. We reserve our rights to explain

15 Paras [11] – [12].

this more fully later, should it be necessary.”

31] I agree with Mr *Maserumule* that the notice does not fully comply with the requirements of the collective agreement. It mentions only one of “a number of reasons” why it is of the opinion that the secondary strike is reasonable in relation to the possible direct or indirect effect on the business of the primary employers. It does not set out why the one factor – the loading and off-loading of trucks – would make the strike reasonable in relation to its effect on the primary employers. All it alleges is that the primary employers may lose customers or credibility because the strike may impact on their customers.

32] It would be overly formalistic, though, to interdict the planned strike action for this reason alone. The Constitutional Court very recently considered a different question relating to a strike notice for a primary strike, and whether the notice governed non-members of the union, in *SATAWU & Others v Moloto NO & Another*.¹⁶ That judgment considered the requirements of the Act and not of a collective agreement. Nevertheless, the following *dictum* of Yacoob J (for the majority) is instructive regarding the choice between an interpretation requiring more information in a strike notice and an interpretation requiring less:

“We assume, for present purposes, that the interpretation requiring more information than that is constitutionally permissible. Which interpretation, then, sits better with the spirit, purport and objects of the Bill of Rights?

In our view really there is no contest. Interpreting the section to mean what it expressly says is less intrusive of the right to strike; creates greater certainty than an interpretation that requires more information in the notice; serves the purpose of the Act – specifically that of orderly collective bargaining – better; and gives proper expression to the underlying rationale of the right to strike, namely, the balancing of social and economic power.”

33] I am not entirely convinced that the same considerations apply in this case. Firstly, the parties have elected to impose more stringent obligations on the union than are required by the Act. Secondly, the requirement to

16 [2012] ZACC 19 (21 September 2012) paras [73] – [74].

spell out the grounds in the collectively agreement arguably provides greater certainty and would lead to more orderly collective bargaining. On balance, though, I would not prohibit the planned secondary strike for this reason alone.

34] The further question of compliance with s 66(2)(c) remains.

Nature and extent of the secondary strike

35] As Van Niekerk J pointed out in *SALGA v SAMWU*¹⁷, the reasonableness of the nature and extent of the secondary strike entails an enquiry into the effect of the strike on the secondary employer, i.e. Transnet. It will require consideration, *inter alia*, of –

35.1 the duration and form of the strike;

35.2 the number of employees involved;

35.3 their conduct;

35.4 the magnitude of the strike's impact on the secondary employer; and

35.5 the sector in which it occurs.

Duration and form of the strike

36] The strike is set to last for one full day at TFR and three full days at TPT. It will take the form of a full-blown strike as opposed to the workers withholding their labour for a limited duration during the day or an overtime ban.

37] Although a strike for one day does not appear to be extensive, the cumulative effect of four days' strike action in this sector will be significant.

38] The applicant has shown that the proposed strike by Transnet Freight Rail employees, although only for one day, will nonetheless have a major disruptive effect on its operations and on its customers. According to the

¹⁷ *Supra* (LC) para [16].

applicant – and SATAWU does not contest this -- it will take Transnet Freight Rail approximately a month to recover from a one day strike. SATAWU has not shown precisely how such a strike may possibly have an effect on the business of the primary employers, other than to allude to the “contractual chain” that flows from Transnet to its customers to primary employers. It is against this background that the court has to assess the requirements of reasonableness and proportionality set by section 66(2) (c).

- 39] Likewise, the applicant has shown that the effect of the strike on the business operations of Transnet Ports Terminal over a period of three days will be major, and will in addition, have a catastrophic effect on what is already an ailing economy. All imports and exports transported by ship go through Transnet Port Terminals. The intention of the strike is to prevent all cargo from being loaded or off-loaded. Thus for three days, Transnet Port Terminals will not be able to conduct its business. This will affect not just Transnet Port terminals, but also Transnet Freight Rail, which delivers cargo to the ports for export and collect imported goods. Overall, the Applicant’s business will be severely and negatively affected. The Court needs to evaluate whether given the impact of the secondary strike on the Applicant – i.e. the secondary employer -- and the likely effect on the business of the primary employers, the secondary strike should be allowed.

Number of employees involved

- 40] The strike at TFR will involve some 36 000 employees as opposed to the now less than 25 000 employees still participating in the primary strike. At TPT the strike will last for three days and involve more than 4000 employees. As in *Chubb Guarding*¹⁸, the disproportionate number of Transnet employees who will embark on the secondary strike relative to those of the primary employers still on strike is a factor to be considered.

¹⁸ [2005] 11 BLLR 1062 (LC) para [11].

Conduct of the employees

41] It is difficult to assess the possible future conduct of the employees. However, the court has the benefit of being able to consider the conduct that has characterised the primary strike to date. It has been particularly violent and disruptive, going far beyond the aims of orderly collective bargaining and peaceful picketing.

42] In this regard, one cannot but be reminded of the words of WB Yeats in *"The Second Coming"*:

Turning and turning in the widening gyre
the falcon cannot hear the falconer;
Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
the ceremony of innocence is drowned;
The best lack all conviction, while the worst
are full of passionate intensity."

43] In the case of the primary strike, SATAWU has indeed called upon its members to act peacefully, in accordance with the orders of this Court; but it seems to have had little effect. In the era since the tragedy at Marikana when workers embarking on a wildcat strike were fatally wounded by members of the South African Police Services, nationwide strikes have occurred where the falcon (the workers) will not hear the falconer (their union representatives). Even though the current primary strike is protected and sanctioned by SATAWU, it does not appear as if the union has managed to maintain control over its members. Anarchy has indeed prevailed; blood has been spilt and non-striking workers have been killed. One cannot predict with any certainty what would happen if the secondary strike were to proceed; but there is a real apprehension that the strike could exacerbate the violence that has characterised the primary strike

thus far.

Magnitude of strike's impact on secondary employer and the sector in which it is to occur

- 44] I have already pointed out what a major impact the strike will have on the secondary employer. TPT and TFR do not fall within the road freight sector; as such, the major impact of the strike on the secondary employer would appear to be disproportionate to its possible direct or indirect effect on the business of the primary employers.

Direct or indirect effect on business of the primary employers

- 45] The court has to consider the extent of the pressure placed on the primary employers by the secondary strike.
- 46] Dealing, firstly, with TFR, the applicant has shown that Transnet Freight Rail and the primary employers are in fact competitors. They both transport goods and it is a business strategy of Transnet Freight Rail that it should lure business away from the primary employers. As was observed by Bhoola J in *Coca Cola Fortune (Pty) Ltd v FAWU & Others*,¹⁹ in such a case, the possibility of the secondary strike having an effect on the primary strike is remote, or is not one that is contemplated by section 66(2)(c).
- 47] In relation to the Transnet Port Terminals, SATAWU has alleged that if cargo is not off-loaded or loaded, this will have some impact on the business of the primary employers. However, if one accepts that the primary strike has brought to a halt the collection of containers by the employees of the primary employers, a secondary strike at Port Terminals will not have any effect nor is it likely to have any effect on the business of the primary employers.
- 48] It must be said that there is a factual dispute on the papers as to the extent to which a secondary strike may have a possible direct or indirect effect on the business of the primary employers. Mr *Brickhill* urged me to

¹⁹ (2010) 31 *ILJ* 1855 at para [13].

resolve the conflict by applying the well-known rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*²⁰, i.e.

‘[W]here in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order ... may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.’

- 49] However, as I have already stated, this application is not one for a final order. The rule in *Plascon-Evans* does not apply. In interlocutory interdicts, the approach of the court in the face of a dispute of facts on the papers is this:²¹

“The proper manner of approach is to take the facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining interim relief, for his right, *prima facie* established, may only be open to ‘some doubt’.”

- 50] The court would be greatly assisted in resolving those factual disputes, were it to be furnished with a report by the CCMA as envisaged by section 66(5). But that report is not yet available. I shall return to that aspect of the relief sought shortly.

Proportionality

- 51] Is the nature and extent of the secondary strike reasonable in relation to the possible direct or indirect effect on primary employers?
- 52] The nature and extent of the secondary strike will be such that it will have a major impact on Transnet. Is that reasonable in relation to the possible direct or indirect effect on the primary employers?

20 1984 (3) SA 623 (A) at 634H-635C.

21 CB Prest *Interlocutory Interdicts* (Juta, 1993) p 60; *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

- 53] SATAWU alleges in its answering affidavit that there is a link between TFR and Transnet insofar as customers may leave containers on a road vehicle trailer for collection by TFR. How this link may impact on the business of the primary employers, is not clear. The potential harm caused to Transnet appears to me to be disproportionate to the very slight possible effect the strike may have on the primary employers.
- 54] The same holds true for TPT. At best, SATAWU may establish that employees in the road freight industry deliver goods to TPT for off-loading. But in the context of a primary strike having the result that those trucks are not running – except, perhaps, for a few that are being driven by replacement workers at the risk of life and limb – it is difficult to see how a strike at TPT could have an effect on the primary employers in the road freight industry. Even if it did, the nature and extent of the secondary strike would not be reasonable in relation to the possible direct or indirect effect on the primary employers.
- 55] It is difficult, though, to ascertain the possible effect on the primary employers, and the relationship between the different employers, on the basis of affidavits drawn in haste. That brings me to the next point to be considered.

Section 66(4) report

- 56] To reiterate – the LRA envisages a specific role for the CCMA in disputes of this nature. The following subsections of s 66 are relevant:

“(4) Any person who is a party to proceedings in terms of subsection (3), or the Labour Court, may request the Commission to conduct an urgent investigation to assist the Court to determine whether the requirements of subsection (2) (c) have been met.

(5) On receipt of a request made in terms of subsection (4), the Commission must appoint a suitably qualified person to conduct the investigation, and then submit, as soon as possible, a report to the Labour Court.

(6) The Labour Court must take account of the Commission's report in terms of subsection (5) before making an order."

- 57] In this case, the applicant has requested the CCMA to conduct an investigation in terms of s 66(4). The CCMA has identified suitably qualified persons to conduct the investigation, but has not yet appointed them. It is envisaged that such an appointment can be made, the investigation carried out, and a report furnished to the Court within seven days.
- 58] Seady & Thompson²² have noted that the practicalities associated with trying to conduct a meaningful investigation under urgent circumstances makes the CCMA's job and an enviable one, and places a question mark over the utility of the exercise contemplated by section 66 (4).
- 59] In terms of section 66 (6), though, this court must take account of the CCMA's report before making an order. At the moment, that the report has not yet been submitted and indeed, a suitably qualified person has not yet been appointed to conduct the investigation in terms of section 66 (5). In my view, the most practical way of enabling the court to consider the report to be furnished by the CCMA in terms of section 66 (5) is to adopt a process similar to that adopted by the court in *Sealy of South Africa (Pty) Ltd & others v PPWAWU*²³. Although that the matter was heard as an *ex parte* application and the matter before me is opposed, with both parties having filed substantial pleadings and heads of argument, I intend to consider whether the applicant has made out a case for interim relief; and if so, to issue a rule *nisi* pending the furnishing of a report contemplated in section 66 (5). That report must be in place before the court on the return day in terms of section 66 (6).

Has the applicant satisfied the requirements for urgent interim relief?

- 60] Against this background, the court must finally consider whether the applicant has satisfied the requirements for an urgent interdict outlined

²² *Supra* at AA1-330.

²³ [1997] 4 BLLR 421 (LC).

earlier.

A prima facie right?

- 61] On the evidence currently before the Court, and without the benefit of a report from the CCMA, I am satisfied that the applicant has made out at least a *prima facie* case, though open to some doubt, to satisfy the requirements for interim relief.
- 62] The nature and extent of the envisaged strike action is such that it will have a major effect on Transnet and on the economy of the country. It does not appear to be reasonable in relation to the slight possible effect it may have on the primary employers. It is disproportionate to the goal of the strike action, i.e. to force the primary employers to accept SATAWU's demands.
- 63] It may be that, once an investigation has been conducted in terms of section 66(5), a clearer picture emerges and that the applicant may not be able to establish a clear right for the Court to issue a final order in terms of s 66(5). At this stage, though, the applicant has established a *prima facie* right for the interim relief I intend to grant.

Apprehension of irreparable harm?

- 64] The applicant faces a clear apprehension of irreparable harm. Economic loss is envisaged by any strike; but in this case, it is not proportionate or reasonable in relation to the possible effect on the primary employers.
- 65] There is also the real apprehension of harm in the form of violent conduct, leading not only to damage to property, but also physical harm – or even death – for non-strikers. In the documentation attached to SATAWU's answering affidavit, 16 incidents of violence are recorded in one municipality in three days. It appears from the documents attached by the union that stones and petrol bombs have been thrown and vehicles set alight during the primary strike. Although it disavows any collusion with the perpetrators and it has in fact condemned the violence, the union seems

incapable of preventing it.

Absence of alternative remedy

66] The applicant has no other remedy other than the one prescribed by section 66(3) of the LRA, i.e. the procedure that it has followed.

Balance of convenience

67] The balance of convenience favours the applicant. Should the strike proceed at this stage, before the Court has had the benefit of the report envisaged by s 66(6), it will lead to major disruption, losses and possible physical harm to the applicant. The members of SATAWU employed by the applicant, on the other hand, will suffer no prejudice. They will carry on with their work and be paid for their labour. They do not stand to gain from the secondary strike; on the contrary, they would only suffer the loss of four days' wages, were they allowed to strike in solidarity with their comrades in the road freight industry at this stage. SATAWU and its members in that industry suffer no immediate prejudice; and should the Court decide in their favour on the return day, the secondary strike can still proceed.

Order

68] Having considered all of these factors, I make the following order:

68.1 A rule *nisi* is issued calling on the respondent (SATAWU) to show cause on 26 October 2012 at 10h00 why the following orders should not be made final:

68.1.1 declaring that the secondary strike by the respondent's members employed by the applicant at Transnet Port Terminals and Transnet Freight Rail due to commence on 16 October 2012 is in contravention of section 66(2)(c) of the LRA;

68.1.2 directing the respondent to withdraw its secondary strike notice addressed to the applicant and dated 8 October 2012;

68.1.3 interdicting and restraining the respondent from calling for a secondary strike by applicant employees at Transnet Port Terminals and Transnet Freight Rail pursuant to the notice issued on 8 October 2012; and

68.1.4 directing the respondent to notify its members employed at Transnet Port Terminals and Transnet Freight Rail not to embark on a secondary strike pursuant to its strike notice issued on 8 October 2012.

68.2 The orders in subparagraphs 1 to 4 shall operate as an interim interdict bending the return date.

68.3 The CCMA is directed to furnish its report in terms of section 66 (5) of the LRA to this court and to the parties by no later than 19 October 2012.

68.4 The parties are directed to deliver any supplementary affidavits or further submissions pursuant to the report of the CCMA by no later than 24 October 2012.

68.5 The question of costs is to be decided on the return day.

Anton Steenkamp

Judge of the Labour Court of South Africa

APPLICANT: Puke Maserumule of Maserumule Inc.

RESPONDENT: Jason Brickhill

Instructed by Cheadle Thompson & Haysom.