CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 105/22

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA Applicant

and

TRENSTAR (PTY) LIMITED Respondent

Neutral citation:	*National Union of Metalworkers of South Africa v Trenstar (Pty) Ltd* [2023] ZACC 11
Coram:	Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ, Rogers J and Theron J
Judgment:	Rogers J (unanimous)
Heard on:	2 February 2023
Decided on:	18 April 2023
Summary:	Labour Relations Act 66 of 1995 — section 76(1)(b) — distinction between a terminated strike and a suspended strike — interpretation of "in response to a strike"

ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court, Johannesburg):

1. Leave to appeal is granted.
2. The appeal succeeds.
3. The order of the Labour Appeal Court is set aside and replaced with an order in the following terms:
   "(a) The appeal succeeds.
   (b) There is substituted, for the order of the Labour Court, an order as follows: 'It is declared that the respondent was not entitled to use replacement labour for the purpose of performing the work of any employees who were locked out by virtue of the lock-out declared by the respondent on 20 November 2020.'
   (c) The parties shall bear their own costs in the Labour Court and the Labour Appeal Court."
4. The parties shall bear their own costs in this Court.

JUDGMENT

ROGERS J (Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ and Theron J concurring):

Introduction

[1] An employer who embarks on a lock-out may not, as a general rule, use replacement labour to perform the work of the locked-out employees. There is one exception: if the lock-out "is in response to a strike".[1] This case is about the

[1] For the statutory source of the prohibition and the exception, see para [2] below.

interpretation of that exception. The employer is the respondent, Trenstar (Pty) Limited (Trenstar), whose employees include members of the applicant, the National Union of Metalworkers of South Africa (NUMSA). NUMSA brought an urgent application in the Labour Court to interdict Trenstar from using replacement labour during a lock-out. The Labour Court dismissed NUMSA's application. The Labour Appeal Court subsequently dismissed NUMSA's appeal on the basis of mootness. The matter comes before us as an application by NUMSA for leave to appeal against the respective orders of the Labour Court and the Labour Appeal Court.

[2] The prohibition and exception mentioned above are contained in section 76(1)(b) of the Labour Relations Act[2] (LRA). For convenience, I quote the whole subsection:

> "(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 an *employee* who is locked out, unless the *lock-out* is in response to a *strike*."

[3] Section 213 of the LRA defines "strike" and "lock-out" thus:

> "**'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 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".
>
> "**'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

[2] 66 of 1995. Italicised words in the extracts from the LRA quoted in this judgment are italicised in the LRA itself in order to indicate that they are defined in section 213.

> employer breaches those *employees'* contracts of employment in the course of or for the purpose of that exclusion".

Factual background

[4] On Friday 23 October 2020, after failed conciliation on a demand by NUMSA for the payment of a once-off gratuity to employees, NUMSA gave Trenstar notice that its members would embark on a strike starting at 07h00 on Monday 26 October 2020. The notice stated that the strike would take the form of a total withdrawal of labour. The strike began as notified and continued for several weeks. As a result of an urgent application by Trenstar to have the strike action declared unlawful and unprotected, the parties became legally represented. The details of that urgent application are not now relevant except to note that it failed.

[5] At 13h25 on Friday 20 November 2020, NUMSA's attorneys notified Trenstar's attorneys thus:

> "Kindly note that our client and its members have decided to suspend (as of the close of business on the 20th November 2020) the protected strike action which commenced on the 26th October 2020. This is not to be construed as a withdrawal of the demand for the R7500.00 ex-gratia payment.
>
> Our client's members will tender their services and return to work on Monday the 23rd November 2020."

[6] On the same day, and shortly after receipt of this notification, Trenstar wrote to NUMSA as follows:

> "Please take note that the Company hereby gives 48 hours' notice that it intends locking out all NUMSA members, with effect from 07h00 on Monday the 23rd November 2020. This lock-out is in accordance with section 64(1)(c) of the LRA, in terms of which the Company's demand is that:
>
> *The NUMSA members in the Trenstar bargaining unit drop and waive their demand to be paid by the Company a once off taxable gratuity in an amount of R7500 to be paid in addition to the ATB.*

> The Company records that this lock-out is in response to NUMSA's strike action and accordingly section 76(1)(b) is applicable.
>
> During the lock-out the picketing rules agreed between the parties shall be applicable.
>
> Finally, the issuing of this lock-out notice does not constitute a waiver by the company that the strike action to date has been unprotected and which is currently before the Labour Court in respect of a Leave to Appeal application." (Italics in the original.)

[7] NUMSA's attorneys responded in a letter to Trenstar's attorneys, contending that the lock-out was in response to a strike, denying that Trenstar was entitled to use replacement labour during the lock-out and demanding an undertaking that Trenstar would not use temporary labour. In reply, Trenstar's attorneys disputed NUMSA's attorneys' contentions. Trenstar's attorneys stated, among other things, that the lock-out notice was served before the strike was suspended at close of business on that day (Friday 20 November 2020) and that the strike was in any event not over, having only been suspended. Trenstar's lock-out began at 07h00 on Monday 23 November 2020.

Litigation history

Labour Court

[8] NUMSA launched an urgent application in the Labour Court to interdict Trenstar from using replacement labour during the lock-out. NUMSA did not challenge the lawfulness of the lock-out but alleged that it was not in response to a strike. This was so, according to NUMSA, because by the time the lock-out began, the strike action had ended. The lock-out was thus "offensive".[3] In its answering affidavit, Trenstar repeated the contentions contained in its attorneys' letter of Friday 20 November 2020. Trenstar alleged that NUMSA and its members had not "withdrawn the strike or the demand"; they had merely "suspended it" and they could at any time "reinstitute [it]".

[3] In labour law parlance, a lock-out which is not in response to a strike is sometimes styled "offensive", because the employer is seen as using the lock-out as a weapon of offence (attack). Conversely, a lock-out which is in response to a strike is sometimes styled "defensive". Neither of these expressions is used in the LRA.

[9] The matter was argued before Whitcher J in the Labour Court on 24 November 2020. On 30 November 2020 the Labour Court delivered judgment, dismissing the application with no order as to costs. The Labour Court found that the lock-out was lawful. The Court emphasised that the issue was not the lawfulness of the lock-out but whether Trenstar could use replacement labour. Trenstar did not dispute that the employees had tendered their services, even though they had not abandoned their demand for the gratuity. Although the employees could resume the strike at any time, "the current state of play is that the strike is over because the employees are once again tendering their services". This was so, the Labour Court reasoned, having regard to the definition of "strike" in the LRA. With the suspension of the strike, there was no longer a partial or complete concerted refusal to work.

[10] In the Labour Court's view, however, the word "strike" in section 76(1)(b) simply functioned to qualify and identify the kind of lock-out during which replacement labour could be used. The Labour Court could not accept that the mere suspension of a strike, which attracted the counter-measure of a lock-out by the employer, disqualified the use of replacement labour. That would render "effectively nugatory" and lead to "insensible or unbusinesslike results". Properly interpreted, section 76(1)(b) provided that "the trigger for the lawful use of replacement labour is the lock-out of those employees whose labour is to be replaced, not the existence of a continuing refusal to work by those employees". The fact that the strike may have ended shortly before the lock-out started is not determinative.

[11] The Labour Court was alive to the fact that its interpretation would considerably weaken NUMSA's bargaining position. However, it said that this was what the drafters of the LRA had done when permitting an employer to use replacement labour after a union has called a strike and the employer has responded with a lock-out.

[12] In light of the Labour Court's judgment, NUMSA and its members abandoned their demand for a gratuity, and the lock-out ended. According to NUMSA, its members had little choice but to capitulate. The effect of the Labour Court's judgment was that

Trenstar could continue to use replacement labour indefinitely without any negative impact on its business operations. NUMSA's bargaining position was hopelessly weak.

Labour Appeal Court

[13] The Labour Court granted leave to appeal to the Labour Appeal Court. That Court dismissed the appeal. It was common cause, said the Labour Appeal Court, that because the strike and lock-out had both ended, the matter was moot. NUMSA argued that it was still in the interests of justice for the Labour Appeal Court to address the legal issues, because the Labour Court's judgment in the present case was at odds with the earlier judgment of the Labour Court in *Sun International*.[4] The Labour Appeal Court was unmoved. The Court stated that, although NUMSA was a large trade union, it did not represent the broader labour law community. No other party had applied to join as an amicus. Whether Trenstar's lock-out was in response to the strike was, moreover, an issue to be determined "on the unique facts of the case". That there were conflicting judgments on the legal issue did not alter the position.

Contentions in this Court

NUMSA's contentions

[14] On jurisdiction, NUMSA submits that our constitutional jurisdiction is engaged because the case concerns the interpretation of the LRA, being legislation giving effect to the labour relations rights guaranteed in section 23 of the Constitution. NUMSA submits, too, that the interpretation of section 76(1)(b) is an arguable point of law of general public importance which this Court ought to consider.

[15] On the question of leave to appeal, NUMSA submits that it has reasonable prospects of success on the merits. NUMSA acknowledges that the matter is moot, but submits that it is in the interests of justice for this Court to entertain it in order to provide legal clarity on the interpretation of section 76(1)(b). The matter is one of importance

[4] *SA Commercial Catering & Allied Workers Union v Sun International* [2015] ZALCJHB 341; (2016) 37 ILJ 215 (LC); [2016] 1 BLLR 97 (LC).

in the labour field, particularly for those involved in collective bargaining. Cases in which the proper interpretation of section 76(1)(b) arises will generally be moot by the time they reach an appellate court.

[16] On the merits, NUMSA argues that the right of an employer to engage replacement labour "in response to a strike" impacts negatively on the efficacy of strikes. Because the right to strike is guaranteed in section 23(2)(c) of the Constitution, this Court should prefer an interpretation of section 76(1)(b) that impacts least on the right to strike. Moreover, proportionality and balance in the power dynamics of collective bargaining are essential to promote the orderly and effective resolution of labour disputes. An interpretation that preserves rather than distorts power dynamics should be favoured.

[17] For these reasons, the exemption permitted by section 76(1)(b) should be interpreted as ending when the strike ends. This is said to accord with common sense and the ordinary meaning of the phrase "in response to a strike". The reason for the general prohibition against using replacement labour during a lock-out is that employers could otherwise place themselves in a virtually unassailable position. Subject to the limited exception contained in section 76(1)(a), employers may use replacement labour during a strike. The exemption in section 76(1)(b) merely preserves that right where the employer has responded to the strike with a lock-out. Once the strike ends, the employer may continue with its lock-out but may no longer fortify its position by using replacement labour. The contrary view is grossly unfair to employees and irrationally advantages employers. NUMSA thus supports the interpretation adopted by the Labour Court in *Sun International* and criticises the contrary interpretation adopted by the Labour Court in *Ntimane*[5] and the present case.

[18] NUMSA's written submissions did not address the distinction, if any, between a suspended and terminated strike. In oral argument, and in response to questions from

[5] *Ntimane v Agrinet t/a Vetsak (Pty) Ltd* [1998] ZALC 98; (1999) 20 ILJ 896 (LC).

this Court, counsel for NUMSA submitted that the premise of their case was that the strike had ended, as the Labour Court found. Regardless of whether a strike is terminated or suspended, employees have to give fresh statutory notice if they want to withdraw their labour again, at least in the case of a plant-specific strike.[6] It is not necessary for employees to abandon their demand in order for a strike to end.

Trenstar's submissions

[19] Trenstar does not contest this Court's jurisdiction. In regard to mootness, Trenstar submits that there are no conflicting authorities which this Court need resolve. *Sun International*[7] dealt with the question whether an employer which had locked out its employees in response to a strike could continue to use replacement labour once the strike came to an end. Here, by contrast, the strike was merely suspended. The applicable Labour Court judgment was thus *Kings Hire*,[8] which also dealt with a suspended strike. If the strike in the present case had been settled or permanently withdrawn, there might have been a different finding. This goes to show that the present case was decided on its own unique facts.

[20] On the merits, Trenstar's submissions focused on the distinction between a terminated and suspended strike. Trenstar's lock-out notice was issued while the strike was still underway, even though the suspension of the strike had been announced. Factually, the lock-out was in response to the strike. The employees had only suspended their strike and could at any time have reinstituted it. Trenstar argues that, if NUMSA's argument were accepted, no lock-out in response to a strike could ever succeed. Whenever an employer gave 48 hours' notice of a lock-out in response to a strike, a union could defeat the employer's response "by simply issuing a suspension notice

[6] Counsel for NUMSA added the plant-specific qualification after his attention was directed to the statement in para 89 of this Court's judgment in *South African Transport and Allied Workers Union v Moloto N.O.* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC) (*Moloto*) to the effect that a fresh notice is not required where employees resume a suspended strike. Counsel submitted that this statement in *Moloto* was made in the context of a nationwide multi-plant strike.

[7] *Sun International* above n 4.

[8] *National Association of South African Workers obo Members v Kings Hire CC* [2019] ZALCJHB 345; (2020) 41 ILJ 685 (LC); [2020] 3 BLLR 312 (LC).

bringing the strike to an end before the lock-out notice took effect". The argument that NUMSA's bargaining position is weakened by the Labour Court's interpretation overlooks the fact that NUMSA and its members retained the right to start striking again.

Jurisdiction

[21] Our jurisdiction was rightly not in dispute. This Court has consistently held that the interpretation of the LRA is a constitutional matter.[9] The interpretation of section 76(1)(b) also raises an arguable point of law of general public importance.

Leave to appeal

[22] Whether it is in the interests of justice to grant leave to appeal must take into account NUMSA's prospects of success and the question of mootness. As will appear, NUMSA enjoys reasonable prospects of success. As to mootness, the proper interpretation of section 76(1)(b) has been the subject of conflicting judgments in the Labour Court. The Labour Appeal Court has twice declined, on grounds of mootness, to address the issue.[10] As NUMSA contended, cases in which the proper interpretation of section 76(1)(b) arises will typically be moot before they reach an appellate court. It is desirable that those involved in collective bargaining should know where they stand when it comes to the use of replacement labour during lock-outs.[11] A further issue raised by this case is the distinction, if any, for purposes of section 76(1)(b), between a suspended strike and a terminated strike. These issues transcend the interests of the

[9] See, for example, *Solidarity obo Members v Barloworld Equipment Southern Africa* [2022] ZACC 15; (2022) 43 ILJ 1757 (CC); [2022] 9 BLLR 779 (CC) at para 34, *Steenkamp v Edcon Ltd* [2016] ZACC 1; 2016 (3) SA 251 (CC); 2016 (3) BCLR 311 (CC) at para 25, *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at paras 13-4.

[10] An appeal against the Labour Court's judgment in *Sun International*, above n 4, was dismissed for mootness: *Sun International Limited v South African Commercial Catering and Allied Workers Union* [2017] ZALAC 24; (2017) 38 ILJ 1799 (LAC); [2017] 8 BLLR 776 (LAC). The Labour Appeal Court followed the same course in the present matter.

[11] Compare *Association of Mineworkers and Construction Union v Anglo Gold Ashanti Limited t/a Anglo Gold Ashanti* [2021] ZACC 42; (2022) 43 ILJ 291 (CC); 2022 (8) BCLR 907 (CC) at para 30, where this Court held that it was in the interests of justice to hear a matter that was moot because "[i]f leave to appeal is granted, the decision would clarify the approach to secondary strikes, for the parties and others in the labour relations community. A judgment would also resolve disputes, if any, between different courts".

litigants in the present case. Although every case will present its own particular facts, the facts of the present matter do not preclude general answers to the issues.

[23] For these reasons, it is in the interests of justice to grant leave to appeal.

The merits

The suspension issue

[24] I start with the distinction Trenstar draws between a suspended and terminated strike. In order for there to be a strike as defined in the LRA, there must be a concerted withholding of labour and this concerted withholding of labour must be for a specified purpose. If employees are not refusing to work and are not retarding or obstructing work, they are not on strike, and no strike exists. This is the ordinary meaning of the words used in the definition of "strike". If the employees were previously refusing to work for a prescribed purpose, but are no longer refusing to work, there is not a strike. The fact that the grievance or dispute underlying the prescribed purpose remains in existence does not mean that the strike has not come to an end; a demand unaccompanied by a concerted withdrawal of labour is not a "strike".

[25] The LRA does not deal with the "termination" of strikes or with "suspended" strikes. This is unsurprising. A "strike' is a state of affairs occurring with a particular purpose. It either exists or it does not. A "strike" ends, in the sense of no longer existing, when there is no longer a concerted withdrawal of labour.

[26] Although the LRA does not deal with the termination and suspension of strikes, terminology of this kind is used in collective bargaining. Its precise meaning may depend on the context. In general terms, though, employees who tender to return to work by "suspending" their strike, rather than "terminating" it, are signalling that they do not abandon their demand and reserve the right to withdraw their labour again in pursuit of their demand. One must distinguish between a strike and an unconditional right to strike. If the dispute has been the subject of unsuccessful conciliation, and if

48 hours' notice of the strike has been given, there is an unconditional right to commence a strike. But there is no strike until there is a concerted withholding of labour.

[27] If there is a concerted withholding of labour, and if the employees later return to work by "suspending" their strike, they are conveying that they do not waive the unconditional right to strike which previously accrued to them. During the period of suspension, there is no strike as defined, only an unconditional right to strike. If employees suspend their strike and the employer accepts their tender of services, the employer could obviously not then refuse to pay them on the basis that they were still on strike.[12]

[28] Counsel for NUMSA submitted that, where employees "suspend" their strike, they have to give a fresh 48 hours' notice if they want to reinstate their strike. This is contrary to the decision of the Labour Court in *Transportation Motor Spares*.[13] This Court, in *Moloto*,[14] cited *Transportation Motor Spares* as one of several Labour Court judgments which had interpreted section 64(1)(b) of the LRA generously to employees.[15] Whether, in the case of a suspended strike, the reinstitution of the strike requires a fresh 48 hours' notice was not actually the issue in *Moloto* and thus the point may still be regarded as open. For present purposes, I am willing to assume that no fresh notice need be given and that the suspension of a strike may thus differ in this respect from the complete abandonment of a strike. Nevertheless, and during the period of the suspension, there is no strike, even though the employees have an unconditional right to reinstitute the strike at any time.

[12] Section 67(3) of the LRA provides that an employer is not obliged to remunerate employees for services they do not render during a protected strike.

[13] *Transportation Motor Spares v National Union of Metalworkers of South Africa* [1998] ZALC 71; (1999) 20 ILJ 690 (LC).

[14] *Moloto* above n 6.

[15] Id at para 89 and fn 83.

[29] In the present case, the strike took the form of a complete withdrawal of labour. The suspension of the strike, coupled with a tender of services as from Monday 23 November 2020, meant that the strike came to an end at 17h00 on Friday 20 November 2020. Trenstar did not claim that the tender of services was a ruse or incomplete or that NUMSA's members were going to continue their strike in some new form, such as partial refusal to work or a retardation or obstruction of work.

[30] The position in this case, therefore, is that the strike ended at 17h00 on Friday 20 November 2020. A few hours earlier, but after being notified that the strike would so end, Trenstar gave notice that it would commence a lock-out at 07h00 on Monday 23 November 2020. Trenstar in fact implemented the lock-out as notified. As from the Monday morning, the employees' absence from work was due to a lock-out, not a strike. Trenstar did not reject the tender of services as unacceptable or incomplete. Instead, it excluded the employees from the workplace in terms of a lock-out despite their tender of services.

The response issue

[31] In oral argument, counsel for Trenstar said that if this Court rejected his argument that a suspended strike remained a strike for purposes of section 76(1)(b), he did not contest NUMSA's interpretation of that section. It is unclear whether counsel was conceding that the Labour Court's judgment in *Sun International* was right and that the earlier judgment in *Ntimane* was wrong. Either way, it would not be right for us to decide the matter simply on the basis of a concession.

[32] The expression "in response to a strike" is capable, semantically, of the meaning given to it in *Ntimane*. The expression could be understood as characterising a lock-out with reference to what caused the lock-out to be implemented. If the lock-out was implemented because the employees went on strike, one could say that the lock-out was "in response to a strike". Once the cause of the implementation of the lock-out is established, its character is fixed, and the right to use replacement labour lasts as long as the lock-out lasts. On this view, it might not even be necessary for the lock-out to

have started while the strike was still underway. The question would simply be whether the employer had recourse to use its ultimate weapon because the employees were the first to choose their ultimate weapon.

[33] This is not, however, the only meaning of which section 76(1)(b) is capable. Like a strike, a "lock-out" as defined in the LRA is a state of affairs occurring with a specified purpose. It is an exclusion of employees from the workplace for the purpose of compelling them to accept a demand. In the context of section 76(1)(b), the question is whether that state of affairs "is in response to a strike". Since the state of affairs persists as a result of ongoing decisions by the employer to maintain the exclusion of employees from the workplace, the lock-out's character need not be treated as immutably fixed as at the date of its commencement. At certain stages of the lock-out it might be in response to a strike; at other stages it might not.

[34] The present tense "is", in the expression "unless the lock-out is in response to a strike", lends some support to this approach. The right to use replacement labour depends on whether, at the time such use is proposed, the employer's exclusion of workers from the workplace is an exclusion which is responding to a strike. This suggests that the strike must still be underway at the relevant time.

[35] An argument which might be raised against this interpretation is that a lock-out occurring in parallel with a strike is a purely notional exclusion of employees from the workplace, since the employees are in any event withholding their labour. The lawmaker, it might be suggested, could not have had such a pointless lock-out in mind when enacting section 76(1)(b). However, parallel lock-outs in response to strikes are not uncommon. Such a lock-out signals to the strikers that it is the employer rather than they who control the timing of the employees' return to work. Moreover, not all strikes take the form of a complete withdrawal of labour. A complete exclusion of employees from the workplace may be a rational response where the strike takes the form of a partial withdrawal of labour or a retardation or obstruction of work.

[36] *Technikon*[16] involved a parallel lock-out. The union gave notice of its members' intention to strike for two days as from 14 March 2000. The employer immediately responded by giving notice of its intention to embark on a "defensive" lock-out[17] from the time of the commencement of the strike, which lock-out would continue until the union accepted the employer's wage offer. In subsequent correspondence, a dispute arose as to whether the employer would be entitled to use replacement labour during the lock-out. The case served in the Labour Court as a matter of urgency before either the strike or the lock-out began. The Labour Court, for reasons which need not detain us, concluded that the employer's lock-out notice was invalid.

[37] On appeal,[18] the union argued that the exception in section 76(1)(b) should be read as applying only where the lock-out is in response to an unprotected strike. The Labour Appeal Court rejected that argument. Zondo JP said the following about the purpose of section 76(1)(b):

> "The rationale behind section 76(1)(b) is that if an employer decides to institute a lock out as the aggressor in the fight between itself and employees or a union, it may not employ temporary replacement labour. That is to discourage the resort by employers to lock-outs. The rationale is to try and let employers resort to lock-outs only in those circumstances where they will be prepared to do without replacement labour (ie when they are the aggressors) or where they are forced to in self-defence in the sense that the lock-out is 'in response to' a strike by the union and the employees – in other words, where the union and the employees are the aggressors.
>
> The policy is one that also says to unions and employees: Do not lightly resort to a strike when a dispute has arisen because, in the absence of a strike, the employer may not employ replacement labour even if it institutes a lock-out but, if you strike, the employer will be able to employ replacement labour – with or without a lock-out. The sum total of all this is that the policy is to encourage parties to disputes to try and reach

[16] *National Union of Technikon Employees v Technikon South Africa* [2000] ZALC 155; (2000) 21 ILJ 1645 (LC).

[17] For this terminology, see above n 3.

[18] *Technikon South Africa v National Union of Technikon Employees of South Africa* [2000] ZALAC 24.

> agreement on their disputes and a strike or lock-out should be the last resort when all reasonable attempts to reach agreement have failed."[19]

[38] On the question whether the employer could use replacement labour, Zondo JP said that it was "as clear as daylight" that the employer's lock-out was in response to the strike which the union's members had begun. The Labour Appeal Court concluded that the Labour Court should have dismissed the union's urgent application. The Labour Appeal Court's judgment was not directed to the question whether the employer would be entitled to carry on using replacement labour after the strike ended. The urgent application to which the appeal related had been brought and adjudicated before the strike and lock-out began.

[39] In interpreting the exception contained in section 76(1)(b), it is important to bear in mind the usual position governing the use of replacement labour during strikes and lock-outs. Subject to the one exception contained in section 76(1)(a), an employer may use replacement labour during a strike. But subject to the one exception contained in section 76(1)(b), an employer may not use replacement labour during a lock-out. The LRA, in allowing an employer in general to use replacement labour during a strike, has already allowed a significant weakening of the efficacy of strikes. The norm advocated by the International Labour Organisation (ILO) is that employers should not be entitled to use replacement labour during strikes except in the case of essential services or where the strike would cause an acute national crisis.[20]

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[19] Id at paras 40-1.

[20] International Labour Organisation "Right to strike" *Compilation of Decisions of the Committee on Freedom of Association* (2018), available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70001:0::NO. The Committee on Freedom of Association (Committee) is a tripartite body, set up by the Governing Body (GB) of the ILO, that examines alleged infringements of the principles of freedom of association and the effective recognition of the right to collective bargaining enshrined in the Constitution of the ILO (para 1). At paras 917-19, the conclusions and referenced reports of the Committee on the hiring of workers during a strike are set out as follows:

> "Strikers should be replaced only: (a) in the case of a strike in an essential service in the strict sense of the term in which the legislation prohibits strikes; and (b) where the strike would cause an acute national crisis.
>
> The hiring of workers to break a strike in a sector which cannot be regarded as an essential sector in the strict sense of the term, and hence one in which strikes might be forbidden, constitutes a serious violation of freedom of association.

[40] Particularly since the right to strike is constitutionally protected while the right to lock-out is not, one can understand why our lawmaker in general does not allow an employer to use replacement labour during a lock-out. If the employer wishes to "inflict pain" on employees by excluding them from the workplace and not paying them, it must in general be willing to suffer the matching "pain" of an interruption in its revenue-earning operations. Why then should there be any exception to the prohibition? The obvious answer is that if the employees are in any event on strike, the employer should not, by responding with a lock-out, be deprived of the right it would otherwise have had to use replacement labour during the strike. That justification for the exception ceases when the employees are no longer on strike.

[41] An employer who decides to persist with an exclusion of employees from the workplace after they have ended their strike and tendered their services is no longer responding to the strike, but is choosing to use the lock-out offensively in a way that is indistinguishable from the employer who, in the complete absence of a strike, embarks on a lock-out to compel compliance with its demand. To say that the ongoing lock-out is still responding to the strike is to treat the ongoing lock-out almost as some form of punishment because the employees chose to embark on a protected strike. The lawmaker could not have intended to reward retribution of that kind.

[42] In *Moloto*[21] the question was whether a strike notice has to be issued on behalf of all employees who go on strike or whether a notice covering only some of them is sufficient to afford protection to a strike by all of them. The majority in this Court preferred the latter interpretation of section 64(1) of the LRA. The majority's approach to the interpretation of the relevant provisions of the LRA is important. After noting

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> If a strike is legal, recourse to the use of labour drawn from outside the undertaking to replace the strikers for an indeterminate period entails a risk of derogation from the right to strike, which may affect the free exercise of trade union rights."

[21] *Moloto* above n 6.

that the right to strike is protected as a fundamental right in the Constitution without any express limitation, the majority said:

> "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 restrictive of the right if the text is reasonably capable of bearing that meaning."[22]

[43] The majority also emphasised the injunction in section 39(2) of the Constitution that every court, when interpreting any legislation, must "promote the spirit, purport and objects of the Bill of Rights". In interpreting section 64(1), therefore, a court "should not restrict the right to strike more than is expressly required by the language of the provision", unless the purposes of the Act and the section on a proper interpretation import a restriction.[23] The majority also referred to the *First Certification* case[24] in support of the proposition that the right to strike protected in the Bill of Rights "must be interpreted in the general context that it is a right that is based on the recognition of disparities in the social and economic power held by employers and employees".[25]

[44] The competing interpretations of the exception in section 76 (1)(b) undoubtedly have a bearing on the right to strike. The extent of an employer's right to use replacement labour where a lock-out "is in response to a strike" must inevitably affect an assessment by unions and employees on whether they should go out on strike in the first place. If, as was held in *Ntimane*, the right to use replacement labour continues for as long as the lock-out continues, provided that the lock-out started as a response to a strike, strike action is decidedly less attractive and less effective for unions and employees. Once they have embarked on a strike, even one of limited duration, the

[22] Id at para 43. See also at para 52.

[23] Id at paras 53-4.

[24] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 66.

[25] *Moloto* above n 6 at paras 56-7.

employer may respond with a lock-out and then use replacement labour indefinitely until the employees capitulate. That is what happened in the present case.

[45] This Court's jurisprudence thus mandates us to prefer an interpretation which confines the use of replacement labour to the duration of the strike, provided that section 76(1)(b) is reasonably capable of that meaning. For the reasons I have given, that is a meaning which the language of the section can bear.

[46] The *Kings Hire* case,[26] on which Trenstar has placed so much reliance, is a red herring. The case was not concerned with an employer's right to use replacement labour during a lock-out. Section 76(1)(b) was not mentioned in the judgment. The case was about the lawfulness of the employer's lock-out. The union contended that the employer could not lawfully implement a lock-out where the employees had decided to suspend a proposed strike in response to which the lock-out notice had been issued. The Labour Court's rejection of that contention is unremarkable and of no application here.

[47] It follows, from my preferred interpretation of section 76(1)(b) that, even if, notionally, Trenstar's decision to give notice of a lock-out was in response to the strike which had lasted for several weeks and which was not quite over when the lock-out notice was given, the right to use replacement labour no longer existed when the lock-out actually began on the Monday morning.

Conclusion

[48] The appeal must thus succeed. The Labour Court erred in dismissing NUMSA's application, and the Labour Appeal Court erred in not upholding NUMSA's appeal. Because the matter is moot, it would not now be appropriate to substitute, in place of the Labour Court's dismissal of the application, the interdictory relief which NUMSA sought in its notice of motion. A substituted order in declaratory form will suffice.

[26] *Kings Hire* above n 8.

[49] Neither the Labour Court nor the Labour Appeal Court granted costs against NUMSA. Although we are reversing those Courts' decisions on the merits, it remains appropriate that the parties should bear their own costs. This is, for sound reasons, the default position where parties seek to enforce their rights in terms of the LRA.[27] Apart from the fact that the parties remain in a collective bargaining relationship, we have, at NUMSA's instance, dealt with the merits of the case despite its mootness in order to clarify important matters of principle.

Order

[50] The following order is made:

1. Leave to appeal is granted.
2. The appeal succeeds.
3. The order of the Labour Appeal Court is set aside and replaced with an order in the following terms:
   "(a) The appeal succeeds.
   (b) There is substituted, for the order of the Labour Court, an order as follows: 'It is declared that the respondent was not entitled to use replacement labour for the purpose of performing the work of any employees who were locked out by virtue of the lock-out declared by the respondent on 20 November 2020.'
   (c) The parties shall bear their own costs in the Labour Court and the Labour Appeal Court."
4. The parties shall bear their own costs in this Court.

[27] See Commercial Stevedoring Agricultural and Allied Workers' Union v Oak Valley Estates (Pty) Ltd [2022] ZACC 7; 2022 (5) SA 18 (CC); 2022 (7) BCLR 787 (CC) at para 67.and *Zungu v Premier of the Province of KwaZulu-Natal* [2018] ZACC 1; (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC) at paras 22-4 .

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