



EMPLOYMENT

ALERT

THE RIGHT TO STRIKE – NOTICE REQUIREMENTS

After losing in both the Labour Court and Labour Appeal Court (LAC), Equity Aviation Services (Pty) Ltd (Equity) came before the Supreme Court of Appeal (SCA) to argue its long held belief that employees who are not members of a trade union do not strike lawfully where they have not given notice to strike in terms of s64(1)(b) of the Labour Relations Act, 1995 (LRA). In terms of the judgment handed down on 30 November 2011, the SCA agreed with Equity's argument, overturning the previous orders of the Labour Court and LAC. Both of these courts had previously held that the dismissal of those non-union members who had joined the protected strike was automatically unfair, ordering their reinstatement with retrospective effect.

The strike notice in question, issued on 15 December 2003 by SATAWU, read "we intend to embark on strike action on 18 December 2003 at 08h00." There was no question that the strike was protected where SATAWU members were concerned. Other employees who did not belong to the union also participated in the strike. Equity took the view that their participation was unlawful as none of them had given the requisite notice. The argument advanced on behalf of Equity was that notice had only been given on behalf of SATAWU members and accordingly, only its members satisfied the procedural requirements of lawful strike action. The employees were accordingly dismissed for unauthorised absenteeism during the strike.

When the matter came before the LAC, the primary question for consideration was whether the dismissed employees were required to issue a separate strike notice to Equity or whether SATAWU's notice had been sufficient to render the strike action by the non-union members lawful. In answering this question, the SCA noted

that s3 of the LRA requires it to be interpreted in such a way as to give effect to its primary objects. One of those primary objects of the LRA is the promotion of orderly collective bargaining and the effective resolution of labour disputes. According to the SCA, s64(1)(b) is clearly designed for just that purpose.

Referring to the decision by the LAC in *Ceramic Industries Ltd t/a Betta Sanitaryware and Another v NCBWU and Others [1997] 6 BLLR 697 (LAC)*, the SCA reiterated that s64(1)(b) must be interpreted and applied in a manner that best gives effect to the primary objects of the Act. As was stated in *Ceramic Industries*, the section's specific purpose is to give an employer advanced warning of the proposed strike action so that the employer may prepare for the power-play that will follow. That specific purpose is defeated if the employer is not informed in a written notice in exact terms when the proposed strike will commence.

Drawing on the purpose of s64(1)(b), the SCA held that the requirement of a strike notice is a procedural requirement for the exercise of the right to embark on strike action. Accordingly, employees who are not union members would not be prevented from joining a protected strike which already commenced provided they give separate notice of their intention to strike. Employees who wished to join a strike may give notice through a representative or personally. Any other interpretation would not promote orderly collective bargaining but would usher in an error of chaotic collective bargaining in our labour dispute resolution.

Gavin Stansfield

CONTACT US

For more information about our Employment practice and services, please contact:



Aadil Patel
Director
National Practice Head
T + 27 (0)11 562 1107
E aadil.patel@dcladh.com



Fiona Leppan
Director
T + 27 (0)11 562 1152
E fiona.leppan@dcladh.com



Sherisa Rajah
Senior Associate
T + 27 (0)11 562 1181
E sherisa.rajah@dcladh.com



Gillian Lumb
Director
Regional Practice Head
T + 27 (0)21 481 6315
E gillian.lumb@dcladh.com



Tim Mills
Director
T + 27 (0)11 562 1160
E tim.mills@dcladh.com



Mabasa Sibanda
Senior Associate
T + 27 (0)11 562 1182
E mabasa.sibanda@dcladh.com



Johan Botes
Director
T + 27 (0)11 562 1124
E johan.botes@dcladh.com



Gavin Stansfield
Director
T + 27 (0)21 481 6314
E gavin.stansfield@dcladh.com



Mark Meyerowitz
Associate
T + 27 (0)11 562 1125
E mark.meyerowitz@dcladh.com



Faan Coetzee
Director
T + 27 (0)11 562 1600
E faan.coetzee@dcladh.com



Michael Yeates
Director
T + 27 (0)11 562 1184
E michael.yeates@dcladh.com



Lerato Phashe
Associate
T + 27 (0)11 562 1202
E lerato.phashe@dcladh.com



Melanie Hart
Director
T + 27 (0)11 562 1179
E melanie.hart@dcladh.com



Pranisha Maharaj
Senior Associate
T + 27 (0)21 481 6460
E pranisha.maharaj@dcladh.com



Ndimiso Zwane
Associate
T + 27 (0)11 562 1231
E ndimiso.zwane@dcladh.com

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T + 27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@dcladh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T + 27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@dcladh.com

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