

THE REQUIREMENT OF NOTICE OF INDUSTRIAL ACTION IN SOUTH AFRICAN LABOUR LAW

1. Introduction

[1] Industrial action¹ is accepted worldwide as an integral part of collective bargaining. It can take different forms. These include a strike², a lock-out³, picketing⁴, a product boycott⁵ and protest action⁶. The list is not intended to be exhaustive. In turn, a strike

¹ Barker & Holtzhausen *Labour Glossary* 71 define the term “industrial action” as meaning “action by unions, employees or employers to pressurise the other party in the furtherance of an industrial dispute”. They go on to state: “It usually refers to strikes and lock-outs but could also include picketing, product boycotts, sit-ins, go-slow strikes and other actions which disrupt the productive process”.

² A strike is defined in s 213 of South Africa’s Labour Relations Act 66 of 1995 (“the Act”) as meaning: “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”.

³ A lock-out is defined in s 213 of the Act as meaning: “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”.

⁴ Picketing is not defined in the Act. However, Barker & Holtzhausen *Labour Glossary* 113 describe picketing as “(a)ction by employees or other persons to publicize the existence of a labour dispute by patrolling or standing outside or near the location where the dispute is taking place, usually with placards indicating the nature of the dispute. The aim of the picketing might simply be to communicate the grievance to the public or it might be to persuade other employees in that workplace not to work and to take their side in the dispute, to deter scab labour, to persuade or pressurise customers not to enter the workplace, to disrupt deliveries or to drum up public support”.

⁵ The term “product boycott” generally refers to the boycott of a certain product of an employer by customers or the public in support of workers who are in dispute with their employer. They do not buy the product or have anything to do with it until the dispute has been resolved.

⁶ The term “protest action” is defined in s 213 of the Act as meaning “the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of strike”.

can itself take different forms such as an overtime ban⁷, a work-to-rule⁸, a rotating strike⁹, a go-slow¹⁰, an intermittent strike¹¹, a secondary strike and a sympathy strike¹². Overtime bans, go-slows, work-to-rules and intermittent strikes are usually referred to collectively as partial strikes¹³.

⁷ An overtime ban refers to a case where employees collectively refuse to work overtime in order to put pressure on the employer to agree to their demands or to address their grievances.

⁸ The term “work-to-rule” refers to a case where workers collectively decide to do only what they are legally obliged to do in regard to their work and nothing more. Cameron et al *The New Labour Relations Act 75* describe the term “work-to-rule” in the following terms: “A work-to-rule occurs when employees act concertedly in following the terms of their contracts to the letter. If the concerted action is carried out in furtherance of an industrial demand, which is usually the case, and it in fact entails an ‘obstruction ... of work’, then perhaps it should be regarded as a strike”. There is no unanimity that work-to-rules are strikes. However, for purposes of this discussion they will be taken as strikes.

⁹ Barker & Holtzhausen *Labour Glossary* 142 define a rotation strike as a “strike that occurs in one or certain sections of an organisation at any given time, whereafter it moves to another or other sections”.

¹⁰ The term “go-slow” refers to a case where workers collectively work slowly in order to put pressure on their employer to agree to their demands.

¹¹ Barker & Holtzhausen *Labour Glossary* 142 define an intermittent strike as meaning “a repeat strike, each lasting for a short time, e.g. a few hours each day or during each shift. Also known as an irritation strike”.

¹² A secondary strike is defined in s 66(1) of the Act as meaning “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 employees, employed within the registered scope of that council, have a material interest in that demand”. Barker & Holtzhausen *Labour Glossary* 142 describe a secondary strike in the following terms: “A secondary strike is a strike in support of a strike by other employees against their employer. The secondary strikers have no issue with their own employer, but that employer might be in a strong position (due to there being a close business relationship as either an important customer or supplier) to pressurize the employer who is in dispute”. Barker & Holtzhausen *Labour Glossary* 143 define a sympathy strike as follows: “A sympathy strike is a strike by one union or group of employees undertaken solely to support the aims of another union or group of employees in an effort to exert further pressure upon an employer. The sympathy strikers may have no immediate interest or benefit in the dispute and such a strike may also simply be an assertion of solidarity (‘solidarity strike’), although it may sometimes have political or economic motives. It is sometimes distinguished from a ‘secondary strike’, which is a strike against an employer not involved in the original dispute, while a sympathy strike may involve a group of employees in the same establishment as those involved in the primary dispute”.

¹³ See Brassey *Employment and Labour Law* 144.

- [2] In many countries the right to strike is provided for in statutory law.¹⁴ In some it is even entrenched in their Constitutions.¹⁵ The right to lock-out is also provided for in the statutory law of certain countries, although there might not be as many countries which provide for the right to lock-out as there are which provide for the right to strike.¹⁶ In those countries where such rights are provided for, it is usually accepted that such rights may be exercised subject to certain procedural restrictions.¹⁷ One of the common procedural restrictions is the requirement that prior notice be given before a strike or lock-out is resorted to.¹⁸ Jacobs states that, in Italy, the courts have refused to recognise the legitimacy of strikes resorted to without notice,¹⁹ but goes on to say that, in France, no prior notice is required, save in cases where the collective agreement

¹⁴ Some of those countries are South Africa, Namibia, Botswana, Swaziland, Ghana, Zimbabwe, Zambia, Denmark, Sweden, Spain, Finland and the Netherlands.

¹⁵ South Africa is one of such countries. See s 23(1)(c) of the Constitution of the Republic of South Africa, 1996 (“the RSA Constitution”).

¹⁶ Unlike the right to strike, which is entrenched in the RSA Constitution, the right to lock out is not entrenched in the RSA Constitution. At the time when the Constitutional Court was asked to certify the RSA Constitution, certain employers argued very strongly that the failure of the RSA constitutional text to entrench in the Bill of Rights the right to lock out was a breach of one of the principles which the interim Constitution of the RSA prescribed the final constitution should be based upon. In support of the inclusion of the right to a lock-out it was also *inter alia* argued that the right to bargain which the constitutional text sought to entrench in the Bill of Rights would be less effective unless the right to lock out was also entrenched. See *In re certification of the Constitution of the RSA* 1996 (4) SA 744 (CC) at 794 to 697 (par 63).

¹⁷ See Ben-Israel *International Labour Standards* 118 who states: “Generally speaking, the CFA observed that, while a general prohibition of strikes constitutes a considerable restriction on the opportunities open to trade unions for the furthering and defending of the interests of their members, the situation is different when the law imposes procedural restrictions or a temporary ban on strikes. Pertaining to the procedural restrictions, one can mention, for example, the obligation to observe a certain quorum, to take the decision to strike by secret ballot, or to give prior notice to the employer before calling a strike. In connection with the temporary ban on strikes, one should mention, for example, strike restrictions during conciliation and arbitration procedures and during a cooling-off period, during a statutory period of strike notice or during the life of a collective agreement. Such restrictions on the right to strike are acceptable as long as they do not place substantial limitations on the means of action open to trade-union organisations”.

¹⁸ See the quotation from Ben-Israel’s work in fn 17 above.

¹⁹ See Jacobs *Strikes and Lock-outs* 433 fn 90.

explicitly requires notice and in the case of the civil service, where it is required by statute.²⁰

- [3] When the Labour Relations Act 66 of 1995 (“**the Act**”) was passed in 1995, South Africa joined those countries which not only provide for the right to strike and the “**recourse**” to lock-out in statutory law, but also subject the exercise of such right and recourse to the procedural requirement that notice be given before such right and recourse can be exercised.²¹ The purpose of this dissertation is to examine the statutory provisions relating to this procedural requirement for protected industrial action in order to establish their meaning, applicability and scope. In the end it will be suggested that, within the South African context, there is no justification for the inclusion of this procedural requirement in the Act. In discussing this issue, reference will be made to the statutory provisions of some countries dealing with this topic. The idea in referring to such statutory provisions is not to state what the legal position is in such countries, but to show what provisions such statutes contain, or contained in the case where they have been repealed, and to compare such provisions with those of the South African statute. It cannot, however, be stated unequivocally that these statutory provisions accurately reflect the current statutory position in these countries. By way of introduction, reference will first be made to the historical developments in South Africa that

²⁰ Jacobs *Strikes and Lock-outs* 433 fn 91.

²¹ Some of the countries which subject the exercise of the right to strike to the procedural requirement of giving prior notice are Denmark, Finland, Israel, the Republic of Slovenia, the Netherlands, Spain, Namibia, Swaziland, certain jurisdictions of Canada, England, Norway, Australia, Ghana, the United States of America, Zimbabwe and Botswana. Obviously, this is not an exhaustive list.

preceded the inclusion of the requirement of prior notice of industrial action in the Act.

2. **Historical developments leading to the inclusion in the Act of the requirement of prior notice of industrial action**

- [4] The inclusion in the Act of the requirement of prior notice of industrial action in 1995 did not simply occur out of the blue, for there were developments which led to the inclusion of this requirement in the Act. The seed for the inclusion of this requirement in a statute was planted by the Industrial Court when it held in certain judgments²² in 1987 and 1988 that employees who had gone on strike without giving any warning or notice to their employer had acted unfairly towards their employer. These were cases where employees, who had been dismissed for striking, brought unfair labour practice claims against their employers under the Labour Relations Act 28 of 1956 (“**the old Act**”). After the pronouncements in those cases in 1987 and 1988, the Industrial Court, the old Labour Appeal Court (created under the old Act) (“**the old Labour Appeal Court**”), the then Supreme Court and the Appellate Division of the Supreme Court followed up with other judgments in the late 1980s right into the mid-1990s.²³ In all

²² *MAWU v BTR Sarmcol* (1987) 8 ILJ 815 (IC) at 836G and *BAWU & others v Palm Beach Hotel* (1988) 9 ILJ 1016 (IC) at 1023G.

²³ *MAWU v BTR Sarmcol* (1987) 8 ILJ 815 (IC) at 836G; *BAWU & others v Palm Beach Hotel* (1988) 9 ILJ 1016 (IC) at 1023G; *Ray's Forge & Fabrication (Pty) Ltd v NUMSA & others* (1989) 10 ILJ 762 (IC) at 773J; *SACWU v SASOL Industries (Pty) Ltd & Another (2)* (1989) 10 ILJ 1031 (IC) at 1037C-E; *BAWU & others v Asoka Hotel* (1989) 10 ILJ 167 (IC) at 177H-178C; *BAWU & others v Edward Hotel* (1989) 10 ILJ 357 (IC); *MWASA & others v Perskor* (1989) 10 ILJ 1062 (IC) at 1068-1069D; *BTR Dunlop Ltd v NUMSA (2)* (1989) 10 ILJ 701 (IC) at 707E-H; *NTE v SACWU & others* (1990) 11 ILJ 43 (N); *FAWU v Middevrystaatse Suiwel Ko-operasie Bpk* (1990) 11 ILJ 776 (IC); *FBWU & others v Hercules Cold Storage (Pty) Ltd* (1990) 11 ILJ 47 (LAC); *FBWU & others v Hercules Cold Storage (Pty) Ltd* (1989) 10 ILJ 457 (IC); *Mercedes-Benz of SA (Pty) Ltd v NUMSA* (1991) 12 ILJ 667 at 672 (this was an arbitration award and not a judgment of

these cases the courts consistently held the resort by workers to industrial action without prior notice to their employers to be unfair. These cases demonstrate that the Industrial Court played a very important role in the development of this procedural requirement for protected industrial action in South Africa. Of course, as indicated above, the old Labour Appeal Court and the Appellate Division gave their approval²⁴ to the approach initiated by the Industrial Court. It is necessary to discuss at least some of these cases in order to show how the idea of prior notice of industrial action originated and developed and was ultimately included in the new statutory dispute-resolution dispensation for labour disputes in post-apartheid South Africa.

- [5] It would appear that the first indication of an obligation or need on the part of a union to give an employer a strike notice or warning before resorting to a strike was given in the decision of the Industrial Court in *Metal and Allied Workers Union v BTR Sarmcol*.²⁵ There the court referred to aspects of the union's conduct before and during the strike, as well as after the dismissal of the employees for participation in the strike, which it seems to have been unhappy about and referred to “**the manner in which**

a court); *NUMSA & others v MacSteel (Pty) Ltd* (1992) 13 ILJ 826 (A) at 835B; *NUMSA & others v Malva (Pty) Ltd* (1992) 13 ILJ 1207 (IC) at 1216D-E; *CWIU v Reckett Household Products* (1992) 13 ILJ 622 (IC); *NUMSA v Three Gees Galvanising* (1993) 14 ILJ 372 (LAC); *Doornfontein Gold Mining Co Ltd v Num & others* (1994) 15 ILJ 527 (LAC) at 542B; *SACWU & others v BHT Water Treatments (Pty) Ltd* (1994) 15 ILJ 141 (IC) at 163F-164A; *NUMSA & others v Maranda Mining Co Ltd* (1995) 16 ILJ 1155 (IC); *FWCSA & others v Casbak Burger Box CC* (1996) 17 ILJ 947 (IC) at 955C-I; *NUMSA & others v Datco Lighting (Pty) Ltd* (1996) 17 ILJ 315 (IC).

²⁴ *NUMSA & others v Three Gees Galvanising* (1993) 14 ILJ 372 (LAC); *Doornfontein Gold Mining Co Ltd v Num & others* (1994) 15 ILJ 527 (LAC) at 542B; *FBWU & others v Hercules Cold Storage (Pty) Ltd* (1990) 11 ILJ 47 (LAC); *NUMSA & others v MacSteel (Pty) Ltd* (1992) 13 ILJ 826 (A) at 835 B.

²⁵ (1987) 8 ILJ 815 (IC).

the principal strike was conducted without prior warning and with machines simply left running ...”.²⁶ In 1988 the Industrial Court took this further. In *BAWU & others v Palm Beach Hotel*²⁷ it held that, even if the strike could be said to have been legal,²⁸ the union and its members had acted unreasonably and unfairly by, among others, resorting to a strike without giving the employer **“notice of when the strike would begin”**.²⁹ There the Industrial Court further pointed out that such failure on the part of the union and its members was a **“serious failure bearing in mind that the respondent [was] a hotel with obligations to guests including**

²⁶ *Op cit* 836G.

²⁷ (1988) 9 ILJ 1016 (IC) at 1023G.

²⁸ Although reference is made here and elsewhere in this discussion to a legal strike, the question whether, under the Labour Relations Act 28 of 1956 (“the old Act”), there was a right to strike and, therefore, whether one could talk of a legal strike, was a controversial question. This was because, on its own, that Act did not expressly refer to a right to strike, but simply specified conditions which had to be fulfilled in order for a strike not to constitute a criminal offence. However, just before the end of the apartheid era, the old Labour Appeal Court handed down one of its most celebrated judgments, namely the judgment in *BAWU & others v Blue Waters Hotel* (1993) 14 ILJ 963 (LAC) which had as its basis an acknowledgement of the existence in South Africa of the right to strike. The requirements for a legal strike in terms of s 65 of the old Act were that:

- (a) there had to be a dispute between, on the one hand, employees or a union and, on the other, an employer.
- (b) an application had to be made to the Department of Labour in terms of s 35 of the old Act for the appointment of a conciliation board to try to resolve the dispute through discussion. That is if there was no industrial council with jurisdiction. If there was an industrial council with jurisdiction, the dispute had to be referred to the industrial council which had to try to get the parties to resolve the dispute through discussion.
- (c) if a period of 30 days from the date of the delivery of the application for the establishment of a conciliation board or from the delivery of the referral of the dispute to the industrial council lapsed without the dispute having been resolved, a ballot had to be conducted to determine whether the majority of the workers supported the resort to a strike. The ballot had to be a secret ballot. If the majority of the workers who took part in the ballot supported the resort to a strike, a strike could then commence. There was no requirement for notice under the old Act. The requirement of notice existed only under the ELRA and the PSLRA, both of which are referred to later.

²⁹ *BAWU & others v Palm Beach Hotel* (1988) 9 ILJ 1016 (IC) at 1023G.

providing breakfast".³⁰ It held that they had no right to inconvenience the guests in this way.

- [6] In 1988 the old Act was extensively amended by the Labour Relations Amendment Act of 1988³¹ ("**the 1998 Amendment Act**") which came into operation on 1 September 1988. One of the amendments was that to the definition of the term "**unfair labour practice**". Prior to the 1998 Amendment Act this definition excluded strikes and lock-outs. The amendment of the definition of an "**unfair labour practice**" in s 1(1) of that Amendment Act made it possible for the Industrial Court to find a strike or a lock-out to be an unfair labour practice if, for example, the strike or lock-out contravened the provisions of s 65³² of the old Act, or if the strike or lock-out was in breach of a pre-strike or pre-lock-out procedure agreed to between the parties. It further contemplated that a strike or lock-out could be unfair for any other reason. It is suggested that this amendment might have encouraged the idea that a strike notice or lock-out notice should be given because failure to do so could lead to the strike or lock-out later being found to have constituted an unfair labour practice.³³

- [7] In *Ray's Forge & Fabrication (Pty) Ltd v NUMSA & others*³⁴ the Industrial Court, in referring to conduct on the part of the union

³⁰ *Op cit* 1023G.

³¹ Act 83 of 1988.

³² Section 65 of the old Act prescribed the pre-strike and pre-lock-out procedures.

³³ For a discussion of the fairness of industrial action under the Amendment Act, see Cameron et al at *The New Labour Relations Act* 88-89.

³⁴ (1989) 10 ILJ 762 (IC) at 773J.

and the workers which it regarded as having contributed to making the overtime ban an unfair labour practice, stated that “**(n)o indication of the overtime ban was given before hand**”.³⁵ In this case the Industrial Court also said that it seemed that the overtime ban had been resorted to for the purpose of “**softening up the employer**” because, apparently, an earlier overtime ban had not achieved the desired result. It is suggested that what underlay this statement by the Industrial Court was the notion that fairness dictated that there was an obligation on the part of the union and the workers to have given the employer a warning or notice before resorting to an overtime ban, and that the failure to give such warning or notice rendered the resort to an overtime ban unfair.

- [8] In *SA Chemical Workers Union v Sasol Industries (Pty) Ltd & Another*(2)³⁶ one of the grounds relied upon by the employers for their submission that the strike was illegal was that they had not been given any formal notice before the resort to a strike.³⁷ It is surprising that this argument was advanced in view of the fact that there was no statutory requirement at the time that notice be given before a strike could be legal in the sense in which that term was used during the life of the old Act. The Industrial Court found that there was overwhelming evidence which showed that the employers had had constructive notice of the strike.³⁸ It seems to be

³⁵ *Op cit* 773J.

³⁶ (1989) 10 ILJ 1031 (IC).

³⁷ *Op cit* 1037C-E.

³⁸ *Op cit* 1052I-1053A.

implied in this finding of the Industrial Court that it regarded constructive notice as sufficient.

[9] In *BAWU & others v Asoka Hotels(2)*³⁹ the strike was found to have been legal in the sense that it was not prohibited by s 65 of the old Act. However, the union had not given the employer any notice as to when the strike would commence. A three-member bench of the Industrial Court held that it would, **“even where the strike is legal, scrutinize the manner in which the strike was called and conducted to see whether the employees acted reasonably”**.⁴⁰ It went on to say that **“(a)n employee has obligations towards his employer”** and that **“(i)n this case the manner in which the strike was called was, in the court’s opinion, unfair in that no notice was given of when the strike would commence”**.⁴¹

[10] The court referred to the fact that the employer in that case was a hotel and had obligations towards its guests. The next sentence in the judgment directly placed an obligation on unions and workers to give a strike notice before resorting to a strike. The sentence read thus:

“There is in general an obligation on employees who intend to go on strike to give advance notice so that the employer is in a position to take whatever action may be appropriate to safeguard its own interests.”⁴²

³⁹ (1989) 10 ILJ 167 (IC).

⁴⁰ *Op cit* 177H-178C.

⁴¹ *Op cit* 177I.

⁴² *Op cit* 177J.

However, the court then seemed to qualify this general obligation when it said in the following sentence:

“The nature of the employer’s business would have an influence on the requirement that due notice is given.”⁴³

Thereafter, the court went on to say:

“A longer period of notice may be required in certain circumstances. The court may, in particular circumstances, even require that the body organizing the strike make certain key personnel available to prevent damage to plant and equipment. It is not necessary to try to enumerate all the factors, but obvious ones are service industries where members of the public may be inconvenienced and employers who use continuous processes which cannot be immediately shut down without causing great harm or even danger. As the respondent runs a hotel the applicants were unreasonable in not giving notice of the date and time when this strike would commence.”⁴⁴

In *BAWU & others v Edward Hotel*⁴⁵ the Industrial Court also took a dim view of the union’s failure to give the employer a specific notice of when the strike would commence.⁴⁶ It then said, **“(a) last effort to secure negotiation may have helped”**.⁴⁷

⁴³ *Ibid.*

⁴⁴ *Op cit* 177J-179A.

⁴⁵ (1989) 10 ILJ 357 (IC).

⁴⁶ *Op cit* 376I.

⁴⁷ *Op cit* 376I.

[11] In *Media Workers Association of SA and others v Perskor*⁴⁸ the employer argued that the union should have given it a warning or notice of an impending strike and that the union's failure to give such warning or notice was unfair, particularly because the strike affected the section concerned with the production and distribution of newspapers which, it submitted, were a highly perishable product. Where the court dealt with this argument in the judgment,⁴⁹ a reference is made to the answer which the union's general secretary gave when, in the course of his evidence, he was asked why the union had not given the company prior notice of the strike. His answer was that the purpose was to shock the company and pressurise it so that it would be drawn to the negotiating table and do serious business. Relying on the decision in *BAWU & others v Palm Beach Hotel*⁵⁰ the Industrial Court held that the union had acted unfairly towards the employer in not giving a strike notice.

[12] In *MWASA & others v Perskor*⁵¹ a number of grounds were advanced on behalf of the union to justify the union's failure to give the employer a strike notice. One of these was that a previous strike upon which the workers had embarked prior to this one had served as a warning to the employer. Another reason was that the employer could not have believed that the situation would have remained static. It was also said that the strike had not been planned and had arisen out of the frustration which the workers had

⁴⁸ (1989) 10 ILJ 1062 (IC).

⁴⁹ *Op cit* 1068I-1069D.

⁵⁰ (1988) 9 ILJ 1016 (IC).

⁵¹ (1989) 10 ILJ 1062 (IC).

been experiencing. The Industrial Court held that none of these factors or reasons outweighed the importance of **“fairness of notice to the employer of an intended strike, at any rate, where, as here, the employer’s business will be severely disrupted by a strike without warning”**.⁵²

- [13] While giving instances of conduct on the part of strikers that would render a strike an unfair labour practice as contemplated in the definition of an unfair labour practice (as amended by the Amendment Act)⁵³ in *BTR Dunlop Ltd V NUMSA(2)*⁵⁴ the Industrial Court also mentioned **“(c)onduct which is calculated to cause maximal damage to the employer and so arranged that the employer cannot avoid damage by employing temporary employees ...”**.⁵⁵ It is suggested that the failure to give the employer notice of the commencement of a strike would ensure that, once the employees went on strike, the employer was taken by surprise and might not be able, depending on various factors, to arrange temporary replacement labour immediately. Not giving the employer notice of the commencement of the strike would greatly enhance the prospects of maximum damage to the employer’s business. In the light of this it is suggested that the above dictum by the Industrial Court in this case is an indication that the court was of the view that a union should give the employer a strike

⁵² *Op cit* 1069C.

⁵³ See paras (l) and (m) of the then amended definition of the phrase “unfair labour practice” in s 1 of the Amendment Act.

⁵⁴ (1989) 10 ILJ 701 (IC).

⁵⁵ *Op cit* 707E-H.

notice before it could embark upon a strike, failing which this could well render the strike an unfair labour practice.

- [14] In *NTE Ltd v South African Chemical Workers Union and others*⁵⁶ the employer had purported to institute a lock-out against his employees in order to put pressure on them to agree to a lower wage increase than the one they were demanding and to other new terms and conditions of employment. At that time the definition of a lock-out in s 1 of the old Act included what was termed the lock-out dismissal. Such a dismissal entailed an employer terminating the contracts of employment of his employees for the purpose of compelling them to agree to his demands. A dismissal coupled with such a purpose constituted a lock-out in terms of the definition of a lock-out in s 1 of the old Act. In purporting to lock the workers out by terminating their contracts of employment in this case, the employer did not give them notice of the termination of their contracts of employment which, in the context of the prevailing statutory framework at the time, could have been construed as some kind of a lock-out notice. The question for decision by the Court was whether or not an employer who sought to lock its employees out by way of the termination of their contracts of employment as envisaged by the then definition of a lock-out was required to give notice of such termination. The Court held that such notice was required, otherwise the termination would not be a termination as contemplated in the definition of the word “**lock-out**”, because what was contemplated in the definition was a valid termination.

⁵⁶ (1990) 11 ILJ 43 (N).

- [15] In *FAWU v Middevrystaatse Suiwel Ko-operasie Bpk*⁵⁷ it was decided that the termination envisaged in the definition of the word “**lock-out**” in s 1 of the old Act was a valid termination and that a valid termination required a notice of termination. This decision was in line with what had been decided in *NTE*.⁵⁸
- [16] In *Food and Beverage Workers Union & others v Hercules Cold Storage (Pty) Ltd*⁵⁹ the old Labour Appeal Court took the union’s failure to give the employer notice of when the strike would commence as underscoring the union’s intention to cripple the company financially and as supporting the employer’s contention that the union lacked bona fides in negotiating with it. This case was an appeal against a decision of the Industrial Court reported under *Food and Beverage Workers Union & others v Hercules Cold Storage (Pty) Ltd*.⁶⁰ It would appear that the union’s failure to give the employer prior notice of the strike was not one of the factors that the Industrial Court took into account against the union when it dealt with the case.
- [17] It appears from the arbitration award in *Mercedes-Benz of SA (Pty) Ltd v NUMSA*⁶¹ that the collective agreement that had been concluded between the employer and the union in that case already in 1989 included a provision in the pre-strike dispute procedure in

⁵⁷ (1990) 11 ILJ 776 (IC).

⁵⁸ (1990) 11 ILJ 43 (N).

⁵⁹ (1990) 11 ILJ 47 (LAC).

⁶⁰ (1989) 10 ILJ 457 (IC).

⁶¹ (1991) 12 ILJ 667 at 672.

terms of which the union had to give the employer at least 72 hours' written notice of the commencement of industrial action before industrial action could be embarked upon. This may well be an indication that some unions and employers had accepted the need for the giving of prior notice before industrial action and were beginning to incorporate such requirement in their collective agreements or recognition and procedural agreements.

- [18] In *NUMSA & others v MacSteel (Pty) Ltd*⁶² the Appellate Division had to consider whether an overtime ban that the union and its members had instituted in order to compel the employer to agree to their collective bargaining demands constituted an unfair labour practice. In the course of considering this question, the Court mentioned, among others, the fact that the overtime ban “**was instituted without any notice to [the employer] and so disabled [the employer] from making arrangements for alternative labour or for alternative delivery arrangements with its customers**”.⁶³ The Court went on to say that there were ample grounds to justify the Industrial Court's finding that the overtime ban was unfair. It is clear from this decision that one of the grounds that the Court relied upon for this conclusion was the fact that no notice of the overtime ban had been given to the employer. It can be argued that this judgment marked an important step towards the inclusion in a statute of the requirement of notice of industrial action because the Appellate Division (which was the highest court in the land at that time) had in effect given its imprimatur to the

⁶² (1992) 13 ILJ 826 (A).

⁶³ *Op cit* 835B.

approach that the Industrial Court had been following for about five years.

[19] With regard to notice to the employer of an overtime ban in the *MacSteel*⁶⁴ case, Grogan subsequently expressed the view that to insist that a trade union inform the employer of its intention to resort to an overtime ban if the employer did not make a move in the negotiations was not an unduly onerous requirement.⁶⁵ This view suggested support for the requirement of prior notice before industrial action, because an overtime ban falls under industrial action when resorted to for purposes of collective bargaining.

[20] In *NUMSA & others v Nalva (Pty) Ltd*⁶⁶ the Industrial Court held that the strikers “**were clearly in the wrong**”⁶⁷ in going on an illegal strike. In connection with this conclusion the Court mentioned, among other things, the fact that the illegal strike had been “**sprung upon the [employer] without any notice or warning**”. In *Chemical Workers Industrial Union v Reckitt Household Products*⁶⁸ the union had agreed that it would give the employer 24 hours’ written notice of its intention to commence a strike, but later commenced the strike without giving the employer the agreed notice. The Industrial Court held that this was a clear breach of the agreement and that that agreement meant that the

⁶⁴ *NUMSA & others v MacSteel (Pty) Ltd* (1992) 13 ILJ 826(A).

⁶⁵ See Grogan “The Overtime Ban” 56.

⁶⁶ (1992) 13 ILJ 1207 (IC).

⁶⁷ *Op cit* 1216D-E.

⁶⁸ (1992) 13 ILJ 622 (IC).

right to strike was suspended until the agreed notice had been given.

[21] In *NUMSA v Three Gees Galvanising*⁶⁹ employees embarked upon an overtime ban over a dispute concerning an alleged unfair retrenchment involving four of their colleagues, and they did so without any prior notice to the employer. The Labour Appeal Court held their overtime ban to have been an unfair labour practice for, among others, the reason that they had not given the employer prior notice of the overtime ban. In coming to this conclusion the Labour Appeal Court relied on the decision of the Appellate Division in *NUMSA & others v Macsteel (Pty) Ltd.*⁷⁰ In *Doornfontein Gold Mining Co Ltd v National Union of Mineworkers & others*⁷¹ one of the matters that the Labour Appeal Court took into account in concluding that the dismissal of the workers for participating in an illegal strike was fair, was the fact that the employer had not been given prior notice of the strike.

[22] In *South African Chemical Workers Union & others v BHT Water Treatments (Pty) Ltd*⁷² the Industrial Court held that, although the law did not demand reasonable notice of an intention to strike, it was universally accepted that employers should be notified in advance of an intention to strike. The court took into account the evidence tendered on behalf of the employer that its position had worsened when the strike took

⁶⁹ (1993) 14 ILJ 372 (LAC).

⁷⁰ (1992) 13 ILJ 826 (A).

⁷¹ (1994) 15 ILJ 527 (LAC) at 542B.

⁷² (1994) 15 ILJ 141(IC) at 163F-H.

place at the end of the month, which was a very busy time. The Court found that the employer had been seriously inconvenienced by the fact that it had to find temporary workers immediately and that the administrative personnel also had to stand in. Counsel for the union had argued that the employer had not lost any orders, and the court found that the consequences of the union's failure to give a strike notice to the employer had not been significant.

[23] In *NUMSA & others v Maranda Mining Co Ltd*⁷³ the court took the fact that the employer had not been given notice of the illegal strike into account against the union and the dismissed employees in determining whether the dismissal of such employees for going on an illegal strike constituted an unfair labour practice. In *NUMSA & others v Datco Lighting (Pty) Ltd*⁷⁴ the workers had also gone on an illegal strike without giving the employer any notice of the strike. In assessing the fairness of the dismissal of the participants in that strike, the Industrial Court took this factor into account against them.

[24] In *Food Workers Council of SA & others v Casbah Burger Box CC*⁷⁵ the workers refused to finish their work that remained at knock-off time. They also refused to clean their work stations before leaving work at the end of their shifts and left their stations filthy. The Industrial Court found that this conduct constituted an overtime ban, the purpose of which was to put pressure on the

⁷³ (1995) 16 ILJ 1155 (IC).

⁷⁴ (1996) 17 ILJ 315 (IC).

⁷⁵ (1996) 17 ILJ 947(IC).

employer at one of its busiest trading places to alter its closing-down procedure. It found further that the conduct constituted a strike. The workers had embarked upon this overtime ban without giving the employer any prior notice or warning of the overtime ban. Emphasising the fact that the workers had gone on an overtime ban without any prior notice or warning to the employer, the Industrial Court stated that “[the employer] was, **figuratively speaking, caught with its pants down**”. Relying on the cases of *NUMSA v MacSteel (Pty) Ltd*⁷⁶ and *NUMSA v Three Gees Galvanising*⁷⁷ the Industrial Court held that the failure to give the employer a warning or notice of such overtime ban was sufficient on its own to render the overtime ban an unfair labour practice.⁷⁸

- [25] Another important factor which also contributed to the introduction of this requirement into the Act was the appointment in 1990 of a technical committee of the National Manpower Commission,⁷⁹ chaired by Professor AA Landman, which was asked to consider various proposals made by stakeholders about the old Act in response to an invitation issued in the Government Gazette of 13 October 1989. One of the proposals that the Technical Committee made was that there should, among others, be a statutory requirement that, before a strike could be said to be legal, it be shown that “**24 hours (or such other period as may have been**

⁷⁶ (1992) 13 ILJ 826 (A).

⁷⁷ (1993) 14 ILJ 372 (LAC).

⁷⁸ See *Food Workers Council of SA & others v Casbah Burger Box CC* (1996) 17 ILJ 947 (IC) at 955C-D.

⁷⁹ This was a commission established under the old Act.

agreed upon in writing) written notice of the commencement of the strike has been given”.⁸⁰

[26] In 1993 two pieces of legislation were passed which are very important in the historical developments that led to the inclusion of the requirement of notice of industrial action in a statute of general application. These Acts were the Education Labour Relations Act of 1993⁸¹ (“**the ELRA**”) and the Public Service Labour Relations Act of 1993⁸² (“**the PSLRA**”). Their importance lies in the fact that they marked the first occasion in the history of South Africa that a strike notice and a lock-out notice were included in a statute as a requirement for a legal strike and lock-out. No other statute in the history of South African labour law had ever included such a requirement.

[27] The ELRA⁸³ gave educators/teachers the right to strike, but the exercise of such right was subject to the provisions of that Act. It also precluded an employee organisation, or office-bearer or official or member thereof, from calling or taking part in any strike unless “**written notice of at least seven days has been given to the employer or employers concerned of ... the date of commencement of such a strike**”.⁸⁴ Section 15(5) precluded an employer from instituting a lock-out unless “**he has given written**

⁸⁰ See “Proposals for the Consolidation” 297.

⁸¹ Act 146 of 1993.

⁸² Act 103 of 1993.

⁸³ See s 15(1) of the ELRA.

⁸⁴ Section 15(5)(b) is a section of the ELRA.

notice to the employee organization or organizations concerned of the commencement of such a lock-out". Section 19(1) of the PSLRA granted employees to whom that Act applied the right to strike and the employers to which it applied **"the right to lock-out"**, provided that certain conditions were present. The PSLRA further precluded a strike unless certain conditions were met. One of these was that **"written notice of at least 10 days has been given to the particular employer or employers concerned of ... the date of the commencement of such a strike"**.⁸⁵ Subsection 5 further required an employer to **"give written notice of at least 10 days either to the employees concerned, if they are not members of an employee organization, or to the employee organization or organizations concerned of his or its intention to call a lock-out, indicating the date of commencement of such lock-out"**.

[28] In 1993, soon after the passing of the PSLRA and the ELRA, Olivier wrote an article in which he evaluated the PSLRA against international standards or norms as determined by the International Labour Organisation (the **"ILO"**).⁸⁶ With regard to the procedural requirement of prior notice before a strike, he wrote, relying on Ben-Israel,⁸⁷ that such a requirement was acceptable provided that the notice, especially the period, was reasonable.⁸⁸

⁸⁵ Section 19(4) of the PSLRA.

⁸⁶ Olivier "Labour Relations for the Public Service" 1371.

⁸⁷ Ben-Israel *International Labour Standards* 118.

⁸⁸ Olivier "Labour Relations for the Public Service" 1388.

[29] Lastly, the terms of reference of the Ministerial Task Team⁸⁹ which was appointed to draft the Labour Relations Bill, which preceded the Act, required the Task Team to have regard to international norms⁹⁰ in drafting the Labour Relations Bill. In the explanatory memorandum⁹¹ which accompanied the draft Bill, as well as in the draft Bill itself prepared by the Ministerial Task Team, provision was made for the requirement of prior notice of strikes, lock-outs and protest action. It is argued that the requirement in the terms of reference of the Ministerial Task Team that, in preparing the Bill, it had to have regard to international law enabled the Ministerial Task Team to include in the Bill the requirement of notice before industrial action, since such requirement is quite common internationally.

[30] In seeking to determine which parts of the pre-1995 jurisprudence on the law of strikes and lock-outs should be carried over into the new system, it would not have escaped the attention of the Task Team that case law suggested that the failure to give a strike notice to the employer was regarded by the courts as unfair. It would also not have escaped the attention of the Task Team that the ELRA and the PSLRA prescribed the giving of prior notice of a strike and lock-out, nor would it have escaped their attention that the committee (referred to earlier which had been chaired by Professor AA Landman) had recommended this requirement. As already

⁸⁹ See "Explanatory Memorandum" 278-279. This was a Ministerial Task Team that had been appointed by the first Minister of Labour in post-apartheid South Africa to overhaul the laws regulating labour relations and to prepare a negotiating document in draft Bill form to initiate a process of public discussion and negotiation among government, organised labour, business and other interested parties.

⁹⁰ *Op cit* 279.

⁹¹ *Op cit* 308-9.

stated above, the Ministerial Task Team included the requirement of notice for a protected primary strike, a secondary strike, protest action and a protected lock-out in the draft Bill which, with certain changes, was later passed as the Act.

3. The provisions of the Act prescribing notice of industrial action

[31] When the Act was passed in 1995, it contained a requirement in various sections for some or other notice to be given before a strike, a secondary strike, a lock-out or a protest action could be resorted to. The relevant provisions of the Act, quoted below, are s 64(1)(b), (c), (d), s 66(2)(b) and s 77(1)(b) and (d). This marked the first time in the history of South African labour law that a statute of general application laid down such a requirement. Although, prior to this Act, such a requirement was provided for in both the ELRA and the PSLRA, those were not statutes of general application, as their application was limited to, respectively, the education sector and the public service.

[32] The provisions of s 64(1)(b), (c) and (d) of the Act read thus:

“64(1) Every employee has the right to strike and every employer has recourse to lock-out if –

(a) ...

(b) in the case of a proposed strike, at least 48 hours’ notice of the commencement of the strike, in writing, has been given to the employer, unless –

(i) the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; or

- (ii) the employer is a member of an employers' organisation that is a party to the dispute, in which case, notice must have been given to that employers' organisation; or
- (c) in the case of a proposed lock-out, at least 48 hours' notice of the commencement of the strike, in writing, has been given to any trade union that is a party to the dispute or if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council.
- (d) in the case of a proposed strike or lock-out where the State is the employer, at least seven days' notice of the commencement of the strike or lock-out has been given to the parties contemplated in paragraphs (b) and (c)."

[33] Section 66(2)(b) provides:

"(2) No person may take part in a secondary strike unless:

- (a) ...
- (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."

[34] Section 77(1)(b) and (d) of the Act provide:

"(1) Every employee who is not engaged in an essential service or a maintenance service has the right to take part in a protest action if –

- (a) ...

- (b) **the registered trade union or federation of trade unions has served a notice on NEDLAC stating –**
 - (i) **the reasons for the protest action; and**
 - (ii) **the nature of the protest action;**
- (c) **...**
- ~~€~~(d) **at least 14 days before the commencement of the protest action, the registered trade union or federation of trade unions has served a notice on NEDLAC of its intention to proceed with the protest action.”**

[35] The provisions quoted above all require the giving of prior notice for protected industrial action. These statutory provisions raise a number of questions. These include the following:

- (a) Who must give notice?
- (b) To whom must notice be given?
- (c) Purpose of the notice.
- (d) Duration of the notice.
- (e) Extension of notice.
- (f) Contents of the notice.
- (g) Timing and computation of the notice periods.
- (h) Can industrial action be commenced later than the date or time given in the notice?
- (i) Circumstances when notice is not required before industrial action.
- (j) Types of industrial action in respect of which prior notice is not required.

Each one of these questions will be discussed in turn. However, before they are discussed, it is necessary to consider the

interpretive framework within which these provisions must be interpreted and applied.

4. Interpretive framework

[36] In order to interpret and apply the above statutory provisions properly, it is necessary to understand the constitutional and statutory interpretive framework within which the provisions must be interpreted and applied. That interpretive framework must take account of the provisions of s 23 of the Constitution.⁹² The interpretive framework itself consists of ss 39(1), (2) and (3), 232 and 233 of the Constitution, as well as s 1 read with s 3 of the Act.

[37] Section 23 of the Constitution provides:

- “(1) Everyone has the right to fair labour practices.**
- (2) Every worker has the right –**
 - (a) to form and join a trade union;**
 - (b) to participate in the activities and programmes of a trade union; and**
 - (c) to strike.**
- (3) Every employer has the right –**
 - (a) to form and join an employers’ organisation; and**
 - (b) to participate in the activities and programmes of an employers’ organisation.**
- (4) Every trade union and every employers’ organisation has the right –**
 - (a) to determine its own administration, programmes and activities;**
 - (b) to organise; and**

⁹² The RSA Constitution.

- (c) to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
- (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

[38] Section 39(1) of the Constitution deals with the interpretation of the Bill of Rights. It reads thus:

- “(1) When interpreting the Bill of Rights, a court, tribunal or forum –**
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;**
 - (b) must consider international law; and**
 - (c) may consider foreign case law.”**

Section 39(2) of the Constitution deals with the interpretation of any legislation and the development of the common law and customary law. It reads thus:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

Section 39(3) recognises the existence of other rights other than those in the Bill of Rights. It reads thus:

“(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”

Sec 233 of the Constitution deals with the role and place of customary international law in South Africa. It reads thus:

“232. Customary international law.- Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

Sec 233 of the Constitution deals with the role of international law in the construction of legislation in South Africa. Sec 233 reads:

“233. Application of international law.- When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

[39] Section 1 of the Act states the purpose of the Act. It provides that the purpose of the Act is to **“advance economic development, social justice, labour peace and the democratisation of the workplace”**. It seeks to achieve this purpose by fulfilling the primary objects of the Act. The primary objects of the Act, as set out in s 1 thereof, include:

- (a) giving effect to and regulating the fundamental rights conferred by s 23 of the Constitution.
- (b) giving effect to obligations incurred by the Republic as a member state of the ILO.

- (c) the provision of a framework for employees and trade unions, on the one hand, and employers and employers' organisations, on the other, to bargain collectively to determine wages, terms and conditions of employment and other matters of mutual interest.
- (d) the promotion of orderly collective bargaining, and
- (e) the effective resolution of labour disputes.

[40] Section 3 of the Act deals specifically with the interpretation and application of the Act. It reads thus:

- “3. Interpretation of this Act – Any person applying this Act must interpret its provisions –**
- (a) to give effect to its primary objects;**
 - (b) in compliance with the Constitution; and**
 - (c) in compliance with the public international law obligations of the Republic.”**

It is, therefore, within the above interpretive framework that the provisions of the Act must be interpreted in order to determine their meaning, scope and application.

5. Who must give notice?

[41] In order to ensure that industrial action will be protected, it needs to be determined at the outset whether a prior notice of such action will be necessary. This is so because there are instances where no

notice is required for industrial action.⁹³ If a notice is required, the first question that arises is: who must give such notice?

Primary strike

- [42] Section 39(1)(b) of the Trade Disputes Act of 2003 of Botswana, which prescribes the giving of a notice of a lock-out or of a strike, does not specify in express terms who should give notice. However, in terms of s 159 of the Labour Act of 2003 of Ghana the notice must be given by a party to the dispute who intends to resort to industrial action. In respect of a primary strike that does not involve the State as the employer, the provision of the Act that deals with the giving of a notice in South Africa is s 64(1)(b) of the Act. In respect of a strike that involves the State as an employer, the provision of the Act that deals with the giving of a notice of a primary strike is s 64(1)(d). It is not necessary to quote those provisions. They have been quoted above. It suffices to say that not all of them expressly specify who must give notice of a primary strike. There can, however, be no doubt that in most cases a strike notice will be given by the union which is calling the strike if there is a union involved in the dispute. However, it will not always be the case that a strike is called by a union, because, unlike in certain countries, in South Africa the right to strike is not union-based but employee-based.⁹⁴ The result hereof is that a group of employees is able to engage in a protected strike even if they do not belong to any union. In such a case there can be no doubt that anyone of such employees who is authorised to do so may give the required notice

⁹³ Section 64(3) of the Act.

⁹⁴ See s 23(2)(c) of the RSA Constitution and s 64(1) of the Act.

on behalf of the group of employees. But even in a case where a strike is called by a trade union, the notice can be given by one or more of the employees who intends participating in the strike, provided that he or she is authorised to do so. If there is no union involved in the dispute, for example where the employees' union does not associate itself with a proposed strike, the notice can likewise be given by the employees through one or more of their number who is or who are authorised by the group of employees concerned. If the employees are represented by a committee, the notice can also be given by such committee.

- [43] The notice can also be given by any person outside of that group of employees whom the group of employees has authorised to give such notice on their behalf. A good example of such a person would be an attorney. As with all agents, anyone who has to deal with such person, for example the employer, would be entitled to demand proof of such person's authority. It is suggested that proof of such authority should preferably, but not necessarily, be in documentary form. It will, however, still be sufficient if all the employees concerned were to verbally confirm to the person seeking such proof that they have given such person authority to act as their agent. If an employee or anyone purporting to act as an agent gives notice of a strike without authority from the employees concerned, such notice will not be valid or effective.

- [44] It would be advisable that, in a case where there is no union involved in the dispute and a group of employees intend embarking upon a strike, the employer take steps to ensure that such notice indeed emanated from the group of employees and that the notice

did not emanate from an individual acting on a frolic of his own. If the notice was given without the authority of the group of employees concerned, the employer could challenge the validity of such notice and have it set aside. It is, however, argued that, where an employee (or anyone for that matter), has given the employer a notice of a strike without authority to do so, the employees may later ratify such notice.

[45] In respect of an industry-wide strike – that is, a strike in respect of a collective agreement to be concluded in a bargaining council – the provision of the Act that deals with the giving of notice of industrial action is s 64(1)(b)(i) of the Act. Section 64(1)(b)(i) does not contain any express provision as to who bears the obligation to give the notice that is required to be given to the bargaining council. It is argued that the necessary implication arising from s 64(1)(b)(i) is that in such a case the union(s) which is/are part of the bargaining council and which seeks/seek to initiate such a strike bear the obligation to give such a notice. It is doubtful that in such a case a trade union that is not part of the bargaining council can validly give notice of an industry-wide strike to a bargaining council. However, no firm view is sought to be expressed herein in this regard. In such a case the union would be seeking to instigate an industry-wide strike in support of a collective agreement to be concluded in a council in which it plays no role.

[46] Where the proposed strike is an industry-wide strike, but is not in respect of a collective agreement to be concluded in a bargaining council, s 64(1)(b)(i) does not apply. In such a case the strike will be a primary strike in each workplace affected throughout the

industry and the notice that must be given is governed by the notice relating to a primary strike. Under the old Act, the Black and Allied Workers Union (“**BAWU**”) instigated a number of strikes in hotels and restaurants in 1988 in its campaign to secure recognition by different employers in the hotel and catering industry in and around Durban.⁹⁵ There was no statutory requirement for a strike notice, but the union made separate referrals of disputes to the relevant industrial council in terms of s 35 of the old Act to satisfy the conditions for a “**legal**” strike.

Secondary strike

- [47] The requirement of a secondary strike notice is contained in s 66(2)(b) of the Act. That provision does not expressly state who bears the obligation to give notice of a secondary strike. However, there can be no doubt that the secondary employees have that obligation. That does not mean that a secondary strike notice can be given only by the secondary employees. It is argued that both the union involved in the primary dispute, to which the secondary employees may or may not belong, as well as the union of which the secondary employees are members, which may not be involved in the primary dispute or primary strike, may give notice of a secondary strike. There can be no reason why they cannot. As far as the union involved in the primary strike/primary dispute is concerned, it has an interest in the secondary strike and should be able to take steps to ensure that employees who intend going on the

⁹⁵ A number of employers affected by those strikes dismissed the striking workers, but, in the end, BAWU and the workers won the court cases which ensued thereafter. The reported cases are *BAWU & others v Palm Beach Hotel* (1988) 9 ILJ 1016 (IC), *BAWU & others v Asoka Hotels* (1989) 10 ILJ 167 (IC), *BAWU & others v Edward Hotel* (1989) 10 ILJ 357 (IC) and *BAWU & others v Blue Waters Hotel* (1993) 14 ILJ 963 (LAC).

secondary strike to assist it and its members in the resolution of the primary dispute, act within the law so that they will enjoy the necessary protection of the law. The union of which the secondary employees are members and which is not involved in the primary strike/primary dispute also has an interest that, if its members take part in a secondary strike, such strike is a protected strike. It is also argued that the employees involved in the primary dispute/primary strike also qualify to give notice of a secondary strike which is in support of their cause.

Protest action

[48] Protest action is dealt with in s 77 of the Act. Both s 77(1)(b) and 77(1)(d) contemplate different types of notices. In terms of s 77 only a registered trade union or a registered federation of trade unions can call a protest action. Section 77 has an express provision stating who must give notice. It provides that the registered trade union or federation of trade unions calling the protest action must give the notices provided for therein. As the Act has a specific provision dealing with who is required to give notice of the protest action, it is not open to anyone else to give such notice unless such other person acts as an agent of the registered trade union or federation of trade unions concerned. Such agent could be an attorney or other person who has been duly authorised.

[49] The employees who will participate in the protest action have no right to give such notice. Where the protest action has been called by a federation of trade unions, not even a registered trade union

which is an important affiliate of such federation of trade unions qualifies to give notice of such protest action in its own right. A notice that is given by anybody other than the registered trade union or federation of trade unions calling the protest action or its duly authorised agent would be invalid and can be ignored by all concerned. NEDLAC is entitled in such a case to a notice issued by the caller of the protest action.

Lock-out

- [50] In respect of a lock-out, s 64(1)(c) of the Act applies, but it does not expressly state who must give the lock-out notice. However, it is obvious that the employer bears the obligation to give a lock-out notice. A duly authorised agent of the employer, such as an attorney or other agent or an employers' organisation of which the employer is a member, can also validly give such notice even if it is not a party to the dispute. In such a case it would be giving such notice as an agent of the employer and not in its own right. Where the employer is a juristic person, for example a company or a close corporation, it obviously can act only through some or other human being such as its general manager, a human resources director or manager, or a member of the close corporation or any of its employees or directors or officials. However, each one of such persons would be obliged to furnish proof of authority to issue such notice if the union concerned in the dispute, or the employees concerned, required proof of such authority.
- [51] Where the proposed lock-out relates to a collective agreement to be concluded in a bargaining council, s 64(1)(c) of the Act applies. In

respect of that situation, there is also no express provision in the Act as to who bears the obligation to give notice of a lock-out. It is argued that in such a case the employer party to the bargaining council or the employers' organisation(s) concerned bears or bear the obligation to give a lock-out notice to the bargaining council.

6. **To whom must the notice be given?**

[52] In Finland the Mediation and Labour Disputes Act requires the notice to be given not only to the other party to the dispute but also to the office of the National Conciliation Officers.⁹⁶ In Iceland s 16 of the Labour Disputes Act requires that

“(a) decision on stoppage of work to be commenced for the purpose of enforcing an amendment to a decision upon wages and terms shall be made known to the Mediator and those against whom such action is mainly directed 7 days prior to the date of the intended commencement of such action.”⁹⁷

In Spain the employer and some administrative authority must be given notice of a strike.⁹⁸ In Sweden the notice must be given to the other party to the dispute and also to some government authority, namely the Mediation Office.⁹⁹ In Namibia notice must be given to other parties to the dispute and a copy thereof must be given to the

⁹⁶ See Orasmaa “Right to Strike in Finland”.

⁹⁷ See O’skarsson “Right to Strike in Iceland”.

⁹⁸ See Salmeron and Garcia “Right to Strike in Denmark”.

⁹⁹ See Kock “Right to Strike in Sweden”.

Labour Commissioner.¹⁰⁰ In Swaziland notice must be given to the parties to the dispute and “**the office of the Commissioner of Labour and the Commission**”.¹⁰¹ In Norway¹⁰² notice must be given to the parties to the dispute and to the National Mediator. In Botswana¹⁰³ a strike notice or a lock-out notice is required to be given to not only the parties to the dispute, but also to a state official, namely the Commissioner of Labour.

- [53] It would seem that in Greece civil servants are required by s 30 of Act 1264 of 1982, in exercising their right to strike, to give notice of their demands to the Ministry under which they fall, as well as to the Minister of Economics and Special Minister to the Prime Minister and to, thereafter, refrain for a period of four days from any strike.¹⁰⁴ In the Republic of Slovenia the decision to resort to a strike must be sent to “**the competent body of the Chamber or professional association**”.¹⁰⁵ It would appear that in Israel¹⁰⁶ the notice of a strike is required to be given both to the employer and to the Chief Labour Relations Officer. The latter official is a public official.

¹⁰⁰ Section 81(1) of the Namibia Labour Act of 1992.

¹⁰¹ Section 86(7) of Swaziland’s Industrial Relations Act 1 of 2000.

¹⁰² See s 28(1) of the Labour Disputes Act of Norway.

¹⁰³ Section 39(1)(b) of the Botswana Trade Disputes Act of 2003.

¹⁰⁴ Koniaris *Labour Law and Industrial Relations* par 417.

¹⁰⁵ See Novak “Right to Strike in the Republic of Slovenia” who refers to s 5A of the Settlement of Labour Disputes Law in this regard.

¹⁰⁶ See Adler “The Right to Strike in Israel”.

[54] Unlike the position in some of the countries referred to in the two immediately preceding paragraphs, the current Act does not contain any requirement that any government official, government department or authority be given notice of any strike or lock-out. However, its predecessor, the old Act, contained a provision which required an employer to **“forthwith notify the inspector defined by regulation” “(w)henever, as the result of a dispute concerning the terms or conditions of employment of an employee or employees if there is a discontinuance of work”**.¹⁰⁷ It was a criminal offence for an employer to fail to so notify an inspector.¹⁰⁸ It is, however, not clear how often this requirement was complied with during the life of that Act.

[55] In South Africa, s 64(1)(b) of the Act governs the question of who must be given notice of the commencement of a primary strike. There are three potential persons or entities who must be given notice. Each one is entitled to notice in certain specified circumstances. Section 64(1)(b)(i) creates the general rule that the notice of the commencement of a strike must be given to the employer who is the target of the proposed strike. However, there are two exceptions to this general rule when the notice is required to be given to another entity and not the employer. The two exceptions are provided for in subparagraphs (i) and (ii) of par (b) of s 64 (1). They are dealt with next.

Exception 1: (s 64(1)(b)(i))

¹⁰⁷ Section 65A of the old Act.

¹⁰⁸ Section 65A(2) of the old Act.

[56] The one exception is where the issue in dispute relates to a collective agreement to be concluded in a bargaining council. In such a case the notice must be given to the council concerned. In such a case the strike would be an industry-wide strike and the reasoning is that it would be administratively too burdensome, if not impracticable, to require that notice be given to each and every employer that is bound, or is to be bound, by the collective agreement. In the light of the fact that the council consists of employers and employers' organisations, on the one hand, and trade unions, on the other, a strike notice to the council would necessarily constitute a notice to all the employers and employers' organisations involved in the council. The employers' organisations must in turn pass the notice to their members who are individual employers.

[57] The exception provided for in s 64(1)(b)(i) arose pertinently, and, was examined in detail, in *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v NUMSA & others*.¹⁰⁹ In this case an employer who was not a member of an employers' organisation involved in a bargaining council approached the Labour Court to interdict its employees from participating in an industry-wide strike that was related to a collective agreement that was to be concluded in a bargaining council. The employer's basis for its application was that it was entitled to be given a strike notice before its employees could take part in that industry-wide strike, even though notice had been given to the council. It contended that, since it had not been given notice, the strike by its employees was unprotected. Zondo J dismissed the application on the basis that the case fell under s 64

¹⁰⁹ (1999) 20 ILJ 677 (LC).

(1)(b)(i) which required that the notice be given to the council and that such section made no provision for notice to be given to individual employers as well.

[58] In *Tiger Wheels* the employer pointed out that it was not party to the dispute in the council, nor was it a member of any employers' organisation involved in the council and that, because of that, whatever notice might have been given to the council was of no assistance to it and would not serve the purpose of notice as articulated by the Labour Appeal Court in *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building and Allied Workers Union*.¹¹⁰ In *Tiger Wheels* the Court analysed the provisions of the Act in a very detailed manner and gave reasons why the statutory provisions read the way they did.

[59] First, the Court relied on the language used in s 64(1)(b) and found that it was plain and free from any ambiguity. In effect the Court held that s 64(1)(b) meant what it says, namely that, as a general rule, a strike notice is required to be given to the employer except where one of the two exceptions provided for in s 64(1)(b)(i) and (ii) applies. The exception provided for in s 64(1)(b)(i) is concerned with a case where the dispute which is the subject of the proposed strike relates to the conclusion of a collective agreement in a bargaining council. In such a case, held the Court, the notice is required to be given to the bargaining council concerned and there is no requirement that it should also be given to the employer.

¹¹⁰ (1997) 19 ILJ 671 (LAC). For the purpose of such a notice as articulated in the judgment of the Labour Appeal Court in *Ceramic Industries*, see the topic: "Purpose of notice" that begins at par 80 of the dissertation.

[60] The Court then went on to examine the rationale behind the exception. In this regard the Court took the view that the idea must have been that a bargaining council was taken to be a forum which is representative of the industry in which it exercises jurisdiction and that, if notice were given to a bargaining council, notice could be deemed to have been given to all employers who fall within the scope of the bargaining council. The Court also expressed the view that this exception was enacted in order to avoid an administrative nightmare that would result if notice had to be given to every individual employer in the whole industry before there could be an industry-wide strike.

[61] It is necessary to pause and make one observation about the notion that it would be an administrative nightmare if notice had to be given to individual employers in the whole industry. On the face of it this argument looks attractive. However, on close examination, is it so attractive? It is arguable that this exception is sound in a situation where two or three unions are the ones which must give notice and they must give notices to many individual employers, for example to 500 employers. However, it loses some of its attractiveness when one considers a situation where the notice may be given by the employees in each workplace. In such a case the provision would be that, before employees in any workplace can take part in an industry-wide strike, the necessary notice must be given to their employer. In these days of advanced technology a union would simply give an instruction to all shop stewards or members in each workplace affected to give their employer the required notice which would have been prepared in advance. All the employees would need to do would simply be to hand over the

prepared notice to their employer. The union could also, if it so wished, transmit the notices directly to the individual employers by fax. In terms of administrative achievability, that would be achievable. However, it could be costly to the union. These observations notwithstanding, the administrative burden that giving notices to individual employers would have placed on unions' administrative and financial capacities is sufficient to justify the exception to the rule provided for in s 64(1)(b)(i).

[62] The Court stated that s 64(1)(b)(i) should be interpreted, as commanded by s 3 of the Act in respect of the whole Act, in such a way as to promote the primary objects of the Act. It noted that one of the primary objects of the Act is to promote sectoral bargaining. The situation to which s 64(1)(b)(i) applies is a situation relating to sectoral collective bargaining. Accordingly, the point that the Court sought to make was that, if resorting to a strike concerning a collective agreement to be concluded in a bargaining council were to become too onerous owing to the administrative and financial burden placed on unions, not only would that undermine one of the primary objects of the Act, but it might also be in conflict with the international principle that procedural restrictions to the right to strike should be reasonable.

[63] The Court also had regard to another primary object of the Act, namely the promotion of effective dispute resolution. A strike is one of the legitimate means for the resolution of labour disputes. Accordingly, construing a statutory provision in such a way as not to impede, but to facilitate, a strike would promote effective dispute resolution. The Court held that a construction of s

64(1)(b)(i) which would be compatible with the ILO standards should be preferred to an interpretation which was not in line with such standards. Although the Court did not refer to s 233 of the Constitution, the approach it adopted in this matter is enjoined by s 233 of the Constitution. Section 233 provides that

“(w)hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

[64] In considering the relevant provisions of the section, the Court had regard to the fact that, in a case involving an industry-wide strike such as in *Tiger Wheels*, a single employer cannot settle the dispute giving rise to the strike. It also took into account the fact that *Tiger Wheels* was not party to the dispute, but also the fact that *Tiger Wheels*’ employees had a material interest in the issue in dispute. The Court ultimately dismissed the application brought by *Tiger Wheels*.

Exception 2: (sec 64(1)(b)(ii))

[65] The second exception to the general rule is to be found in s 64 (1)(b)(ii). That exception is where

“(ii) the employer is a member of an employers’ organisation that is a party to the dispute in which case, notice must be given to that employers’ organisation.”

It is argued that this exception is simple and straightforward. It is to the effect that the notice must be given to the employers' organisation of which the employer is a member where such organisation is involved in the dispute. This is in line with the principle that requires communication to be with and through the representative where a party is represented by a representative in a dispute. It could be perceived as not only undermining the authority of the representative were communication to be directed to the party itself despite it having a representative, but also undermining the process of collective bargaining.

- [66] Where the employer is a member of an employers' organisation but that organisation is not involved in the dispute, it is not contemplated that the notice must be given to the employers' organisation. In such a case it must still be given to the employer itself. If notice was given to the employers' organisation and not the employer, it may be argued that in law there is no notice to the employer.

Lock-out

- [67] In the case of a lock-out, the position is governed by s 64(1)(c). The rule is that, if there is a trade union which is party to the dispute, the notice must be given to that union. Where there is no trade union involved in the dispute, the notice must be given to the employees concerned. If the issue in dispute relates to a collective agreement to be concluded in a bargaining council, the notice must be given to the council. Does the provision in s 64(1)(c) mean that, if there are two or more trade unions involved in a dispute, the

employer can give notice to any one of the trade unions in order to comply with the requirement? For the reasons given below, it is argued that it cannot.

- [68] The purpose of a lock-out notice is to give the employees concerned the opportunity to avoid or prevent the lock-out, or, if they so wish, to take whatever steps they may wish to take in order to mitigate the effects of the lock-out upon themselves.¹¹¹ They can achieve the former by either capitulating to the employer's demands or ensuring that the dispute is settled before the lock-out occurs. They can achieve the latter by taking steps to boost their income or to rearrange their financial reserves in such a way that there will be money that they can use to survive during the period of the lock-out. Where a union has a strike fund to help its members in times such as these, the notice period could be used by the union to make such arrangements as may be necessary with its bank to ensure that funds will be available for use for the benefit of the employees during the lock-out. If the notice is given to the employees, they will be able to do what they consider to be necessary. If it is not given to them, but it is given to a union of which they are members and which represents them, this will be achieved too because their union has obligations towards them. Such union also has their interests at heart and would want to bring such information to their attention. If, however, the lock-out notice is given neither to them nor to the union of which they are members, but is given to another union, which will inevitably be a rival union, there is little prospect that the rival union will draw

¹¹¹ These purposes of a lock-out notice are in line with the purposes of a strike notice as decided by the Labour Appeal Court in *Ceramic Industries*.

their attention to the lock-out notice. The rival union would probably not mind, to say the least, if employees who belong to a rival union were not to know in advance of an impending lock-out and were to be taken by surprise on the morning of the day of the lock-out when they find the gates locked, because, in that way, their union will be portrayed in a negative light.

[69] Another scenario which raises similar questions as the scenario where there are two or more trade unions involved in a dispute is where there is a trade union involved in the dispute, but it represents only some of the employees affected by the dispute and not others, and the others are not represented by any union. It is argued that in the first scenario where there are two or more trade unions to which employees facing a possible lock-out belong, the employer's obligation is not limited to giving the lock-out notice to any one of the trade unions. In the scenario where there is one trade union, but it represents only some and not all the employees who are facing a possible lock-out, the employer is required to give notice of the lock-out to all unions involved in the dispute. In the case of the second scenario the employer is required to give notice to the trade union as well as to the employees involved in the dispute who are not represented by any trade union.

[70] Brassey has expressed the view¹¹² that a s 64(1)(c) notice (i.e. lock-out notice) **“suffices if given to any trade union that is a party to the dispute”**. He goes on to say:

¹¹² Brassey *Employment and Labour Law* vol 3 A4:12-A4:13.

“It is for the trade union to alert its members and other employees and trade unions who may be party to the dispute.”

Regrettably Brassey does not advance any reasons for this proposition. It is suggested that this proposition is not correct. Although the language used in s 64(1)(c) may seem to suggest that, if there are two or more trade unions that are party to a dispute, the obligation of the employer or of the employers’ organisation to give a lock-out notice is limited to giving it to any one of the unions that are party to the dispute and, therefore, not to every union that is a party to the dispute, or, to employees who are not represented by any trade union, it is suggested that, upon a proper construction, this can simply not be correct.

- [71] It is trite that provisions of the Act must be interpreted purposively. Accordingly, in interpreting this provision it is important to consider what purpose of the Act and/or of the section would be served by any particular construction. Section 64(1)(c) refers simply to **“any trade union that is party to the dispute”** and does not, for example, qualify **“any trade union”** by reference to, for example, any union that represents the majority of the employees affected by the dispute. Accordingly, if Brassey’s proposition were to be correct, it would mean that, if two unions were involved in a dispute with an employer, one being a well-established union with more than 75 percent of the employer’s employees as its members and the other one being a small, unknown union that has been registered for only a few months representing only 25 percent of the employer’s employees, the employer would have discharged its obligation in terms of s 64(1)(c) if it served the lock-out notice on

the small, unknown union representing a few employees in the workplace and failed to give notice to the majority union representing the overwhelming majority of the employees. It is argued that there simply can be no sound or logical reason why the drafters of the Act would have wanted to enact a provision which produces such a result. A provision with such a meaning would serve no purpose of the Act or of the section.

[72] It is argued that the better proposition would be that, where there are two or more trade unions which have a dispute with an employer, in effect each one of such unions has a separate dispute with the employer. This means that, if there were two or three unions, there would be a dispute between the employer and each one of the two or three unions separately. Support for this proposition can be derived from the fact that each one of the different unions can settle its own dispute with the employer and leave each of the other unions to continue with their respective disputes with the employer. Accordingly, it is argued that, when s 64(1)(c) of the Act refers to “**any trade union that is a party to the dispute**”, it refers to “**every**” trade union that is in dispute with the employer on the subject matter. Construed in this manner, s 64(1)(c) means that, if there are two or more unions involved in a “**dispute**” (which in fact is “**disputes**”), the employer’s obligation is to give a lock-out notice to every trade union involved in such a “**dispute**” and not to give notice to only one union – which might even be some fly-by-night union.

[73] Brassey also advances the proposition that the union to which, based on his proposition, the employer chooses to give notice

assumes the responsibility of alerting other trade unions and employees who are not its members to the impending lock-out. Once again, unfortunately Brassey does not advance any reason for this proposition. It is argued that this proposition is also not correct. The better proposition, it is argued, would be that, in such a case, the rule that s 64(1)(c) creates is that employees who would be subjected to the impending lock-out, and who are either not members of any union or whose union is not party to the dispute, are entitled in their own right to be given a lock-out notice. Accordingly, the employer is obliged to give them notice of the lock-out. The same rule would apply to other unions. It is argued that they, too, are entitled to a lock-out notice. In the case of a union that is party to the dispute, employees who are its members are entitled to be informed by such union of the lock-out notice. The proposition advanced by Brassey might have been attractive if s 64(1)(c) conferred the right to be given notice on a trade union that is representative in the workplace, but, as representativity does not come into the picture in s 64(1)(c), the proposition is fraught with difficulties.

Strike notice and lock-out notice involving the State as employer

- [74] Where the State is the employer and is the target of a proposed strike, or where the State is the employer proposing to institute a lock-out, the provisions that govern the position are s 64(1)(d) read with paragraph (b) and (c). This means that, as a general rule, a strike notice must be served on the State, except in the situations covered by the exceptions to that general rule as set out in

subparagraph (i) and (ii) of s 64(1)(b). Where the State seeks to institute a lock-out, the lock-out notice must be served on the trade union that is party to the dispute, or must be served on the employees if there is no trade union that is party to the dispute or on the union and employees which/who are not represented by that union if they are party to the dispute. If there are two or more trade unions that are party to the dispute, each union must be given a lock-out notice, unless the unions and the State have made different arrangements on the issue. If the issue in dispute relates to a collective agreement to be concluded in a council, the State must give the lock-out notice to the council.

- [75] Where the State is party to a dispute as employer, the question that arises is: to whom must a strike notice be delivered? It is suggested that it can be delivered to the Office of the President or to the Office of the Minister of Public Service and Administration or to any of the representatives of the State as employer that are set out in the definition of the word “**employer**”¹¹³ in s 1 of the PSLRA. It is suggested that s 202(2)¹¹⁴ of the Act cannot be relied upon as entitling the service of a strike notice on the office of the State Attorney, because that provision relates to a legal process and not just any document or correspondence directed at the State. Although a strike notice is a requirement of law, it is not a legal

¹¹³ In s 1 of the PSLRA the word “employer” is defined as meaning the “State as employer as represented – (a) at central level, by representatives appointed for that purpose by the responsible Minister; and (b) at departmental level, by representatives appointed for that purpose by the head of the department concerned”.

¹¹⁴ Section 202(2) of the LRA reads thus: “Service on the Office of the State Attorney of any legal process directed to the State in its capacity as an employer is service on the State for the purposes of this Act”.

process. A legal process would be a summons or other court process.

Secondary strike

[76] Section 66(2)(b) requires the notice of a secondary strike to be given to “**the employer of the employees taking part in the secondary strike or, where appropriate, the employers’ organisation of which that employer is a member**”. Such employer is the secondary employer. What s 66(2)(b) contemplates is that the notice of a secondary strike must be given to the secondary employer, or the employers’ organisation of which such employer is a member. The circumstances in which the notice must or can be given to the employers’ organisation of which the employer is a member are not set out, but it is provided that that applies “**where appropriate**”. The obvious question that arises is: when would it be appropriate to give the secondary strike notice to the employers’ organisation and when would it not be?

[77] It is worth noting that the particularity which the Act displays in s 64(b) and (c) in dealing with the question of when a strike notice or lock-out notice can or should be given to a union or an employer or employees or a bargaining council is conspicuous by its absence when the Act deals with the same issue in s 66(2) with regard to a secondary strike. It is argued that the one situation where, in the words of s 66(2)(b), it would be “**appropriate**” to give a secondary strike notice to an employers’ organisation of which the secondary employer is a member, is where both the primary employer and the secondary employer are members of such organisation and the

organisation represents the primary employer in the primary dispute or is party to the primary dispute. The one reason why it definitely would be appropriate to do so in such a case is that the employers' organisation would be a representative of both employers and would be a party to the primary dispute.

[78] It is argued that the mere fact that the secondary employer is a member of an employers' organisation would not on its own be good enough to bring that situation within the ambit of “**appropriate**” as contemplated in s 66(2)(b). It is argued that this is because the requirement in the section that the employers' organisation be one of which the secondary employer is a member is a condition that is separate and distinct from the “**where appropriate**” requirement in s 66(2)(b). Accordingly, service of the notice upon an employers' organisation on the sole ground that the secondary employer is a member of such organisation would not satisfy the requirement that notice can or must be given to such organisation “**where [it is] appropriate**” to do so. However, it can be argued that it would also be appropriate to serve the notice on such employers' organisation where, for whatever reason, it was impracticable for the union to serve the notice on the secondary employer itself.

[79] Obviously, if the secondary employer has appointed an agent, for example an attorney, a secondary strike notice can be served on such agent. In such a case notice to the agent is notice to the principal, the secondary employer. In *Sealy of SA (Pty) Ltd &*

*others v PPWAWU*¹¹⁵ the notice of a secondary strike was served on a person who acted as human resources manager for a number of companies in a group of companies. The Court, per Basson J, held the notice to have been given to all the employers whose employees were going to embark upon a secondary strike on the basis that the human resources manager was acting for all the companies concerned.

Protest action

- [80] Section 77(1) requires both notices that it provides for, namely the one required by paragraph (b) and the other that is required by paragraph (d) to be given to NEDLAC. There is no requirement that any notice should be given to the employers whose employees will participate in the protest action. Protest action is defined in s 213 of the Act as meaning:

“the partial or complete concerted refusal to work, or the retardation or obstruction of work, for the purpose of promoting or defending the socio-economic interests of workers, but not for a purpose referred to in the definition of strike.”

From this definition of “**protest action**” it is clear that protest action is a strike with a different purpose. It is a strike aimed at promoting or defending the socio-economic interests of workers. It is not a strike aimed at the amendment of the terms and conditions of employment of employees as is the aim of an ordinary strike. The effect of the provisions of s 77(1)(d) read with the definition of

¹¹⁵ (1997) 18 ILJ 392 (LC).

“**protest action**” is that, whereas, ordinarily, workers may not refuse to work for purposes envisaged in the definition of “**strike**” without (among other requirements) prior notice of their plan having been given to their employer, when they refuse to work for the purpose envisaged in the definition of “**protest action**”, their employer need not be given any prior notice of their intention and plan.

[81] The rationale behind the provision that notice be given to NEDLAC and the absence of a provision requiring that notice be given to employers whose employees would participate in the protest action is that NEDLAC is a statutory body that includes organised business, government and organised labour. Just as in the case of a strike relating to a collective agreement to be concluded in a bargaining council, where the notice must be given to the council because it is a forum representing employers and employees, NEDLAC is also a forum representing, among others, organised business in the country and service of notice of protest action on it is deemed sufficient notice to individual employers in the country for purposes of protest action.

[82] The number of participants in a protest action can run into many thousands of workers in different parts of the country. This possibility might have given rise to fear that, from an administrative point of view, to require notices of protest action to be given to individual employers would make it impossible for protest action to be embarked upon and that this would be inconsistent with international norms set by the ILO. However, on reflection it does not appear that it would have been so much of an

administrative nightmare if the requirement were that employees who wanted to participate in such a protest action would need to give notice to their employer. Obviously, it is much more convenient to organised labour that no notices need be given to individual employers. Probably the matter was viewed from the point of view of requiring the registered trade union or federation of trade unions calling the protest action to give notices to every employer whose employees would or could participate in the protest action. If the caller of the protest action were to be the one to shoulder the responsibility of giving notice to every employer whose employees would or might take part in the protest action, then, surely, there can be no doubt that satisfying such a requirement would have been an administrative nightmare.

7. Purpose of notice of industrial action

Primary strike

[83] Writing about the requirement of strike notices and strike ballots in certain Canadian jurisdictions, Arthurs¹¹⁶ et al write thus with regard to the purpose of such requirements:

“These provisions are, respectively, designed to protect the interests of the employer against the precipitate strike action, and of individual workers against strikes which are not democratically mandated.”

¹¹⁶ See Arthurs et al *Labour Law and Industrial Relations* 732.

[84] In *Ceramic Industries Ltd t/a Betta Sanitary Ware v National Construction Building & Allied Workers Union*(2)¹¹⁷ the strike notice that the union had given the employer read:

“This serves to inform the company that a strike shall start at any time after 48 hours from the date of this notice. This is in respect of matters GA.3672.”

In the *Ceramic Industries* case the Labour Appeal Court held that the purpose of the notice prescribed by s 64(1)(b) **“is to warn the employer of collective action, in the form of a strike, and when it is going to happen, so that the employer may deal with that situation”**.¹¹⁸ It went on to say that **“(b)y their very nature strikes are disruptive, primarily to the employer, but also to employees and, sometimes, to the public at large”**.¹¹⁹ The Court also stated that a failure to give proper warning of an impending strike could undermine orderly collective bargaining. Once an employer has been warned of an impending strike, continued the Court, he may decide to capitulate to the union’s demand and thus avoid the strike, or he may take steps to protect the business when the strike starts. The Court held that, for the former, the notice in the *Ceramic Industries* case could suffice because the employer had more than 48 hours before the strike could commence within which he could give in to the demands but, for the latter, the notice in that

¹¹⁷ (2) (1997)18 ILJ 671 (LAC).

¹¹⁸ *Op cit* 676D-E.

¹¹⁹ *Ibid.*

case was not sufficient, “**because the employer does not know when, after 48 hours, the proposed strike will commence**”.¹²⁰

Lock-out

- [85] The same purposes that apply to the notice of a primary strike could be said to be applicable, with the changes required by the context, to the provision of s 64(1)(c) as regards a lock-out notice. However, in relation to a lock-out notice, the purpose of the notice would be to warn the union or the employees of the impending lock-out and when the lock-out would commence so that they, too, can decide whether to accept the employer’s demands, or, if not, to make whatever arrangements they may wish to make in the knowledge that from a certain date or time they will be locked out.

Secondary strike

- [86] In regard to a secondary strike, the provision relating to the notice requirement is not worded in the same way as the provision relating to the notice requirement for a strike and a lock-out. The provision in s 66(2)(b) does not refer to a notice “**of the commencement**” of a secondary strike, whereas s 64(1)(b) and (c) refer to a notice “**of the commencement of**” a strike or lock-out respectively. Section 66(2)(b) requires “**notice of the proposed secondary strike**” as opposed to a notice “**of the commencement of the secondary strike**”. Its purpose can only be to warn the employer of the impending secondary strike and to give him a period of at least seven days before the strike can commence to

¹²⁰ *Op cit* 676H.

make whatever arrangements he may deem necessary to deal with the situation. The secondary strike may commence at the end of the seven-day period, or much later than that. However, it cannot commence before the expiry of the seven-day period.

Protest action

[87] In regard to protest action, two notices are required by s 77(1)(b) and (d) respectively. Section 77(1)(b) contains one of the conditions which must be met before **“every employee”** can acquire the right to take part in a protest action. It provides that the registered trade union or federation of trade unions calling the protest action must have served a notice on NEDLAC stating the reasons for, and the nature of, the protest action. The purpose of this notice is not to inform NEDLAC when the protest action will commence. Its purpose is to give NEDLAC an opportunity to consider the dispute or matter giving rise to the proposed protest action before the union or federation of trade unions calling the protest action can proceed with the protest action. That this is the purpose can be inferred from the provision of s 77(1)(c). Section 77(1)(c) is the third of the conditions prescribed by s 77(1) as conditions that must exist before **“every employee”** can acquire the right to participate in a protest action. It requires that

“the matter giving rise to the intended protest action [must have] been considered by NEDLAC or any other appropriate forum in which the parties concerned are able to participate in order to resolve the matter.”

From this it is clear that the purpose of the notice required by s 77(1)(b) is to give NEDLAC an opportunity to consider the dispute with a view to resolving it and thus avoid the proposed protest action.

- [88] Section 77(1)(d) deals with the second notice.¹²¹ The notice required by s 77(1)(d) is also another condition prescribed by s 77(1) as one of the conditions which must exist before **“every employee”** can acquire the right to participate in a protest action. Section 77(1)(d) requires that **“(a)t least 14 days before the commencement of the protest action, the registered trade union or federation of trade unions [must have] served a notice on NEDLAC of its intention to proceed with the protest action”**. The latter is the actual protest action notice. It is argued that, before a protest action notice required by s 77(1)(d) can be given, the dispute giving rise to, or which has given rise to, the impending protest action must have been considered by NEDLAC as required by s 77(1)(c) of the Act.¹²² That notice cannot be issued before that condition has been met. The rationale behind the requirement that such notice not be issued until after the subject matter of the impending protest action has been considered is to give NEDLAC the opportunity to do whatever it can to try to have the matter resolved without protest action. The notice prescribed by s 77(1)(d)

¹²¹ It is interesting to note that the notices required for protest action are not expressly required to be in writing as is the case with a strike notice, a lock-out notice and a secondary strike notice in terms of s 64(1)(b), (c) and s 66(2)(b) respectively. However, it is argued that the use of the word “serve” in both s 77(1)(b) and (d) must be construed to mean that the registered trade union or federation of trade unions must have served a notice that is in writing, because in s 213 of the Act the word “serve” is defined as meaning “to send by registered post, telegram, telex or to deliver by hand”. Accordingly, a verbal notice is not competent.

¹²² This is also how the Court understood the position in *Business South Africa v Congress of South African Trade Unions & Another* (1997) 18 ILJ 474 (LAC).

thus presupposes that attempts to resolve the matter have failed. At that stage the way is open for protest action to be proceeded with.

8. **Duration of notice of industrial action**

[89] In South Africa the duration of a notice of a primary strike or a lock-out that does not involve the State as employer¹²³ is 48 hours of the commencement of such strike or lock-out. In the case of a strike or lock-out that involves the State as employer, the duration of the notice of a primary strike or a lock-out is seven days.¹²⁴ In the case of a secondary strike, the duration of the notice is seven days.¹²⁵ In the case of a protest action the duration of the required notice is 14 days.¹²⁶ With regard to the duration of the notice of industrial action in those countries which require prior notice of industrial action, it is interesting to observe that, in some countries, the notice required is of a much longer duration than the notice required in South Africa in the case of a strike, particularly a primary strike that does not involve the State as employer. A few examples will suffice in this regard.

[90] In Denmark the notice required is one of at least seven days before the implementation of a work stoppage.¹²⁷ In Finland a notice of 14

¹²³ Section 64(1)(b) of the Act.

¹²⁴ Section 64(1)(d) of the Act.

¹²⁵ Section 66(2) of the Act.

¹²⁶ Section 77(1)(d) of the Act.

¹²⁷ See Anderson "Right to Strike in Denmark".

days before the commencement of a strike is required.¹²⁸ In Iceland the position is governed by s 16 of the Labour Disputes Act. It seems to require in effect seven days' notice of the intended commencement of a work stoppage.¹²⁹ In the Republic of Slovenia¹³⁰ it seems that, in terms of s 3(1) of the Strike Act, the strike notice required is five days' notice before the date of the commencement of the strike. In Sweden¹³¹ the notice required is **“written notice to the counter-party seven days prior to the action”**. As in Sweden, at least seven days' written notice of industrial action is required in England.¹³² In Israel a 15-day advance notice of a strike is required.¹³³

- [91] In Swaziland, just like in South Africa, the notice required for a strike is 48 hours' notice.¹³⁴ However, whereas in South Africa the Act requires the notice to be **“of the commencement of the strike”** or **“lock-out”**, as the case may be, s 86(7) of Swaziland's Industrial Relations Act requires the notice to **“be given ... at least forty eight (48) hours before the commencement of such**

¹²⁸ This is in terms of the Mediation and Labour Disputes Act. See Orasmaa “Right to Strike in Finland”.

¹²⁹ Section 16 reads: “A decision on stoppage of work to be commenced for the purpose of enforcing an amendment to or decision upon wages and terms shall be made known to the mediator and those against whom such action is mainly directed 7 days prior to the date of the intended commencement of such action”.

¹³⁰ See Novak “Right to Strike in the Republic of Slovenia”.

¹³¹ See Kock “Right to Strike in Sweden”.

¹³² Section 234A of the Trade Unions Reform and Employment Rights Act of 1993 of England.

¹³³ See Adler “The Right to Strike in Israel” who refers to s 5A of the Settlement of Labour Disputes Law in this regard.

¹³⁴ Section 86(7) of the Industrial Relations Act of 2000 of Swaziland.

action”.¹³⁵ (Underlining provided). In Namibia,¹³⁶ 48 hours’ notice is also required. However, the wording of the relevant section of the Namibian Act also differs from the wording of the South African Act, because, in terms of the Namibian Act, the party seeking to resort to a strike or lock-out is required **“to give notice of such intention ... on a date at least 48 hours before such party commences such action ...”**. In Zimbabwe¹³⁷ resort to industrial action – which the relevant statute refers to as **“collective job action”** – is precluded **“unless fourteen days’ written notice of intent to resort to such action ... has been given to the party against whom the collective job action is to be taken”**.

- [92] In Botswana s 39(1)(6) of the Trade Disputes Act of 2003 also requires that **“48 hours notice of the commencement of the strike or lock-out”** must have been given in the prescribed form. This wording is the same as the relevant part of the wording in s 64(1)(b) and (c) of the Act, except that in South Africa there is no reference to a prescribed form. In Ghana the position is governed by ss 159 and 160 of the Labour Act of 2003. Where the parties to a dispute fail to refer a dispute to voluntary arbitration, or where the dispute remains unresolved at the end of arbitration proceedings, **“either party intending to take strike action or institute a lock-out, shall give written notice of this to the other party and the Commission within seven days after failure to**

¹³⁵ Compare with s 66(2)(b) of the South African Act which uses the word “prior” instead of “before” to refer to the period before the commencement of a secondary strike and does not refer to a notice of the commencement of a secondary strike. See also s 86(8) of Swaziland’s Industrial Relations Act of 2000 in respect of a lock-out.

¹³⁶ Section 81(1) of the Labour Act 6 of 1992 of Namibia.

¹³⁷ Section 104(2) of the Labour Relations Act of Zimbabwe.

agree to refer the dispute to voluntary arbitration or the termination of the proceedings”.¹³⁸

Section 160(1) reads:

“A party to an industrial dispute who has given notice of intention to resort to a strike or lock-out under section 159 may do so only after the expiration of seven days from the date of the notice and not at any time before the expiration of the period.”

It seems that the upshot of ss 159 and 160(1) is that a notice of seven days must be given before the commencement of a strike or lock-out.

[93] The duration of a strike notice or a lock-out notice in India is rather complicated, as will be shown below. The provisions of section 22(1)(a)(b) and (2)(a)(b) of the Industrial Disputes Act of 1947 of India govern the issue of strike notice and lock-out notice respectively, but they are worded in such a way that it does not seem to make much sense.

Section 22(1)(a) reads:

“(1) No person employed in a public utility service shall go on strike, in breach of a contract –
(a) without giving to the employer notice of a strike, as hereinafter provided, within six weeks before striking;
(b) within fourteen days of giving such notice.”

¹³⁸ Section 159 of the Labour Act of 2003 of Ghana.

Section 22(2)(a) and (b) read thus:

- “(2) No employer carrying on any public utility service shall lock out any of his workman –**
- (a) without giving them notice of lock-out as hereinafter provided, within six weeks before locking out; or**
 - (b) within fourteen days of giving such notice.”**

The difficulty with this provision is the use of the phrase in ss 22(1)(a) and 22(2)(2)(a), respectively, “**within six weeks before striking**” and “**within six weeks before locking out**”. Read alone, s 22(1)(a) seems to mean that a strike notice must be given within six weeks before the commencement of a strike. What does this mean? It may be argued that a notice that is given five weeks before the commencement of a strike complies with the statute, because five weeks before such strike falls “**within six weeks before striking**”. It also means that a notice that is given three days before the commencement of a strike complies with the statute, because three days before the commencement of a strike “**falls within six weeks before striking**”. The same reasoning would apply to s 22(2)(a) dealing with a lock-out notice.

- [94] The question which arises is whether s 22(1)(b) makes any difference to the above. It seems that, to some extent, it does. However, it does not seem to remove the essence of the problem arising out of s 22(1)(a). Section 22(1)(b) precludes an employee employed in a public utility from striking “**within fourteen days of giving**” the notice referred to in s 22(1)(a). If one were to read s 22(1)(a) and (b) in a manner that seeks to reconcile the two, the

result would be that, in giving a strike notice, a period of at least 14 days must separate the date of the giving of the notice and the date of the commencement of the strike. The result would then be that the notice cannot be given during the last 14 days before the commencement of the strike. Accordingly, the notice would have to be given at any time between the first day of the last six weeks before the strike and the first day of the last 14 days before the strike. It is difficult to think of any other sensible way of reading the provisions of s 22(1)(a) and (b) and s 22(2)(a) and (b) of the Industrial Disputes Act of 1947 of India.

9. Extension of a notice

[95] A question which arises is whether a notice of less than 48 hours can be rectified by the giving of another notice that extends it, or whether the first one should simply be withdrawn and a fresh and adequate notice be given. In *SA Clothing & Textile Workers Union v Stuttafords Department Stores Ltd*¹³⁹ two notices of a lock-out were issued by the employer to the union. The first notice was issued at midday on 17 August 1998 and fell short of the required 48 hours. A second notice was then given the following day, 18 August 1998, at 11h23. On its own it also did not give the required 48 hours. The employer argued that the notice requirement of s 64(1)(c) had been complied with in that, ultimately, at least 48 hours' notice of the commencement of the lock-out had been given, as the second notice was an extension of the first one. In fact the employer argued that the result was that the union had received in

¹³⁹ (1999) 20 ILJ 2692 (LC).

excess of the required 48 hours' notice of the commencement of the lock-out.

[96] In support of its contention in this regard, the employer in the *Stuttafords* case relied on Zondo J's judgment in *Transportation Motor Spares v NUMSA & others* (referred to more fully in paragraph 195 *infra*), in particular paragraph 32 thereof. In that case the main issue was whether a second strike notice was required before workers resumed a strike which they had suspended and in respect of which a proper notice had been given prior to its commencement. The Court held that no second notice was required. In paragraph 32 Zondo J had this to say in this regard:

“[32] Also, on the same assumption as referred to in the preceding paragraph, insofar as a sec 64(1)(b) notice is meant to give the employer an opportunity to make whatever arrangements (including hiring replacement labour for the duration of the strike), such purpose would have been served by the single notice given prior to the commencement of the strike. I say this because, if the applicant wanted to make other arrangements for its business in the light of the proposed strike, it would have been able to make those arrangements between the time of the sec 64(1)(b) notice and the day when the strike commenced. In fact it seems that the applicant did make use of the replacement labour because, in the answering affidavit, the shop steward who deposed thereto says, on returning to work on 2 September, the second and further respondents found that there was replacement labour.”

[97] In *Stuttafords* the Labour Court dealt with the issue as follows:

“Although the case of *Transportation Motor Spares v NUMSA* is distinguishable on the facts, the ratio of the judgment is, with respect, correct and likewise applicable to this case. I cannot agree with Mr Steenkamp that each of the notices given by the respondent must be looked at in isolation. The cumulative effect of those notices is such that more than 48 hours’ notice of the commencement of the lock-out was given. The applicant had the opportunity from midday on Monday 17 August until 08h30 on Thursday, 20 August 1998, to reflect on its position and to either accept the respondent’s demand or to prepare itself for a lock-out.”¹⁴⁰

[98] It is not clear how the Labour Court in *Stuttafords* viewed the ratio in Zondo J’s judgment in *Transportation Motor Spares* as helpful in that case, as the two cases dealt with different issues. The ratio of Zondo J’s judgment in that case was simply that, once an adequate notice as required by the statute had been given in respect of the commencement of a strike, there was no obligation, if the strike was temporarily suspended, to give another notice on the resumption of the strike. The issue in *Stuttafords* was whether the giving of the two strike notices ensured that the union had been given 48 hours’ notice of the commencement of the lock-out as required by s 64(1)(c) of the Act.

[99] In *Transportation Motor Spares* only one notice had been given. If the judgment of the Labour Appeal Court in *Ceramic Industries* is correct as to the purposes of a s 64(1)(b) notice – which must be the same in respect of a s 64(1)(c) notice – it is argued that the decision of the Labour Court in *Stuttafords* was, with respect,

¹⁴⁰ *Stuttafords* case at 2698F (par 33 of the judgment).

incorrect. In the *Stuttafords* case the first notice was given on Monday 17 August and the lock-out commenced on Thursday 20 August at 08h30. Although, cumulatively, the two notices gave the employees more than 48 hours, the fact of the matter is that, when the first notice was given, it fell short of 48 hours and was therefore, on its own, fatally defective and invalid. As such the union was entitled to ignore that notice and not to begin to make any decisions or preparations on the basis thereof. It is argued that in law there is no obligation on a party on whom a notice either in terms of s 64(1)(b) or 64(1)(c) has been served to begin to make any plans or to make any preparations for a strike or a lock-out where the strike notice or lock-out notice given is fatally defective. It is argued that a notice that gives less than the required 48 hours is fatally defective.

[100] When the second notice was served, which was at 11h30 on Tuesday 18 August 1998, it also gave the union less than 48 hours' notice. The second notice was also fatally defective. In terms of the Labour Appeal Court's judgment in *Ceramic Industries*, one of the purposes of a s 64(1)(b) notice, and thus, it is argued, of a s 64(1)(c) notice as well, is to give the employer an opportunity to avoid the strike by capitulating or an opportunity to make such preparations for the eventuality of the strike as it may deem necessary in order to protect its business. The idea is that the employer must have at least 48 hours, in the case of a primary strike, before the strike can commence. That is an employer who is not the State. In the case of the State the idea is that the employer must have at least seven days' notice of a strike before it can occur.

In the case of a secondary strike, the idea is that the secondary employer must have at least seven days' notice.

[101] The question that arises is: when can it be said that the notice that the employer has been given is “**48 hours notice of the commencement**” of the strike? Obviously, if some or other notice was given to the employer, there will be a point at which it can be said that the employer had knowledge of the date or time of the commencement of the strike. The determinative question is whether from that point to the date or time of the commencement of the strike, it is a period of at least 48 hours. If it is, the employer has been given at least 48 hours' notice of the commencement of the strike as required by the Act and, accordingly, there has been compliance with the Act. If it is not, the employer has not been given “**at least 48 hours notice of the commencement of the strike**” as required by the Act and, accordingly, there has been no compliance with the Act.

[102] If the test propounded above to determine whether an employer has been given “**at least 48 hours notice of the commencement of**” a strike is applied to the facts in the *Stuttafords* case, it can be seen that there was no compliance with s 64(1)(c), because it cannot be said that there was a period of at least 48 hours during which the employees or the union knew the day or time for the commencement of the lock-out.

[103] In the light of the above it is argued that, as a matter of principle, an extension of a s 64(1)(b) or (c) notice will not be valid and effective unless, after the extension, it is possible to identify a time

when it can be said that, if regard is had to when the strike or lock-out is to commence, or commenced, in terms of the first or the second notice, the recipient had knowledge, or would have had knowledge, of the commencement date or time for a period of at least 48 hours before the commencement of the strike or lock-out. If such a time cannot be identified, then the second purpose of a strike notice or lock-out notice as identified by the Labour Appeal Court in *Ceramic Industries* cannot be achieved and the notice is, accordingly, fatally defective. It is suggested that, where the giver of a notice suspects or believes that the notice is not in compliance with the statute, he should simply withdraw the notice and give a fresh one. In conclusion, and on the assumption that the Labour Appeal Court's decision in *Ceramic Industries* was correct, it is argued that *Stuttafords* was wrongly decided on this point. A subsequent appeal¹⁴¹ to the Labour Appeal Court was upheld on the ground that the Labour Court had lacked jurisdiction to deal with the claim. Accordingly, the Labour Appeal Court did not have to consider the Labour Court's decision on the issue of notice.

[104] Although the test advanced above may be criticised, as can the approach that was adopted by the Labour Appeal Court in *Ceramic Industries*, on the basis that it is rather technical, there is an answer to that criticism. The answer is that, where the Act requires a party to know when the strike or lock-out will commence and to have that knowledge for at least 48 hours before the commencement of the strike or lock-out, there is no other way of dealing with the

¹⁴¹ *Stuttafords Department Stores Ltd v SACTWU* (2001) 22 ILJ 414 (LAC).

matter than by adopting an approach that might seem rather technical.¹⁴²

10. Content of notice

[105] In Zimbabwe¹⁴³ the notice of intention to resort to a “**collective job action**”, as industrial action is referred to in the relevant Act, is required to contain “**the grounds for the intended collective job action**”. Section 7(1) of the Act on Mediation in Labour Disputes of Finland requires the notice of a work stoppage to contain “**an indication of the causes of the projected stoppage or the extension of the stoppage or, the date of its commencement and the scope**”.¹⁴⁴ There is a suggestion that the reference in that Act to a stoppage of work or work stoppage embraces both a stoppage of work as a result of a strike and a stoppage of work as a result of a lock-out.¹⁴⁵ In England¹⁴⁶ the notice is required to contain

- (a) a description of the employees whom the union intends to induce to take part or continue to take part in the industrial action;
- (b) a statement whether the action is intended to be continuous or discontinuous and, where it is to be continuous, the intended date for any of the affected employees to begin to

¹⁴² For a further discussion on issues relating to strike notices, see Zondo “The New Labour Courts” 700-708.

¹⁴³ Section 104(2) of the Labour Relations Act of Zimbabwe.

¹⁴⁴ See Orasmaa “Right to Strike in Finland”.

¹⁴⁵ See Titilnen and Ruponen “Mediation of the Collective Interest Disputes” 21-23.

¹⁴⁶ Section 234A of the Trade Union Reform and Employment Rights Act, of 1993 of England.

take part in the action and, where it is to be discontinuous, the intended dates for any of the affected employees to take part in the action; and

- (c) a statement that the notice is given for the purposes of section 234A of the Trade Union Reform and Employment Rights Act of 1993.

[106] Within the context of English law, Smith and Thomas refer to the requirement of industrial action introduced by the Trade Union Reform and Employment Rights Act of 1993 as one of the most controversial reforms introduced by that Act.¹⁴⁷ These learned authors go on to state that, in terms of that Act, the requirement was that unions should give employers at least seven days' notice of official industrial action. They go on to write:

“The notice must be in writing, must describe ‘so that he can readily ascertain them’ the ‘affected employees’, and must state whether industrial action is intended to be continuous or discontinuous. If the action is to be continuous, the notice must state when it is to start; if intended to be discontinuous (i.e. if the union does not intend to take action on all the days on which it could do so), the notice must specify the particular dates on which it is to take place.”¹⁴⁸

[107] In Australia¹⁴⁹ it would seem that the notice must state the nature of the intended action and the day when it will begin. It seems that in

¹⁴⁷ Smith and Thomas *Smith and Wood's Industrial Law* 609.

¹⁴⁸ *Ibid.*

¹⁴⁹ See s 170 mo(5) of the Workplace Relations Act of 1996 of Australia; see also Colvin and Watson *The Workplace Relations Handbook*.

Australia¹⁵⁰ not much information is required to be contained in the actual notice of action as opposed to the notice initiating the bargaining period in terms of the Workplace Relations Act of 1996. This is understandable because much information is required to be contained in the notice initiating the bargaining period. That a great deal of information might not be required to be included in the notice of industrial action does not mean that such information as is required to be in the notice need not be accurate. On the contrary, Colvin and Watson have this to say in this regard:

“It seems that the content of the notice advising of the intention to take industrial action needs to be drafted with some precision. For instance, the Industrial Relations Court of Australia has held that a notice by an employer to employees of the intention to lock-out such employees which was conditional upon the employees taking industrial action was invalid.”¹⁵¹

[108] In Slovenia the notice of a strike is required to contain the following:

- (a) the workers’ requests or demands;
- (b) the time and date of the beginning of the strike;
- (c) the assembly point of the strikers; and

¹⁵⁰ Colvin and Watson *The Workplace Relations Handbook* 74 par 4.7.2.

¹⁵¹ *Op cit* 75 par 4.7.2. The authors refer to an unreported decision of the Industrial Relations Court of Australia in *Lennie v Hawkes* (Industrial Relations C of A, Marshall J, 472/96, 4 October 1996) in support of this point.

- (d) the setting up of a body representing the workers' interests which will be in charge of the "**steering of the strike**".¹⁵²
This committee would be a strike committee.

In Spain the strike notice must contain the objectives of the strike, the form that the strike will take, the commencement date of the strike, the duration of the strike and the composition of the strike committee.¹⁵³ In Sweden the strike notice is required to contain the extent and nature of the strike action.¹⁵⁴ In Finland the strike notice is required to contain reasons for the intended strike, as well as not only the date but also the time when such strike will take place and the intended scope of the strike.¹⁵⁵

[109] While there may be good reasons in certain countries for the requirement that a statutory strike notice or lock-out notice should contain the grounds or reasons for a proposed industrial action, it may be argued that there certainly would be no justification for that requirement in South Africa, because, prior to the stage of the issuing of a strike notice or lock-out notice, the parties to the dispute will have had much prior interaction between themselves about the dispute. Accordingly, by that stage each party would know exactly why the other party may wish to resort to industrial action. Such party does not need that information to be contained in the notice. At that stage each party wants to know whether the other will resort to industrial action and, if so, when. The statutory

¹⁵² See Novak "Right to Strike in the Republic of Slovenia".

¹⁵¹ See Salmeron and Garcia "Right to Strike in Denmark".

¹⁵⁴ See Kock "Right to Strike in Sweden".

¹⁵⁵ See Orasmaa "Right to Strike in Finland".

provisions relating to notice in South Africa require precisely that in so far as a strike notice and a lock-out notice are concerned. It is only in the case of protest action that the statutory provisions require more information than this.

[110] In South Africa the contents of a strike notice or lock-notice must be such as to give the recipient thereof “**48 hours notice ... of the commencement**” of the strike, or, in the case of a lock-out, of the commencement of the lock-out. The reasons for the strike or lock-out are not required to be given in the notice. The same applies to the notice of a secondary strike. In the case of a protest action the real notice of a protest action, which is the one required by s 77(1)(d) and not the one required by s 77(1)(b), also does not require reasons to be given for protest action. However, that is simply because the notice required by s 77(1)(b) is the one that is required to contain the reasons and nature of the proposed protest action.

[111] There is a noteworthy difference in the wording of the provisions of s 64(1)(b) and (c), on the one hand, and the provision of s 66(2)(b), on the other. The provisions of both paragraphs (b) and (c) of s 64(1) require a “**notice ... of the commencement**” of the strike or lock-out, whereas the provision in s 66(2)(b) requires a “**written notice of the proposed secondary strike at least seven days prior to its commencement**”. The wording in s 77(1)(d) is different from the wording in both s 64(1)(b) and (c), on the one hand, and s 66(2)(b), on the other. The significance of these differences in the wording will be dealt with shortly.

[112] In *Ceramic Industries Ltd t/a Betta Sanitaryware v National Construction Building & Allied Workers Union*(2)¹⁵⁶ the Court held as defective a strike notice which informed the employer that **“a strike shall start at any time after 48 hours from the date of this notice”**¹⁵⁷ on the basis that the notice **“did not give a specific time of the commencement of the strike”**. The Court stated that the purpose of s 64(1)(b) **“is to warn the employer of collective action, in the form of a strike, and when it is going to happen, so that the employer may deal with that situation”**.¹⁵⁸ It further stated that s 64(1)(b) assists in orderly collective bargaining.¹⁵⁹

[113] The Court went on to say that **“(t)he language and purpose of s 64(1)(b) require that a specific time for the commencement of the proposed strike be set out in the written notice”**.¹⁶⁰ The Court added:

“The legislature was anxious that attention be paid to the ‘commencement’ of the strike. The use of an exact time expressed in hours as a minimum of the notice to be given seems to indicate that the longer period envisaged by the phrase ‘at least’ should also be expressed in an exact manner.”¹⁶¹

¹⁵⁶ (1997)18 ILJ 671(LAC).

¹⁵⁷ *Op cit* 673G. In *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union & others* (1) (1998) 19 ILJ 260 (LAC) the notice was that “we give you 48 hours’ notice of the workers’ intent to embark on strike action. The strike will not commence before the expiry of the 48 hours’ notification.. At 267G-H the Court, of which Myburg JP and Froneman DJP, who were also part of the court in *Ceramic Industries*, commented that the notice may have been defective but the point had not been taken.

¹⁵⁸ *Op cit* 676D.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Op cit* 676I.

¹⁶¹ *Op cit* 676J.

The Court went on to say:

“The section’s specific purpose is to give an employer advance warning of the proposed strike so that an employer may prepare for the power-play that will follow. That specific purpose is defeated if the employer is not informed in the written notice in exact terms when the proposed strike will commence.”¹⁶²

[114] The judgment of the Labour Appeal Court in *Ceramic Industries* was handed down in May 1997. It seems that the union involved in the case of *Mediterranean Textile Mills (Pty)Ltd v SACWU & others*,¹⁶³ in the Labour Court, was unaware of the judgment of the Labour Appeal Court in *Ceramic Industries* when it issued a notice with a defect similar to the defect in the notice in the *Ceramic Industries* case. In *Mediterranean Textile Mills* the notice given to the employer was that **“SACWU members who are your employees will go on strike after 48 hours from the time you receive this fax”**.¹⁶⁴ Zondo J held that notice to have been defective on the same basis upon which the Labour Appeal Court had held the notice in *Ceramic Industries* to have been defective.

[115] In *Western Platinum Ltd v NUMSA & others*¹⁶⁵ the notice said, among other things, that **“... we confirm our intention to embark**

¹⁶² *Op cit* 677C.

¹⁶³ Unreported judgment of Zondo J in the Labour Court, case no D 249/98, delivered on 17 June 1998.

¹⁶⁴ *Op cit* par 7 of the unreported judgment.

¹⁶⁵ (2000) 21 ILJ 2502 (LC).

on a strike action in furtherance of our demand. The details of the intended strike are set out hereunder as follows: commencement date: Wednesday 15 March 2000 Time: on or before 15:00". The notice in that case had been "**forwarded**" by the union to the employer and it bore the date of 9 March 2000. This means that the notice was written at least six days before the proposed date of the commencement of the strike. It is not clear when the employer received the notice. The Labour Court, through Waglay J, held that the notice informed the employer of the exact time of commencement of the proposed strike when it said that the date of the commencement of the strike was 15 March and the time was "**on or before 15:00**". The learned Judge distinguished that notice from the notice in the *Ceramic Industries* case on the basis that, in the *Ceramic Industries* matter, no date had been given of the commencement of the strike, whereas in this one a date for the commencement of the strike was given. It seems that the Judge did not regard the words "**on or before 15h00**"¹⁶⁶ as constituting non-compliance with the statutory provision.

- [116] It would not constitute compliance with the provision of s 64(1)(b) for a notice to state that the strike would commence as soon as possible after a given date, even if such date were to be more than 48 hours later than the time of the receipt of the notice. However, it is argued that it would constitute compliance with the statute for a notice to state that the strike will commence "**on the first Monday of next month**", provided that there is a period of at least 48 hours between the time when the employer receives such notice and "**the first Monday of next month**". It is suggested that it would not be

¹⁶⁶ *Op cit* par 4.

compliance with the statute for a notice to say that the strike will commence “**within 48 hours**” of receipt of such notice. Such a notice would not give the employer at least 48 hours’ notice of the commencement of the strike. It would give the employer less. Such a notice would also fail to specify the time for the commencement of the strike and would, according to the decision of the Labour Appeal Court in *Ceramic Industries*, fall foul of s 64(1)(b) for that reason too.

[117] With regard to the notice requirement applicable to a secondary strike, the statute does not require that the notice given be a notice of the commencement of the secondary strike. It only requires that the secondary employer, or the employers’ organisation, as the case may be, must have “**received written notice of the proposed secondary strike at least seven days prior to its commencement**”. It would be reasonable to suggest that the drafters of the Act deliberately chose a different wording for the provisions of s 64(1)(b) and (c), on the one hand, and those of s 66(2)(b), on the other, and that, therefore, if in s 64(1)(b) and (c) the drafters intended the exact time for the commencement of a strike and lock-out to be specified, the same was not intended, or could not have been intended, in respect of a secondary strike in terms of s 66(2)(b).

[118] In support of such a construction it is argued that, if the drafters had intended that in both cases the notice should specify the commencement of the strike, they would have used the same wording in both sections. However, this approach is not without difficulty. If the harm that a strike can cause to the business of a

primary employer when resorted to without notice of its commencement was such as to move the drafters to decide that there had to be notice of the commencement of a strike before a strike could be resorted to, would that same argument not have applied a fortiori in the case of a secondary strike which is against an innocent third party to a dispute? It is argued that that argument is stronger in the latter case and that, if there were good grounds to justify such a requirement in regard to a primary strike, there are even stronger grounds for such an approach in respect of a secondary strike. However, the current position is that s 66(2)(b), worded differently as it is, does not require the notice to specify the date or time of commencement of the secondary strike. All that s 66(2)(b) requires, in so far as notice is concerned, is that the employer be informed that a secondary strike is to be resorted to, but that, once that notice has been given, the secondary strike cannot commence earlier than seven days after such notice has been given.

- [119] It is suggested that the test to determine whether the notice of a secondary strike complies with s 66(2)(b) is whether, when the secondary strike commences, it can be said that the secondary employer has, in the words of s 66(2)(b), “**received written notice of the proposed secondary strike at least seven days prior to its commencement**”, which is consistent with the approach adopted by the Labour Court in *Stuttafords* with regard to a s 64(1)(c) notice. It is argued that, while the language of s 64(1)(c) might not allow for such an approach in relation to a lock-out notice (which can also be said of a strike notice in terms of s 64(1)(b), s 66(2)(b) is worded in a manner which allows for such an approach.

Accordingly, the notices in *Ceramic Industries* and *Western Areas* would have sufficed under s 66(2)(b). The purpose of the notice requirement of s 66(2)(b) is to alert the secondary employer to the intention to resort to a secondary strike and to give him a minimum of seven days before the secondary strike can commence. During that seven-day period the secondary employer can do one of two things, or both, depending on what he wants to achieve. If he wants to avoid or prevent the materialisation of the secondary strike, he can, if he is able to, try to put pressure on the primary employer to settle the primary dispute, or he can take the necessary steps to reduce the likely impact of the secondary strike on his business, such as by hiring temporary replacement labour.

- [120] It is argued that the contents of a primary strike notice and a lock-out notice must be such that the notice is clear, unequivocal and unconditional. With regard to unconditionality, there is only one condition that can be put in a notice – that is, that the primary strike will be resorted to or will commence only if the employer has not by the given date acceded to the employees' demands, or that the employer will institute the lock-out referred to in the lock-out notice if the employees have not by the given date accepted his proposals or demands. That condition need not really be stated in a strike notice or lock-out notice because the whole idea of industrial action is predicated upon there being no capitulation by the other party to the dispute or there being no settlement of the dispute. If there is capitulation or if the dispute is settled before the date of the commencement of the strike or lock-out, the right to proceed with industrial action will be lost and any industrial action thereafter would be unlawful and unprotected.

[121] The condition referred to above is different from other conditions.

If any condition were put in a primary strike notice or lock-out notice other than the one just discussed, the notice would be defective and would not constitute compliance with s 64(b) or 64(1)(c). A good example of a condition that would render a s 64(1)(b) or s 64(1)(c) notice defective for its conditionality would be one that reads thus:

“This is to notify you that members of this union employed by you will commence a strike on the 1st June provided that the executive committee of the union approves of such a course of action at its meeting on the 31st May.”

In such a case the commencement of the strike on 1 June is dependent upon the decision of the executive committee to be taken the day before the commencement of the strike. Quite apart from the conditionality of the notice, there is also the fact that the notice is also not unequivocal, because whether the executive committee will pass a resolution in favour of or against the proposed strike is not known. The employer would not know whether to prepare or not to prepare for a strike. By the same token a lock-out notice would be defective if it informed the workers thus: “You will be locked out on 1 June provided that the Board of Directors approves of such a course of action at its meetings scheduled for 31 May”. The above holds true not only in respect of a notice of a primary strike and lock-out, but also in respect of the notice of a secondary strike and of a protest action.

[122] It is argued that, subject to what has been said above, the clarity, unequivocality and unconditionality required of a primary strike notice and a lock-out notice are the same as the clarity, unequivocality and unconditionality required of a notice of termination of a contract.¹⁶⁷ In *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd*¹⁶⁸ it was held that, in order to be effective, a notice of termination of a contract must be clear and unequivocal.¹⁶⁹ In *Putco Ltd v TV Trade Guarantee Co (Pty) Ltd*¹⁷⁰ that statement was approved.¹⁷¹ In this regard it is interesting to note that Colvin and Watson¹⁷² refer to a judgment, namely *Lennie v Hawkes*,¹⁷³ which, based on what these authors say, would support this proposition. These authors write in part:

“It seems that the content of the notice advising of the intention to take industrial action needs to be drafted with some precision. For instance, the Industrial Relations Court of Australia has held that a notice by an employer to employees of the intention to lock-out such employees which was conditional upon the employees taking industrial action was invalid.”¹⁷⁴

¹⁶⁷ See in this regard *Transport and Allied Workers Union & others v Natal Co-operative Timber Ltd* (1992) 13 ILJ 1154 (D).

¹⁶⁸ 1984 (1) SA 443 (W).

¹⁶⁹ *Op cit* 452.

¹⁷⁰ 1985 (4) SA 809 (A).

¹⁷¹ *Op cit* 833E. See also *Ponisann & Another v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A) at 358G and *Rycroft and Jordaan A Guide* 71, all of which authorities were referred to by McCall J in *Transport and Allied Workers Union & others v Natal Co-operative Timber Ltd* (see fn 167).

¹⁷² Colvin and Watson *The Workplace Relations Handbook* 75 par 4.7.2

¹⁷³ Industrial Relations C of A, Marshal J, 472/ 96 dated 4 October 1996.

¹⁷⁴ See Colvin and Watson *The Workplace Relations Handbook* 75 par 4.7.2.

[123] The Act does not expressly provide that the notice must specify which employees will participate in the proposed strike or secondary strike or protest action. However, if the judgment of the Labour Appeal Court in *Ceramic Industries* was correct as to what the purposes of a strike notice under s 64(1) are, then it may be argued that the employees who will participate in the strike must at least be identifiable. If the notice does not identify such employees or does not give an indication as to who they are, it may be difficult in certain circumstances for the employer to be able to do what the notice is meant to give him an opportunity to do. In that way the purposes of, for example, the notice provided for in s 64(1) may be defeated.

[124] If an employer operates its business in one place and there is one union which enjoys 100 percent membership in the workplace and there is a dispute about a wage increase for all the employees, it would be easy for the employer if it were given notice of the commencement of a strike with no names of the would-be participants in the strike to make preparations on the basis that all the workers will participate in the strike because they all belong to the union issuing the notice and are all directly affected by the dispute. However, it may be difficult for the employer to tell which employees will participate in the strike if there are two or more unions and the dispute directly affects only some of the employees and not all, or the employer has many sections or departments within the workplace or operates its business from different depots in different cities or even different provinces in the country.

[125] In *Afrox v SACWU & others (1)*¹⁷⁵ it was held by the Labour Court that where there is a dispute that only directly affects employees based in one branch of a company and such employees embark upon a protected strike, employees of the same employer based in another branch or depot may join the strike after it has been going on in the first mentioned branch. It is argued that in such a case no additional strike notice need be given before the employees in the second branch may join the strike. A strike notice would ordinarily have been given before the employees based in the first branch commenced the strike. In this regard it is appropriate to have regard to Zondo J's words in *Afrox v SACWU & others (1)* where he said:

“In general, where a dispute exists between a union and an employer, the union is entitled to call out on strike all its members employed by that employer wherever they may be so as to bring the full might of its members to bear on the employer in order to pressurize it to agree to the union's demands. This is one of the benefits which a union has in mind when it recruits members, namely that the more members it has the stronger its muscle will be. To say that a union may not resort to calling out on strike all its members employed by an employer against whom it has a dispute so as to end the dispute is to deny it one of its very important weapons. For a conclusion to that effect to be arrived at there would have to be an express or necessarily implied provision in the Act either taking away such a right or limiting such a right. In the new Act generally and chapter IV in particular including s 64 which grants ‘every employee’ the right to strike and s 65 which deals with limitations on the right to strike I am unable to find such a provision and I was not referred to any.”¹⁷⁶

¹⁷⁵ *Afrox Ltd v SACWU & others (1)* (1997) 18 ILJ 399 (LC).

¹⁷⁶ *Afrox Ltd v SACWU & others(1)* (1997) 18 ILJ 399 (LC) at 404J-405B.

[126] In a case such as *Afrox* an employer who receives a strike notice might think that the only employees who will participate in the strike referred to in the strike notice will be those who are directly affected by the dispute or those in a particular branch, unless the contrary is expressly stated in the notice or is implied in the notice. Accordingly, he might, after receiving the strike notice, limit his arrangements for temporary replacement labour to one branch or depot. If the employees that he thought would go on strike are based in his Durban branch, such an employer may be shocked if he were to discover on the date of the commencement of the strike that the employees in his branches in Cape Town, Johannesburg, Bloemfontein and Kimberly are also participating in the strike, or if those branches later join the strike. If it is accepted that one purpose of the notice is to ensure that the employer is not taken by surprise, then, surely, a strike notice that does not at least alert him to the fact that employees based in all of those other branches will also take part in the strike must be defective. It can be argued that the notice need not give a list of the names of the employees who will participate in the strike, provided that such employees are at least reasonably identifiable. Otherwise, the purpose of the section may be completely defeated.

[127] Indeed, if in the Durban branch of the company there is a dispute concerning a few cleaners, the employer would be surprised if, after a strike notice has been served upon him, he were to establish on the day of the commencement of the strike about such a dispute that the clerical staff and even supervisors and some middle management personnel based in Johannesburg and Cape Town

were also taking part in the strike. The employer would ordinarily not have foreseen that employees at such levels and based so far away from Durban, and who are not directly affected by the dispute, would take part in the strike referred in the strike notice. And yet, all such employees would be fully within their right to take part in such a strike if they so wished.

[128] In the light of all of the above it is argued that the contents of a strike notice provided for in both s 64(1)(b) and (d) in respect of a primary strike, and in s 66(2)(b) in respect of a secondary strike, must either identify the employees who will go on strike or must be such that such employees are reasonably identifiable. If that is not the case in respect of a notice, the notice will be defective. This might not apply to a lock-out notice as provided for in s 64(1)(c) of the Act, because the definition of a “**lock-out**” seems to be such that an employer is entitled to subject to a lock-out only those employees who can accept his demands or proposals and not those who are in no position to accept his demands or proposals.

[129] In the Act a lock-out is defined as meaning

“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.”¹⁷⁷ (Underlining supplied).

¹⁷⁷ See s 213 of the Act.

The use of the article “**the**” just before the word “**employees**” seems to be a reference back to the first “**employees**” in the definition. If that is correct, as it seems to be, then, since the first “**employees**” refers to the employees that the employer excludes from the workplace, the employees who are excluded from the workplace must be employees whose exclusion is effected for the purpose of being compelled to accept the employer’s demands.

- [130] If there is a dispute that only directly affects his employees based in his Durban branch and who belong to a certain occupational class, the employer cannot, it seems, exclude employees based in his Cape Town branch or Johannesburg branch from their workplaces, because such employees are in no position to accept the employer’s demands in respect of the employees based in the Durban branch. Even if they were to purport to accept such demands, the dispute would not be resolved if the employees based at the Durban branch refused to accept the employer’s demands or proposals. It is not necessary to express a definitive view on the point whether an employer is entitled to subject to a lock-out not only the employees in his Durban branch who are directly affected by the dispute, but also his employees in his Cape Town and Johannesburg branches who are not directly affected by the dispute. However, it is conceivable that, where the employees based in the Durban branch are members of a particular union which represents the employees not only in the Durban branch but also those in the Cape Town and Johannesburg branches, in principle it may well be quite unfair to the employer to suggest that he may not subject to a lock-out the employees based in the Cape Town and Johannesburg branches so as to bring pressure to bear

upon the union to settle the dispute affecting its members in the Durban branch on the terms and conditions acceptable to the employer.

[131] The need for the employees who will go on strike to be identified or at least to be identifiable is even greater in the case of a secondary strike. The reason for this is that, unlike the primary employer in the primary strike, the secondary employer might not have had the benefit of prior interaction with the issuer of the secondary strike notice concerning the primary dispute. For that reason he might, therefore, be completely in the dark as to not only what the primary dispute is all about, but also as to which employees are covered by the strike notice and, therefore, will take part in the secondary strike. If he operates his business from many branches or depots and the secondary strike notice does not inform him as to which branches or depots will be affected, the purpose of the secondary strike notice might be defeated. It is, therefore, argued that the notice of a secondary strike must either identify the secondary employees who will take part in the secondary strike, or at least such employees must be identifiable from the contents of the notice, failing which the notice will be defective.

11. Timing and computation of notice period

[132] Anyone who has to give notice of industrial action, be it a strike, a secondary strike, or a protest action, needs to know how the prescribed notice is to be computed or reckoned and when the notice periods can start running and when they can end. In this section the different issues relating to the timing and computation

of the notice periods which arise will be dealt with. The notice period in respect of a primary strike where the State as an employer is not involved is expressed in terms of hours. The notice periods in respect of a secondary strike and a protest action are expressed in terms of days. The notice period in respect of a strike where the state is involved as employer is expressed in days just like the notice periods for a secondary strike and protest action. It is convenient to start with a discussion of the notice periods expressed in days and to follow up later with the one expressed in hours.

In respect of a secondary strike and protest action

[133] The secondary strike notice prescribed by s 66(2)(b) of the Act is a **“written notice of the proposed secondary strike”** which the secondary employer must have **“received” “at least seven days prior to its commencement”**. The provisions relating to a notice for protest action, namely s 77(1)(d) of the Act, require that **“at least 14 days before the commencement of protest action, the registered trade union or federation of trade unions [must have] served a notice on NEDLAC of its intention to proceed with the protest action”**. What is common with both notice periods is that they are expressed in terms of a certain number of days before or prior to the commencement of the secondary strike or the protest action, as the case may be. The first question which arises is whether Saturdays, Sundays and public holidays must be taken into account when these notice periods are computed.

[134] The Act does not have a definition for the word “**day**”. Accordingly, that word must be given its ordinary meaning. It would seem that the ordinary meaning of the word “**day**” is “**one of the twenty-four hour periods between one midnight and the next**”. Another meaning that may be given to the word “**day**” may be any period of 24 consecutive hours irrespective of when the first hour begins. Section 4 of the Interpretation Act 33 of 1957, which deals with the reckoning of the number of days when a statute refers to a number of days, provides that “(w)hen any particular number of days is prescribed for the doing of any act, or for any purpose, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day happens to fall on a Sunday or any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday”. What s 4 does not do is to define the word “**day**” in order to clarify whether the expression “**the first day**” refers to the period of 24 hours from any time of a day or night, or whether it refers to a day as it begins from one midnight to the next.

[135] What seems to be clear with regard to the notice of a secondary strike and of a protest action is that, since there is no express provision in the Act to the effect that the word “**day**” (as used in s 64) excludes Saturdays, Sundays and public holidays, it must be accepted that those days are included and must be taken into account. That would be the general rule. That general rule accords with the general rule that s 4 of the Interpretation Act creates which has the effect that Saturdays, Sundays and public holidays are, generally speaking, to be taken into account. Section 4 is also to

the effect that the first day, irrespective of whether it is a business day or public holiday, Saturday or Sunday, is excluded, but the last day is included. However, with regard to the last day, s 4 provides an exception to the general rule if the last day falls on a Sunday or public holiday. Section 4 provides that, if the last day of a period falls upon a Sunday or public holiday, **“the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday”**.

[136] The general understanding of the exception to the general rule provided for in s 4 of the Interpretation Act is that what is excluded in the reckoning of days where the last day of the period concerned falls on a Sunday or on a public holiday, is the Sunday or the public holiday on which the last day falls and the first day. But, is that correct in the light of the fact that s 4 refers to **“every such Sunday or public holiday”**? In other words, is the position not that what is required to be excluded is not only the Sunday or public holiday on which the last day falls and the first day, but also **“every such Sunday or public holiday”** which falls within the period that is being reckoned?

[137] This question arises because of the fact that s 4 refers to **“every such Sunday or public holiday”**. Why was it necessary for the drafters to say **“every such Sunday or public holiday”** instead of simply saying **“such Sunday or public holiday”** if what they meant was that only the first day and the Sunday or public holiday on which the last day of the period in question falls are excluded and not other Sundays or public holidays that happen to fall within the period in question. The use of the word **“every”** before the

words “**such Sunday or public holiday**” introduces some ambiguity to the provision. The word “**every**” should have been omitted. The reference should only have been to “**such Sunday or public holiday**”. The use of the word “**every**” suggests that what is contemplated is not a single Sunday or public holiday but all Sundays or public holidays, as the case may be, falling within the period in question. On such construction the period would be extended by more than just two days (i.e. the last day and the first day in terms of the last part of s 4) if the last day of the period fell on a Sunday or public holiday, because every Sunday or every public holiday falling within the period in question would, depending upon whether the last day fell on a Sunday or on a public holiday, be excluded. However, on the construction referred to earlier, the period is extended only by only two days, namely the first day and the last day.

- [138] It is difficult to see what the rationale would be for the proposition that, simply because the last day of the period happens to fall on a Sunday or public holiday, then all other Sundays or public holidays within the period in question must be excluded. This is said despite the full awareness that the last part of s 4 is to the effect that the first day must also be excluded in addition to the last day if the last day of the period falls upon a Sunday or public holiday. The rationale for the proposition that the Sunday or public holiday on which the last day of the period falls is excluded must be, it is suggested, that that is the last day for something to be done, failing which the right to such thing or the right to do such thing is lost, and, since such day is a Sunday or public holiday, whatever needs to be done cannot be done because it is not a working day. Hence

the period must be extended to enable such thing to be done. It is accepted that that should have been enough to justify an extension by one day. It is not clear why the first day must also be excluded with the result that the period is extended by two days. As far as other Sundays or public holidays are concerned, the rationale for them not being excluded would be that there will have been other days after such Sundays or public holidays on which the person concerned would have had an opportunity to do what he was required to do and, if he did not do it, he cannot be heard to complain that, because of such Sunday(s) or public holiday(s), he could not do what he was required to do within the stipulated period.

[139] In those circumstances it is argued that the word “**every**” as used just before the words “**such Sunday or public holiday**” in s 4 of the Interpretation Act is superfluous and is no sufficient basis to justify the construction that every Sunday or public holiday, as the case may be, that falls within the period should be excluded in the reckoning of a period in days where the last day of such period falls upon a Sunday or public holiday.

[140] If the correct construction of the last portion of s 4 of the Interpretation Act is the one in terms of which only the first day and the Sunday or public holiday on which the last day of a period falls are excluded if the last day of the period falls upon a Sunday or public holiday (“**the two-day construction**”), the implications of s 4 in respect of the notice periods for industrial action are simple and straightforward. They are that:

- (a) where a 48-hour notice of a strike or lock-out issued in compliance with the provisions of s 64 of the Act expires on a Sunday or public holiday, that is the day on which it expires and, simply because it expires on a Sunday or public holiday, does not mean that that portion of the 48-hour period which falls on the Sunday or public holiday gets moved to Monday or the following business day. This is different from a situation where the period is stipulated in terms of days, because, in such situation, s 4 applies. Section 4 does not apply to a situation where the period is not stipulated in terms of days; hence its non-application to the 48-hour period required by s 64 of the Act in regard to notice of a strike or lock-out.
- (b) Sec 66(2)(b) of the Act requires a seven-day notice to be given before the commencement of a secondary strike. If the last day of such seven-day period falls upon a Sunday or a public holiday, the first day and the Sunday or public holiday on which the last day of the period falls do not count. In such a case the last day of the notice will be the Tuesday if such Tuesday is not a public holiday. If such Tuesday is a public holiday, it stands to reason that the last day of the notice will then be the Wednesday. This is so because it is clear that the principle embodied in the last portion of s 4 of the Interpretation Act is that the last day of a period calculated in days within which something must be done is required not to be a Sunday or a public holiday and, if it is, the first day and such Sunday or public holiday do not count. Accordingly the period gets extended by two

days. If the last day falls on a Saturday and such Saturday is a public holiday, the last day of the notice period would be moved, not to the Sunday but to the Tuesday if such Tuesday is not a public holiday. This is because the period gets extended by three days, namely the first day, the Saturday, which is a public holiday, and the Sunday because the last day cannot be a Sunday.

- (c) Subject to changes required by the context, what has been said in (b) above in regard to a seven-day notice in regard to a secondary strike applies with equal force to the 14-day notice required by s 77(1)(d) of the Act in regard to protest action.

[141] If the correct construction of the last part of s 4 of the Interpretation Act is the construction that contemplates that it is not just the Sunday or public holiday on which the last day of a period falls and the first day of such period that get excluded if the last day falls upon a Sunday or a public holiday, but all other Sundays or public holidays, as the case may be, that fall within the period, the implications of the last part of s 4 on the notice periods required by the Act in regard to industrial action are that

- (a) the 48-hour notice for a strike or lock-out required by s 64 of the Act is not affected because that period is stipulated in terms of hours and not days.
- (b) the seven-day period for a notice required by s 66(2)(b) of the Act in regard to a secondary strike and the 14-day

period for a notice for a protest action required by s 77(1)(d) of the Act are affected by the last part of s 4.

- (c) if the last day of a seven-day strike notice or lock-out notice falls on a Sunday or public holiday, that Sunday or public holiday, and any other Sunday or public holiday, as the case may be, that falls within the period in question is excluded in addition to the first day of the period; in such event the notice period is extended by the number of such excluded days.

- (d) if the last day of either a seven-day notice period or a 14-day notice period falls on a Saturday and such Saturday is a public holiday, the last day of the notice period is moved forward to Tuesday, but, if the Tuesday is a public holiday, the last day is moved to Wednesday. This is all because the first day of the period gets extended as dictated by the last part of s 4 of the Interpretation Act. It is also because it is a public holiday and is the last day of the period. Furthermore the period cannot be extended to Sunday because, in terms of s 4, the last day of a period calculated in days cannot be a Sunday. So the period gets moved to Monday, but because the first day of the period must be excluded whenever the last day falls upon a public holiday or Sunday, then another day must be added. This then takes the period up to the Tuesday of the following week that ended on the Saturday which was otherwise going to be the last day.

[142] The fact that, as a general rule, public holidays, Saturdays and Sundays must be taken into account in the reckoning of the various notice periods required by s 64 of the Act in respect of strikes and lock-outs, by s 66(2)(b) in respect of secondary strikes and by s 77(1)(d) of the Act in respect of protest action, has certain implications for the requirement of notice for industrial action. Those implications are

- (a) as the law presently stands, a trade union is able to ensure that, when it gives an employer a 48-hour notice of the commencement of a strike in terms of s 64 of the Act, the employer is hampered as much as possible in seeking temporary replacement labour before the commencement of the strike; a union would do this by ensuring that the 48-hour notice is served on the employer just before closing time on Friday afternoon or early evening, for example 17h00, because, in such a case, the 48-hour period would expire at 17h00 on Sunday and over Saturday and Sunday the employer would find it very difficult to secure temporary replacement labour to do work on Sunday night or on Monday morning when the operations resume after the intervention of the weekend.
- (b) the position becomes even worse for the employer if either Saturday or Monday is a public holiday. If Monday is a public holiday and a 48-hour notice for a strike or lock-out is served on the employer or the union, as the case may be, at some stage on Saturday the entire notice period will be during non-business days from start to finish. The question

that arises in a situation such as this is: to what extent is a strike notice or a lock-out notice that runs either entirely or substantially on non-working days able to serve its purposes articulated by the Labour Appeal Court in the *Ceramic Industries* case?

- (c) an employer may do to a trade union or to employees in relation to a lock-out notice exactly what paragraphs (a) and (b) above suggest a trade union can do to an employer in regard to a strike notice.
- (d) the party giving notice can ensure that the notice period does not in effect extend to more than seven days, in the case of a secondary strike notice, or more than 14 days in the case of a protest action; to achieve this, the party giving notice would have to ensure that the last day of the seven-day or the 14-day notice period, as the case may be, is not a Sunday or a public holiday.
- (e) in a seven-day notice period there will always be a Saturday and a Sunday, which means that, at least, the notice will in effect be five court days or business days. Where there is one public holiday or there are two public holidays during the notice period falling during business days, the notice period will in effect be even shorter in terms of business days.
- (f) in a 14-day notice period there will always be two Saturdays and two Sundays; accordingly, the notice period

will in effect be a notice of 10 court days or business days unless there is one or more public holidays within that period, in which case the notice period will be even shorter in terms of business days or court days.

- (g) a party can serve a notice on another party on a Saturday or Sunday or public holiday where service is effected by the handing of the notice over to such party. A good example of such a case is where the employer is a natural person and the notice is handed over to him or her personally, or where such a notice is personally handed over to the right official of an employers' organisation. The right official of an employers' organisation would be the person that the organisation has designated as the correct official to receive such notice on behalf of the organisation or an official that represents such organisation in its dealings with the party seeking to serve notice or a director of a company or a member of a close corporation or the general secretary or the president or chairperson of a union.

[143] It is true that, where a notice is served on a non-business day such as a Sunday or a public holiday, the party being served with notice might not be able to begin to make arrangements for, for example, temporary replacement labour, in the case of an employer, because of the notice being served on a public holiday or on a non-business day. It may be argued that public holidays and other non-business days such as Saturdays and Sundays should not be taken into account in the computation of the notice periods required by ss 64, 66(2)(b) and 77(1)(d) of the Act. It is suggested that if a notice is

served on a Sunday or public holiday or on a non-business day, the period must be reckoned from the first business day thereafter. This argument would make sense, but it would lack a textual basis in the light of the Act as it currently stands.

[144] Where a notice is sent to a party by post or where it is dropped in the post box either at the business premises or at the residence of the right official of a company or union or other organisation on a public holiday or on a non-business day such as a Sunday, the notice period should, it is argued, be deemed to commence running from the following business day. The basis for this proposition is that, in a case where the notice is dropped in the post box either at the business premises or at the relevant official's residence on a public holiday or on any non-business day such as a Sunday, there would ordinarily be no basis to think that the notice would come to the attention of the relevant official, or of anybody for that matter, prior to the next business day. When the business premises are closed, or, in the case of a notice deposited in the post box at the gate of the residence of the employer or of the right official of the organisation, there would be no reasonable basis for thinking that such official would check his post on a public holiday or on a non-business day, because, normally, no mail arrives on a public holiday or on a Sunday. Accordingly, such official cannot reasonably be expected to become aware of the notice until the next business day. To expect otherwise would be without any justifiable basis. It is trite that, as a general rule, notice does not take effect until it has come to the attention of the addressee. For that reason the notice that is dropped in the post box at the gate of the business premises on a Sunday or on a public holiday or on a

non-business day or at the post box at the gate of an official's residence on a Sunday or on a public holiday would take effect at the earliest on the next business day when the party concerned sees the notice or can reasonably be expected to see such notice.

In respect of a primary strike and a lock-out

[145] The next question that needs to be dealt with is the timing and computation of the 48 hours' written notice of the commencement of a strike or lock-out contemplated by s 64(1)(b) and (c) of the Act. The first point that needs to be made with regard to the computation of 48 hours is that, where the document containing the notice is given to a messenger to deliver by hand or where it is handed over to a courier company to deliver to the recipient or where the notice is sent by post, the period of 48 hours does not begin to run when the notice is handed to the messenger, to the courier company or when it is posted in the post office. Notice is given when it is received by the recipient. Whether it is delivered by the sending party's messenger or by a representative of a courier company, notice would be given when such messenger or representative hands it over to the recipient.

[146] If the notice is handed over to a representative or an employee or official of the intended recipient or recipient organisation, and that official does not, owing to negligence or inefficiency or by design, bring the notice to the attention of the official who deals with such matters in the organisation or delays in doing so, the notice begins to run immediately. It does not only begin to run when it gets to the official who deals with such matters. It would be untenable to

suggest that in such a case the notice does not start to run until it has been received by the right official, because that would be prejudicial and unfair to the sender of the notice who has no control as to when the right official is handed the notice by his colleagues or staff and cannot do anything about the incompetence, inefficiency and internal politics of such office. For that reason, it would be unfair to visit the consequences of the incompetence or inefficiency or maladministration of the recipient party's office or staff on the innocent party.

[147] Another question that arises with regard to the computation of 48 hours is whether, if the notice is given to the recipient at a time other than at the commencement of an hour, for example if it is given at 10h30 as opposed to 10h00, the first hour starts to run from such a time or whether it runs from the commencement of the next hour. It is argued that in practice it is highly unlikely that this would create a problem, because a party seeking to commence industrial action is unlikely to want to start industrial action at exactly the expiry of the 48 hours. However, there is no reason why it cannot start to run immediately after the notice has been given to the recipient party. The next question concerns the timing and computation of the 48 hours in the context of weekends and public holidays.

[148] If a party were to deliver to the other party a 48-hour notice at knock-off time or at a time when the recipient business or union or organisation is closing for the day, for example at 16h30 or 17h00, whatever the closing time may be, or a few minutes before closing time on, say, a Wednesday, does the notice run after hours

throughout the night or does it only begin to run when the recipient business, union or organisation reopens for business or for its normal activities the next business day?

[149] If the answer is that the notice period does run after hours or during the hours that fall in the evening, night or dawn, this would mean that, for example, a business or organisation or union that opens at 08h00 and closes at 17h00 will in effect not have 48 hours to try to prevent the industrial action or to try to prepare for the eventuality of industrial action or to do whatever is necessary to mitigate the possible effects on itself of the proposed industrial action, but will have 48 hours less the hours between 17h00 and 08h00. This is so because, during the hours falling between 17h00 and 08h00, it might be difficult for, say, an employer to use that period to look for temporary replacement labour. However, it is true that that period can be used for further negotiations aimed at a settlement of the dispute so that the industrial action can be avoided. South African practice is such that there are many negotiations that employers and trade unions hold after hours, sometimes round the clock and over weekends.

[150] If, however, the period between 17h00 and 08h00 should not be taken into account, that would be fair to the recipient organisation, but, then, it might mean that in effect the notice given to the recipient party is not 48 hours but over 60 hours, since the period falling after hours can be used for further negotiations. This approach would in effect extend the notice period far above 48 hours, whereas the other approach would in effect shorten the notice period to far less than 48 hours.

[151] It is argued that the correct position is that the hours falling between 17h00 and 08h00 must be taken into account. None of the two approaches referred to above is without its own elements of unfairness to the one or other party, but the approach in terms of which those hours are taken into account seems simpler, more certain and easy to implement.

[152] Another question is whether the 48 hours' notice can be given on a public holiday, a Saturday or on a Sunday. In a case where the employer is a natural person and the notice is given to him personally on a public holiday, a Saturday or a Sunday there can, subject to certain practical difficulties that will be dealt with shortly, be nothing wrong with a 48-hour notice of industrial action being given to a party on a public holiday, a Saturday or a Sunday. The only difficulty is the extent to which the fact that the notice is given on a public holiday or a Saturday or Sunday can undermine one of the purposes of a strike notice under s 64(1)(b) as articulated by the Labour Appeal Court in *Ceramic Industries*.

[153] In *Ceramic Industries* the Labour Appeal Court held that one of the purposes of a strike notice is to enable the employer to take steps such as the employment of temporary replacement labour in order to protect its business interests during the strike. If a strike notice is given to the employer at 17h00 on Friday afternoon, the period of 48 hours will lapse at 17h00 on Sunday afternoon. When the business opens at 08h00 on Monday morning, the workers would commence with their strike. The question that arises is: where is the employer expected to find temporary replacement labour on a

Saturday and a Sunday? In the case of most employers, the answer is: nowhere!

[154] In the light of the above it would, therefore, seem that, if the 48-hour notice prescribed by s 64(1) is given after hours on Friday and expires on Sunday, one of the purposes of such notice is likely to be undermined, if not defeated. In the case of a secondary strike notice or a strike or lock-out notice where the State as an employer is involved, or in the case of the notice of a protest action, the practical difficulties arising from the fact of such notices being given over a weekend are not as serious as in the case of a 48-hour notice. This is because those notices cannot be given in such a way that the entire period that they take consists of non-business days such as Saturday and Sunday. As the example given earlier illustrates, with a 48-hour notice, the entire notice period can fall on a weekend. It would be worse were a union to serve a 48-hour strike notice on, for example, the human resources director of a company on a Friday evening, say at 19h00, which states that a strike will start at 08h00 on Monday morning. In that event the employer's prospects of securing temporary replacement labour before the commencement of the strike would be extremely limited, if not non-existent.

[155] To give another scenario, imagine that the employer is a company that has shift workers who must start a shift at 18h00 on Sunday evening and work up to 06h00 on Monday morning. If a 48-hour strike notice is given to the human resources manager or director or other responsible official at 18h00 on Friday evening which is to the effect that a strike will commence at 18h00 on Sunday evening,

it will be even more difficult for the employer to obtain temporary replacement labour that can start working at 18h00 on Sunday evening when the strike commences. In such circumstances one of the purposes of a strike notice is likely to be defeated.

[156] Where the notice is served on a public holiday, say at 08h00 on a Wednesday and Thursday is not a public holiday, a 48-hour notice will expire at 08h00 on Friday morning. In that case the employer will in effect have half the business hours that he otherwise would have had which he can use to try to secure temporary replacement labour. While this scenario is also unsatisfactory, it is better than the scenario where a 48-hour notice is given on a Friday evening to expire on Sunday evening.

[157] The present provision relating to 48 hours' notice allows a union or workers to give notice in such a way that the employer cannot prepare for the eventuality of a strike. However, it is not only the employer that can be given a 48-hour notice in such a way that he cannot prepare for the eventuality of industrial action. A union or the workers can also be given a 48-hour lock-out notice by an employer in such a way that the union will not have time to take the necessary steps to avoid the lock-out. This would happen if, for example, an employer were to give a 48-hour lock-out notice to a union at 18h00 on Friday evening when the union will no longer be able to have discussions with the workers about what should be done about the notice until 08h00 on Monday morning when the lock-out commences. At the time of the service of the lock-out notice on the union, the workers will have knocked-off and gone home for the weekend and it will be impossible for the union to

advise the workers of the lock-out notice over the weekend and to discuss with them whether they should capitulate in order to avoid the lock-out or try to negotiate a settlement on some other terms or should take steps to try to mitigate the effects of the proposed lock-out on the workers.

[158] It is recommended that the Act should be amended so as to provide that, in relation to the computation of notice periods provided for in s 64(1)(b) and (c) of the Act, the notice period shall not run on a public holiday, Saturday or Sunday. Such an amendment will address the difficulties referred to above which arise when a 48-hour notice is given around closing time or after closing time on Friday afternoon or evening. It is suggested that such an amendment would be beneficial to both employers and trade unions, although probably more beneficial, it is argued, to employers than to trade unions because unions and workers seldom have to deal with industrial action from employers, whereas employers are victims or targets of industrial action far more frequently than unions and workers.

12. Can industrial action be commenced on a later date than the date given in the notice?

[159] One question that arises in regard to the obligation to give notice of industrial action is whether the party giving notice of industrial action is obliged to commence the industrial action on the day or at the time given in the notice, failing which it forfeits the right to pursue industrial action, or whether such party is free to commence the industrial action later than the day or time given in the notice.

[160] It would seem that in Finland, once a party has given a date for the commencement of a work stoppage in a written notice, such party cannot change the date to a later date unless the other party to the dispute agrees to such change.¹⁷⁸ However, a work stoppage can be postponed if that occurs as a result of the intervention of the Ministry of Labour in terms of s 8(1) of the Act on Mediation in Labour Disputes. Section 8 permits the Ministry to intervene and prohibit the commencement or extension of a work stoppage for a maximum of 14 days from the date given in the notice of the work stoppage in certain circumstances and if certain conditions exist. In the case of such an intervention, the Ministry must notify the parties of such prohibition at least three days prior to the date given in the notice or before the expiry of the prohibition period. In terms of s 8(2) the party seeking to pursue a work stoppage is required to commence the work stoppage within three days of the expiry of the prohibition period. If such party wants to commence the strike after such three days, it must obtain the consent of the other party to the dispute. The date for the commencement or extension of a work stoppage after a prohibition – within three days of the expiry of the prohibition, or, with the consent of the other party, outside the first three days of the expiry of the prohibition – must **“invariably be notified to the conciliator and to the other party at least three days before the prohibition ends”**.

¹⁷⁸ In Finland s 7(1) of the Act on Mediation in Labour Disputes provides that “(t)he party giving such notice shall not be permitted, without the consent of the other party, to postpone the commencement or extension of the projected action until a later date than is stated in the notice or to restrict such action to a more limited field”.

[161] The question under consideration was left open by Zondo J in both his article “The New Labour Courts and Labour Law: The first seven months of the new LRA”¹⁷⁹ as well as in his unreported judgment in *Mediterranean Textile (Pty) Ltd v SACWU & others*.¹⁸⁰ If the position were that the union loses such right if it fails to commence the strike at the given time, this would lead to much artificiality, as all that the union would need to do in order not to lose the right would be to commence the strike, but then suspend it immediately thereafter and resume it at another time convenient to it and probably inconvenient to the employer.

[162] If it is said that there is no obligation to commence a strike at the time or on the day given in the notice and that the strike can commence on some later day, the question that would arise is: would this construction of the statute not undermine, or even defeat, the purpose of the requirement of a notice as articulated by the Labour Appeal Court in the *Ceramic Industries* case? The concern about the effect of that construction would be a legitimate concern. However, it is argued that, if this concern is weighed against the concern about the implications of holding that, once a notice has been given, the union must either commence the strike then or forfeit the right to pursue the strike, there can be no doubt that the “**better evil**” is to hold that the union may commence the strike later than the date or time given in the notice.

¹⁷⁹ (1998) 19 ILJ 686.

¹⁸⁰ Unreported judgment delivered on 17 June 1998 by Zondo J in the Labour Court in case no D248/98.

[163] An employer who has been informed that a strike will commence on a certain day or at a certain time and who obtains temporary replacement labour or makes certain arrangements on the basis that there will be a strike will not, if the strike does not commence on such a date, suffer anything worse than he would otherwise have suffered if the strike had commenced on the date given in the notice, because he will be entitled to go ahead with his alternative arrangements if he so chooses. The employer can go ahead and utilise his temporary replacement labour to do the work that the would-be strikers normally perform. He would not allow the employees to perform their duties. In that event he would not be excluding the employees from the workplace for the purpose of getting them to agree to his offer. As he would not be excluding them from the workplace, the fact that he does not utilise their services will not render this a lock-out. This is so because the definition of a lock-out has as one of its elements the exclusion of employees from the workplace. In South African law an employer is entitled to employ temporary replacement labour, except in the two situations specified in s 76(1)(a) and (b) of the Act. Section 76 (1)(a) applies to an employer who has been designated as a maintenance service. Section 76(1)(b) applies to a situation where it is during a lock-out and the lock-out is not in response to a strike. In this kind of scenario the employer would simply be protecting the smooth running of his business from the tactics of the union and its members who obviously want to inflict economic harm on him. He would simply require them not to perform their duties. They could loiter around the premises if they wished or sit around and watch as his temporary replacement labourers perform their duties.

[164] The normal workforce would not be able to sue the employer for wages in such a case because, it is suggested, the giving of a strike notice by employees or a union to an employer is an announcement by the employees to their employer of an intention not to perform their contractual obligations from the date and time fixed for the commencement of the strike. At common law the announcement of such an intention would be a repudiation of the contracts of employment that would give the employer the election to either accept the repudiation and cancel the contracts of employment, which means a dismissal, and sue for whatever damages, if any, he can prove or to reject the repudiation and hold the employees to their contracts of employment and insist on performance. In modern labour law the employer does not have an election to cancel the contracts of employment of such employees when they serve him with a strike notice, because that is required by the Act. However, it is suggested that even then one of the rights that the employer must still have in that situation is what can be called the **“right to mitigate”** his damages.

[165] If the employees notified the employer that there would be an unprotected strike and he did not take any steps to mitigate his losses when, by exercising reasonable care, he could have mitigated his losses, the employees and their union would be the first ones, when sued for such loss, to say that he had a duty to mitigate his losses and should have done so. Accordingly, it is argued that he has a right to mitigate his losses. He would be mitigating his losses if he, after receiving the strike notice, went ahead and secured temporary replacement labour and, if later the

union or the employees wanted to postpone the commencement of their strike, he rejected any tender of their services at that stage and went ahead with his arrangements to use temporary replacement labour. By sending the employer a strike notice, the employees withdraw their standing tender of services and the employer is under no obligation in those circumstances to accept the withdrawal of their earlier withdrawal of the tender of their services – at least not until there is no further threat of them later withdrawing their tender again and, therefore, going on strike.

[166] In *Tiger Wheels Babelegi (Pty) Ltd t/a TSW International v NUMSA & others*¹⁸¹ the strike notice that had been given, which had been given to the bargaining council but not to the employer, gave 1 September 1999 as the day on which all NUMSA's members in the iron and steel industry would go on strike. On that day NUMSA's members employed by various employers in the industry began their strike. The NUMSA members employed by *Tiger Wheels* did not commence a strike on that day but only joined the strike on 4 September 1999.

[167] One of the questions which the Court was called upon to decide was whether the NUMSA members employed by *Tiger Wheels* were entitled to commence the strike on the day that they did after they had failed to commence the strike on the day that had been given in the strike notice given to the bargaining council. In dealing with this issue, Zondo J took as his starting point the judgment of the Appellate Division, now the Supreme Court of

¹⁸¹ (1999) 20 ILJ 677 (LC).

Appeal, in *Chamber of Mines of SA v NUM & others*¹⁸² and that of Bester J in *Free State Consolidated Gold Mines (operations) Ltd operating as President Brand Mine v NUM & others*.¹⁸³

[168] In the *Chamber of Mines* case Hoexter JA had expressed reservations about the correctness of the view that, under s 65 of the old Act, once a union had acquired the “**right**” to call a strike, the exercise of that right could be deferred indefinitely. In the *Free State Consolidated Gold Mines (operations) Ltd* case Bester J’s attention was drawn to the reservation expressed by Hoexter JA as to the correctness of the proposition that, once acquired, the exercise of the right to strike could be deferred indefinitely. Bester J had had this to say in this regard:

“While the remarks of Hoexter JA lend support to the contention that a right to strike acquired in terms of s 65 must be exercised within a reasonable time, the premise that a right must be asserted within a reasonable time after its acquisition does not warrant the conclusion that the failure to do so results *ipso iure* in its loss.”¹⁸⁴

[169] Zondo J then had regard to what was said by Hefer JA in *Mahabeer v Sharma NO & Another*¹⁸⁵ which Bester J relied upon for his conclusion. There Hefer JA had dealt with the delay of a party to a contract to rescind a contract once he has acquired such right to rescind. Hefer JA had said in that case that a failure to exercise such a right did not *ipso iure* result in the loss of that right.

¹⁸² (1987) 8 ILJ 68 (A).

¹⁸³ (1987) 8 ILJ 606 (O).

¹⁸⁴ See *Free State Consolidated Gold Mines (Operations) Ltd operating as President Brand Mine v NUM & others* (1987) 8 ILJ 606 (O) at 610F.

¹⁸⁵ 1985 (3) SA 729 (A) at 736E-I.

He said that a delay may, depending on the circumstances, give rise to the inference that such party had waived his right or had elected not to exercise it. In this regard Hefer JA went further to hold that the lapse of an unreasonable period without such a right being exercised could form part of the material to be considered in order to determine whether the party should be permitted to assert that right. It is argued that the Court was correct in viewing these cases as cases that could provide the principles which should be applied in answering the question that the Court was dealing with.

[170] Zondo J dealt with the issue further in paragraphs 39, 40 and 41 of his judgment. There he said:

“[39] The Act itself does not anywhere contain provisions which expressly state what the effect is in law of a failure on the part of would-be strikers to commence their strike on the day given in the strike notice under s 64(1)(b) as the day on which the strike would commence. To my mind it is highly unlikely that the legislature would have intended that such failure should by itself result in the loss of the right to strike. I say this because, quite apart from there being, in my view, no statutory justification for such a proposition, if regard is had to the various requirements which must be met in order to acquire the right to strike, s 64(1)(b) is not one of the most important ones. It cannot, for example, be ranked on the same level as the requirement that the issue in dispute must have been referred either to the CCMA or to a council with jurisdiction for conciliation.

[40] Even a failure on the part of the union or would-be strikers to attend a conciliation meeting in respect of such an issue in dispute does not per se result in the forfeiture of the right to strike. So why should a failure to commence the strike on the appointed day result in

such serious consequences? In fact if one has regard to the purpose of s 64(1)(b) as stated in the *Ceramic Industries* case, no such purpose is necessarily defeated by such non-commencement of the strike. If the employer on the appointed day has his replacement labour ready and the normal work-force does not go out on strike, the employer can lock the would-be strikers out and his replacement labour can work in the interim.

[41] At any rate, even if it were to be assumed that a delay in the exercise of the right to strike can by itself result in the loss of such a right, then at least the delay would, in my view, have to be an unreasonable delay. It cannot be said that a delay of three or so days, as was the case in this matter, is an unreasonable delay. If the position is that the delay must be considered as one of a number of factors so as to arrive at the conclusion whether or not the employees have waived their right to strike, in this case there are no other facts which must be taken into account together with the delay.”

[171] Discussing the reforms introduced by the Trade Union Reform and Employment Rights Act of 1993, which included the requirement that unions give employers at least seven days’ notice of official industrial action, Smith and Thomas express the following view:

“The notice must be in writing, must describe ‘so that he can readily ascertain them’, the ‘affected employees’, and must state whether industrial action is intended to be continuous or discontinuous. If the action is to be continuous, the notice must state when it is to start; if intended to be discontinuous (i.e. if the union does not intend to take action all the days on which it could do so), the notice must specify the particular dates on which it is to take place.”¹⁸⁶

¹⁸⁶ See Smith and Thomas *Smith and Woods Industrial Law* 609.

These learned authors go on to say that

“[h]aving given notice of the dates on which it intends the discontinuous action to take place, the union does not then have to call for that action to take place on all (or indeed any) of those dates.”¹⁸⁷

[172] In the light of the decision of the Labour Court in *Tiger Wheels*, it is argued that a party which has given notice of industrial action does not lose the right to pursue the industrial action if it fails to commence the industrial action on the date or at the time given in the notice of industrial action. Such party can commence such industrial action on a later date provided that its conduct is not such that such party can be said to have abandoned or waived its right or to have elected not to pursue the industrial action.

13. Circumstances in which notice of industrial action is not required

[173] In respect of primary strikes and lock-outs the Act makes provision for circumstances in which prior notice of a strike or lock-out is not required. Those circumstances are set out in s 64(3) of the Act. They are dealt with in paragraphs A to E below.

A. Where the parties to the dispute are members of a council, and the dispute has been dealt with by that council in accordance with its constitution (s 64(3)(a))

¹⁸⁷ *Ibid.*

[174] This exception to the rule requiring prior notice of industrial action applies where the parties are members of a bargaining council and the dispute has been dealt with by the council in accordance with its constitution. It also means that, even if the parties are members of a council, this exemption will not apply if, in dealing with the dispute, the council has not dealt with it in accordance with its constitution. This exemption ensures that, for example, in a case where the constitution of a council requires a strike notice of a shorter duration than 48 hours, a party does not have to give a notice of the duration specified in the Act but can simply give the shorter notice provided for in the constitution of the council and that will suffice. Accordingly, where the strike notice or lock-out notice given is for less than 48 hours, in the case of a primary strike or a lock-out or an industry-wide strike, that might not necessarily mean that the notice is defective simply because it is less than the period specified in the Act. A shorter notice period will be permissible in a case where the constitution of the council provides for a shorter notice.

B. Where the strike or lock-out conforms with the procedure in a collective agreement (s 64(3)(b))

[175] What is clear from this exception to the general rule is that, if a strike or lock-out conforms with the procedure in a collective agreement between the parties, there is no obligation to give the statutory notice. The question that arises is whether a party to a collective agreement is free to disregard the strike or lock-out procedure contained in a collective agreement provided it complies with the statutory procedure. It is argued that in such a case a party

has an obligation to comply with the pre-strike procedure provided for in the collective agreement and is not free to act in breach thereof. There is nothing in the Act or in the law that gives such a party a licence to disregard such procedure simply because he intends to comply with the statutory procedure.

[176] There is a general misconception that, where a union is party to a collective agreement that prescribes a pre-strike procedure, it has a choice, if it seeks to call a strike, to either comply with the pre-strike procedure in the collective agreement and not with that in the Act or to comply with the pre-strike procedure in the Act and not with the one in the collective agreement.¹⁸⁸ This is a misconception. The true position is that, in such a case, the only choice that the union has is that of complying with the pre-strike procedure contained in the collective agreement and to disregard the pre-strike procedure contained in the Act. It does not have the choice to breach the collective agreement. In other words it cannot look at both and choose to comply with the one in the Act because, for example, that one is less onerous than the one that has been agreed to between the parties in the collective agreement.

¹⁸⁸ One such case is *Columbus Joint Venture t/a Columbus Stainless Steel v NUMSA* (1997) 10 BBLR 1292 (LC), in particular at 1294G-H. See also Du Toit et al *Labour Relations Law* 287 where the authors cite the *Columbus* case as authority for the proposition. *County Fair Foods (Pty) Ltd v FAWU & others* (2001) 22 ILJ 1103 (LAC) differs on the facts because in that case it appears that when the employer brought the urgent application in the Labour Court to challenge the union's right to call a strike, the union had already complied with the whole statutory pre-strike procedure which gave the union the right to call the strike. If, however, the employer had brought the urgent application before the statutory procedure had been complied with to say that the union was contractually required to first comply with the pre-strike procedure contained in the collective agreement before it could resort to the statutory pre-strike procedure, the result may have been different. After all, one of the principles upon which the Act is based is the promotion of self-regulation by employers and employees and compliance with collective agreements is fundamental to the success of the dispute-resolution dispensation contained in the Act.

[177] The statutory provisions in the Act that are the only provisions upon which the choice can conceivably be based are to be found in s 64(3) of the Act. The provisions of s 64(1) are the provisions of the Act which set out the statutory pre-strike procedure. The provisions of s 64(3) set out various circumstances in which it is not necessary that the pre-strike procedure set out in s 64(1) be complied with. With special reference to a situation where there is a collective agreement which has a pre-strike procedure, s 64(3)(b) of the Act provides:

“(3) The requirements of sub-section (1) do not apply to a strike or a lock-out if –
(a) ...
(b) the strike or lock-out conforms with the procedures in a collective agreement;”

[178] Out of the five situations set out in s 64(3) where, in the words of the subsection, **“(t)he requirements of subsection (1) do not apply to a strike or lock-out,”** there is not a single one which directly or indirectly says a pre-strike or lock-out procedure contained in a collective agreement is not binding and need not be complied with. As already stated, what the Act does is to give unions and employees the choice to disregard the statutory pre-strike procedure and comply with a pre-strike procedure contained in a collective agreement, but not the other way round.¹⁸⁹ Of

¹⁸⁹ See also “Explanatory Memorandum” 278. At 302 the following statement appears in the discussion of procedural requirements for strikes: “As in other parts of the draft Bill, provision is made for the parties to follow agreed procedures. In this event they are not obliged to comply with the statutory procedural requirements of the state prior to engaging in industrial action”. It is not said anywhere in the explanatory memorandum that parties who have agreements setting out pre-strike procedures are not obliged to follow such procedures and can ignore them and simply follow the statutory procedure.

course, if the pre-strike procedure contained in a collective agreement has a provision that in effect gives the unions and employees the choice to choose which of the two procedures they will comply with, that is a different matter altogether. Accordingly, to the extent that there are cases which contain statements that perpetuate the misconception referred to above, such statements are not justified by the provisions of the Act, in particular s 64(3)(b) of the Act, and are, with respect, incorrect.

[179] The difficulty arises when the other party to the dispute approaches the Court for relief based on a breach of a procedure provided for in a collective agreement after there has been compliance with the pre-strike statutory procedure. If the aggrieved party only seeks to enforce the procedure contained in a collective agreement after the statutory procedure has been complied with, such party cannot succeed, because, in terms of the Act, the employees will by then have acquired the right to strike, or, in the case of a lock-out, the employer will have acquired the right to lock-out.¹⁹⁰ The effect of the acquisition of such a right would be that such party can immediately resort to industrial action and such industrial action would be protected in terms of the Act.

[180] If, however, the procedure contained in a collective agreement is sought to be enforced before the statutory procedure is complied with, the aggrieved party may succeed in enforcing the collective agreement procedure because the party would not as yet have

¹⁹⁰ Indeed, such a strike or lock-out constitutes neither a delict nor a breach of contract in terms of the Act. Most importantly, the Act precludes a court from entertaining any proceedings in regard to such a strike or lock-out. At that stage there is thus nothing that can be done to prevent the commencement of the strike or lock-out (see s 67(2) read with (7) of the Act).

acquired the right to embark upon industrial action and such proceedings would not be precluded by the Act.¹⁹¹ In *County Fair Foods (Pty) Ltd v FAWU & others*¹⁹² a trade union, Food and Allied Workers Union, and County Fair Foods (Pty) Ltd had a collective agreement which contemplated that there should be two meetings between the parties to try to resolve a collective dispute and that such a dispute would be referred to mediation, whereafter the procedures prescribed by the Act would be resorted to before a strike could be embarked upon. The union complied with some of, but not all, the requirements of the collective agreement, but complied with the pre-strike procedure laid down in the Act. The employer then brought an urgent application for an interdict against the strike on the basis that the union had no right to resort to a strike until all the requirements contained in the pre-strike procedure in the collective agreement had been satisfied. However, by the time the employer brought the urgent application, the union had complied with all the statutory procedures and the union had acquired the statutory right to call a strike.

[181] In subsequent proceedings in the Labour Court it was argued on behalf of the employer that, since the union had not complied with all the requirements of the collective agreement, the strike was unprotected even though the statutory requirements of the Act had been complied with. Although on appeal in the Labour Appeal Court this point was not pursued, the Labour Appeal Court dealt

¹⁹¹ Section 67(6) precludes the institution of any civil proceedings against any person for participating in a protected strike or lock-out or in conduct in contemplation or furtherance of a protected strike or lock-out. Proceedings to challenge a party's right to embark upon industrial action fall, it is argued, within the ambit of "civil proceedings".

¹⁹² (2001) 22 ILJ 1103 (LAC).

with it in any event, as it had not been abandoned. The Court held that compliance with a pre-strike procedure contained in a collective agreement exempts a party from having to comply with the statutory procedure and vice versa. Put differently, the Court held that the Act gives a party a choice between complying with the pre-strike procedure set out in a collective agreement or complying with the statutory procedure and compliance with either procedure suffices to render the strike a protected strike.¹⁹³ It is argued that that statement by the Court must be understood in the context that a party to such a collective agreement is bound by it

¹⁹³ In paras 16-18 of its judgment the Court said:

“[16] In my judgement there is insurmountable difficulty with the appellants’ contention. The Act sets out specific requirements which must be met in order for an employee to acquire the right to strike. Once those requirements have been complied with the Act confers a certain protection and status on the strike. That is the protection and status of a protected strike as defined in s 67(1). Section 67(1) provides: ‘in this chapter, “protected strike” means a strike that complies with the provisions of this Chapter and “protected lock-out” means a lock-out *that complies with the provisions of this Chapter*’ (emphasis added). From this it will be seen that the only requirement for a strike to acquire the status of a protected strike is that it must comply with the provisions of the chapter on strikes and lock-outs in the Act. Section 64(3)(b) provides in effect that, if a strike conforms with the procedures in a collective agreement, the requirements of section 64(1) of the Act need not be complied with. There are also other provisions which deal with situations which exempt a party from having to comply with the requirements of s 64(1) in certain situations (see 64(3)(a), (c), (d) and (e)).

[17] It is clear from the provisions of s 64(3)(b) that the legislature did consider a situation where a party complies with procedures in a collective agreement but not with the requirements of the Act and decided that, in such a case, such party should not be required to comply with another procedure, namely, the statutory pre-strike procedure before a strike can be resorted to. This was one of the deficiencies of the strike procedures under the old Act. Under that Act a party who had complied with a domestic pre-strike procedure was required to also comply with the statutory procedure before it could acquire the right to strike. This was one of the reasons why the ILO’s Fact-Finding and Conciliation and Commission on Freedom of Association concerning the Republic of South Africa criticized the South African pre-strike procedures under the old Act in its report as being inconsistent with freedom of association. (See (1992) 13 ILJ 739 at 755-6 par 644).

[18] Once a strike has been conferred with the status of a protected strike, various legal consequences flow from that. One of these is that participation in such strike is neither a delict nor a breach of contract (see s 67(2)). Another is that a person who is participating in such a strike is immune from any civil legal proceedings in respect of his participation in such strike and in respect of any conduct in furtherance of such strike. Thus s 67(6) provides:

Civil legal proceedings may not be instituted against any person for –

- (a) participating in a protected strike or a protected lock-out; or
- (b) any conduct in contemplation or in furtherance of a protected strike or a protected lock-out.”

and must follow whatever pre-strike procedure is prescribed therein, even if this means complying with both the collective agreement pre-strike procedure and the statutory pre-strike procedure, provided that it is understood that, once a party has complied with the collective agreement procedure or with the statutory procedure, such party has acquired the right to strike or lock-out, as the case may be, and such party cannot be interdicted from pursuing the strike or lock-out because, at that stage, that strike enjoys the status and protection of a protected strike.¹⁹⁴ On the facts of that case the employer came to court late. Had he come to Court earlier before the union had complied with all the statutory requirements for a strike, and sought to enforce the pre-strike procedure in the collective agreement, the result may have been different.

C. Where employees strike in response to a lock-out by their employer that does not conform with the provisions of the chapter in the Act that deals with strikes and lock-outs (s 64(3)(c))

[182] This exception applies to cases where employees strike in response to a lock-out by their employer that does not conform with the provisions of the chapter in the Act that deals with strikes and lock-outs. That chapter is chapter IV. The provisions of the Act relating to this exemption give rise to the question: are employees exempted from complying with the requirements of s 64(1) before

¹⁹⁴ It is interesting to note that in *North East Cape Forest v South African Agricultural Plantation and Allied Workers Union and others* (1997) 18 ILJ 729 (LC) the employer's complaint was that the union had failed to comply with the statutory pre-strike procedure even though it had complied with the domestic procedure.

they go on strike if their employer has instituted a lock-out that does not comply with the chapter on strikes and lock-outs in the Act but does comply with the requirements of a collective agreement between the parties?

[183] The answer to this question is a simple one, namely that the notion of a lock-out or strike that complies with the requirements of a collective agreement but does not comply with the chapter on strikes and lock-outs in the Act is foreign to the Act. It is argued that such a lock-out complies with the chapter on strikes and lock-outs in the Act as well because it is the Act itself that exempts an employer from the obligation to comply with the statutory pre-lock-out procedure where there is a pre-lock-out procedure contained in a collective agreement. It is the Act itself that authorises the employer to institute a lock-out in compliance with the requirements of a collective agreement. In other words that chapter mandates such a lock-out and, accordingly, it would be a contradiction in terms to say that such a lock-out does not comply with that chapter when that chapter mandates it.¹⁹⁵ In any event the rationale behind the exemption is that the employer has flouted the law and has, thereby, divested itself of the right to require the employees to comply with the requirements of s 64(1) before they can go on strike. The rationale is that, if the employer has flouted the law by not following the relevant procedure, it would be unfair to require the employees to wait until they have exhausted procedures while suffering at the hands of an employer who has failed to follow the applicable procedure. By the time they exhaust

¹⁹⁵ See s 64(3)(b) of the Act.

the applicable procedure, it would be too late to undo the prejudice that the employer's unprocedural conduct would have caused them.

[184] Furthermore, in such a case the employer's hands are "**dirty**" and, accordingly, he does not deserve to be treated differently from the way he would be treating the employees himself. However, a lock-out that conforms with the requirements of a collective agreement is not unprotected action, but is protected action. Accordingly, such employer is entitled to insist that, as he has followed procedures before resorting to industrial action, the employees should also follow procedures before they can resort to industrial action. In the light of this it is argued that such employees would not be exempted from following the relevant procedures before they could resort to a strike. They would be required to comply with whatever applicable requirements of the collective agreement.

D. Where the employer locks out its employees in response to their taking part in a strike that does not comply with the provisions of the chapter dealing with strikes and lock-outs (s 64(3)(d))

[185] The comments made under (C) above apply with equal force to this exception, subject to the changes required by the context.

E. Where the employer fails to comply with s 64(4) and (5) of the Act (s 64 (3)(e))

[186] Section 64(3)(e) of the Act provides that the requirements of s 64(1), which include the requirement of a notice for a primary strike and of a lock-out, need not be complied with where the employer has failed to comply with s 64(4) and (5) of the Act. The provisions of s 64(4) and (5) of the Act read as follows:

- “(4) Any employee who or any trade union that refers a dispute about a unilateral change to terms and conditions of employment to a council or the Commission in terms of subsection (1)(a) may in the referral, and for the period referred to in subsection (1)(a) –**
- (a) require the employer not to implement unilaterally the change to terms and conditions of employment; or**
 - (b) if the employer has already implemented the change unilaterally, require the employer to restore the terms and conditions of employment that applied before the change.**
- (5) The employer must comply with a requirement in terms of subsection (4) within 48 hours of service of the referral on the employer.”**

The only requirements in subsection (4) that an employer can conceivably be expected to comply with are the ones contained in paragraphs (a) and (b) of the subsection. They are both requirements that an employee, whose terms and conditions of employment have been changed or are to be changed, is given a right to direct to the employer. In terms of paragraph (a) such employee may require the employer not to implement unilaterally the change in his terms and conditions of employment. In terms of paragraph (b) such employee is given a right, if the employer has already implemented the change, to require the employer to restore his terms and conditions of employment.

[187] Section 64(3)(e) refers to two situations in which the requirements of s 64(1) do not need to be complied with before a resort to a strike. Those are s 64(4) and (5). Read alone, s 64(3)(e) would ordinarily mean that, once an employee such as the one envisaged in s 64(4) has made the requirement contemplated either by s 64(4)(a) or (b), and the employer has failed to comply with such requirement, a strike can be resorted to immediately without the obligation to comply with the requirements of s 64(1). However, it is argued that, because of the provisions of s 64(5), that is not what s 64(3) means. Section 64(5) qualifies s 64(3)(e) read with s 64(4). Section 64(5) makes provision for the period within which the employer must comply with a requirement made to him in terms of s 64(4). Section 64(5) gives the employer a period of 48 hours from the time of receipt of a s 64(4) requirement within which to comply with such requirement.

[188] In the light of s 64(5), it is argued that, after a requirement contemplated in s 64(4) has been made to an employer, a strike cannot be embarked upon against the employer for non-compliance with such requirement until a period of 48 hours has expired. This is because it cannot be said that an employer has failed to comply with a requirement made under s 64(4) until a period of 48 hours from his receipt of such requirement has expired. If a strike were resorted to against the employer before the expiry of the period of 48 hours from the employer's receipt of the s 64(4) requirement, such strike would be in breach of the Act and unprotected, as the

requirements of s 64(1) would not have been complied with.¹⁹⁶ Once 48 hours have expired, there can be an immediate resort to a strike without any compliance with the requirements of s 64(1).

[189] In terms of s 64(5) of the Act the obligation upon an employer to comply with a requirement of s 64(4) endures only for 30 days.¹⁹⁷ Accordingly, where an employer has failed to comply with a requirement contemplated in s 64(5) of the Act within 30 days from the date that the requirement was made to the employer and there has been no resort to a strike, the provisions of s 64(3)(e) cease to apply. The result hereof is that, if, after the expiry of such period, the employees wish to resort to a strike in connection with the employer's unilateral change of their terms and conditions of employment, they can only do so after compliance with the requirements of s 64(1). The exemption from compliance with the requirements of s 64(1) provided for in s 64(3)(e) no longer applies after the expiry of the period of 30 days from the date of receipt by the employer of a requirement contemplated in s 64(4) of the Act.

14. Industrial action to which the statutory requirement of giving notice does not apply

[190] The requirement of prior notice of industrial action provided for in the Act does not apply to all types of industrial action. It applies only to a primary strike, a secondary strike, a lock-out and protest

¹⁹⁶ It is interesting to note that the period provided for in s 64(5) is 48 hours, which is the same length as a notice required by s 64(1) for a strike and a lock-out. It seems that the 48-hour period provided for in s 64(5) can be said to be some kind of notice to the employer that, if he does not comply, a strike may be resorted to.

¹⁹⁷ See *Monyela & others v Bruce Jacobs t/a LV Construction* (1998) 19 ILJ 75 (LC).

action. However, industrial action is not limited to these four types of action. The other types include a product boycott, picketing, marches and demonstrations when these are resorted to in support, or furtherance, of a dispute that is susceptible to a strike or lock-out.

Picketing

[191] The Act deals with picketing in s 69. Section 69(1) provides that

“a registered trade union may authorise a picket by its members and supporters for the purposes of peacefully demonstrating –

(a) in support of any protected strike

(b) in opposition to any lock-out.”

The Act does not require that a notice be given before a picket can be embarked upon. However, parties are free to enter into a collective agreement that requires such notice before picketing can be resorted to.

Product boycott

[192] The Act does not expressly refer to a product boycott. However, a product boycott would fall within the ambit of **“conduct in contemplation or furtherance of a protected strike or a protected lock-out”** as provided for in s 67(2)(b) of the Act. Section 67(2)(b) provides that **“a person does not commit a delict or a breach of contract by taking part in any conduct in contemplation or furtherance of a protected strike or protected**

lock-out". In this regard the provision of s 67(6) is important. Section 67(b) provides that

"civil proceedings may not be instituted against any person for –

(a) ...

(b) any conduct in contemplation or furtherance of a protected strike or protected lock-out".

[193] The Act does not have a provision that requires the giving of any notice before a product boycott can be called or can be resorted to against an employer. This is the position despite the fact that a product boycott, if heeded by sufficient numbers of clients or customers and the public, may prove to be much more damaging to an employer's business than a strike.

Marches and demonstrations

[194] There is also no requirement in the Act for a notice in respect of demonstrations or marches when they fall outside protest action. Of course, marches and demonstrations can take place in the course of strikes, picketing and protest action.

Resumed industrial action

[195] One of the questions which the provisions of the Act requiring the giving of a prior notice before industrial action raise is whether a second strike notice is required before the resumption of a strike for which a notice had already been given but which was suspended. This question arose pertinently in *Transportation*

*Motor Spares v NUMSA & others.*¹⁹⁸ In that case members of the National Union of Metal Workers of South Africa employed by various employers embarked upon an industry-wide strike on 1 September 1998. The dispute related to a collective agreement that was to be concluded at a bargaining council. NUMSA's members employed by Transportation Motor Spares also went on strike. It was common cause that, prior to that, NUMSA had given a proper notice of a strike to the bargaining council as required by s 64(1)(b) of the Act. On 2 September 1999 the NUMSA members employed by Transportation Motor Spares suspended their participation in the strike and returned to work. The reason for the suspension of their participation in the strike was that there were to be consultation meetings relating to a retrenchment which the shop stewards had to attend with the management of Transportation Motor Spares. The employees believed that in all the circumstances it would be convenient if they were not on strike while such consultation meetings were being held, as this would facilitate consultation between the shop stewards and themselves over the matter of retrenchment. In due course the consultation process was finalised.

[196] On 10 September 1999 the employees resumed their strike. Before resuming their strike, they did not give the employer any notice that they were going to resume the strike on the day in question, nor was any further notice given to the bargaining council. In subsequent proceedings in the Labour Court for an interdict against the resumed strike, the employer argued that, before the employees could resume the strike, another strike notice should have been

¹⁹⁸ (1999) 20 ILJ 690 (LC).

given and it should have been given to it as the employer in terms of s 64(1)(b) of the Act as opposed to it being given to the bargaining council; that is, in addition to the notice that had been given to the bargaining council prior to the commencement of the strike on 1 September. The basis upon which this submission was made was that such second strike notice was required if collective bargaining was to be orderly and that, if such second notice was not required, orderly collective bargaining, which is one of the primary objects of the Act, would be undermined. The Court rejected the employer's contention and held that no second notice was required before employees could resume their strike.

[197] The Court took the view that the contention by the employer that orderly collective bargaining would be undermined by a construction which allowed a resumption of the strike without a further notice was based on the assumption that the resumption of the strike without notice was not avoidable. If it were avoidable, then the employer could take the steps necessary to avoid it and in that way orderly collective bargaining would not be undermined. The Court stated that, if an employer wanted to avoid that situation, it was open to it not to allow the workers back at work unless and until they agreed that they would not later resume the strike. In other words he would say to them:

“I have no problem with you exercising your right to strike but I will only allow you to return to work if you agree that you are not going to resume the strike later. If you want to later so resume the strike, then I will not allow you to disrupt my operations by returning temporarily only to later resume the strike”.

He could also say:

“I will allow you to return to work temporarily and resume the strike later only if you agree that, before you resume the strike, you will give me 48 hours’ written notice of the resumption of the strike”.

[198] The employer’s stance would, therefore, be that, in that way, there would be either no suspension of the strike, no temporary resumption of work and no resumption of the strike, or, if there would be, it would be on the terms agreed to by both parties. Accordingly, the issue of a second notice of the strike would not arise except by agreement. The Court took the view that, in such a case, the employees’ tender of their services when they sought to go back to work after suspending their strike, but with the intention to later resume it, was not an unconditional one. It went on to say that, since an employer is under no obligation to accept a conditional tender of services by employees, the employer would be able to prevent the return to work until there was an unconditional tender of services or an agreement on the terms thereof. Zondo J said the following in part in paragraph 19 of his judgment:

“If the employer chooses to allow back at work strikers who have neither called the strike off nor accepted that the dispute is over and that, therefore, they will not have the right to resume the strike at a later stage, it cannot be heard to complain when they resume the strike. If, however, the employer is happy that the strikers resume their work even if they may later resume the strike, but he wants such return to be on specific terms – which may include a requirement that

the strikers will have to give another strike notice before they can resume the strike, then the strikers must give such notice before they can resume the strike.”

[199] The Court further had regard to s 39 of the Constitution which, among other things, provides that, when interpreting the Constitution, a court must promote the values that underlie an open and democratic society based on human dignity, freedom and equality and that, when interpreting any legislation, a court must promote the spirit, purport and objects of the Bill of Rights. The Court also took the view that the strike on 10 September was not a new and separate strike, but was the same strike in respect of which a notice had already been given prior to its commencement, albeit not to the employer but to the bargaining council, which was in accordance with s 64(1)(b) of the Act.

[200] It is to be noted that in 1985 the question arose in *AECI Ltd v SACWU*¹⁹⁹ whether, when employees had sought to resume a strike that they had suspended, it had been necessary that they once again comply with the procedural requirements for a lawful strike prescribed by s 65 of the old Act. In that case the Court held that it was not necessary because this was not a new strike, but a continuation of the lawful strike that had been suspended and the dispute which had given rise to the strike had not been resolved as yet. The Court also pointed out that the delay in the resumption of the strike had not been so excessive as to amount to an abandonment of the original strike. Other considerations were also mentioned. The Court then said:

¹⁹⁹ 1986 (3) SA 729 (W).

“In the light of these considerations, I conclude that the legal prerequisites to strike action, which were complied with in March 1985, continued to apply to the strike which was resumed on 3 June 1985.”

[201] In *Transportation Motor Spares* the Court also took the view that to construe s 64(1)(b) so as to require a second strike notice to be given before workers can resume a strike that they have previously suspended would constitute requiring a notice of resumption of a strike, which the Act does not require, and not a notice of the commencement of a strike, which is what the Act requires. The Court in effect held that the distinction between the two should not be blurred. The common feature in the approach taken by the two Courts in *Transportation Motor Spares* and *AECI* is that in each case the legality of the resumed strike was challenged on a basis that required a procedural step, or procedural steps, to be taken that had already been taken before the commencement of the strike, which would have been a duplication of pre-strike procedures, and in each case the Court rejected the notion of a duplication of procedures.

When employees join a strike that is already under way

[202] It happens frequently that the dispute which gives rise to a strike does not directly affect all the employees of the employer. It may affect directly only a particular occupational class or category of employees, such as drivers or artisans or clerks. A good example in this regard would be a case where the employer employs truck

drivers and other employees. The dispute may concern a long-distance allowance or overtime pay which relates only to overtime work which applies to truck drivers. In such a case the clerical and other staff of the same employer may wish to participate in the strike either from its commencement or to join the strike later when the participation in the strike by only truck drivers seems ineffective. This example will be referred to as example A. Another example is where the dispute directly affects only the employees based in a certain branch or depot of a company and employees employed in another branch or depot wish to participate in the strike either from its commencement, or later, when it seems that the strike by the employees of the branch or depot directly affected by the dispute is ineffective. This example will be referred to as example B.

[203] In the case of employees who are based in one branch or depot of a company wanting to participate in, or join, a strike relating to a dispute that does not directly affect them, but directly affects their co-employees who are based in another branch or depot, that is, example B, the two branches or depots may be close to each other in terms of distance, for example in the same town, but they can also be a long distance away from each other, but in the same province. But, worse still, they could be in different provinces, for example one in Gauteng or KwaZulu-Natal and the other in the Western Cape. To make the situation even worse than that, the employees who are not directly affected by the dispute and who are based in another branch could belong to an occupational class which bears no relation whatsoever to the occupational class to which the employees directly affected belong. They might all

belong to the same union. They may belong to different unions, or, indeed, they might belong to no union at all.

[204] In all of the scenarios given above it is not required that the employees not directly affected by the dispute and who are based in another branch of the company should give a separate notice of their intention to join the strike or to participate in the strike. In *Afrox Ltd v SACWU & others (1)*²⁰⁰ the company had many branches. One of the branches or depots was in Pretoria West. The employees who were directly affected by the dispute were based in that branch. They commenced a protected strike. For that strike to be a protected one, a notice of the commencement of the strike had been given before such commencement. However, employees employed in other branches of the company later joined the strike as well. They did not have a separate dispute with the employer, but were seeking to participate in the strike which the employees at the Pretoria West branch had embarked upon, and for the same reason. The dispute related to a change of shifts at the Pretoria West branch.

[205] One of the issues in the *Afrox* case was whether or not the employees in the other branches were entitled to join, or participate in, the strike when they were not party to the dispute giving rise to the strike. The Court held that they were entitled to do so.²⁰¹ It is argued that in that case the employees based in the other branches

²⁰⁰ (1997) 18 ILJ 399 (LC).

²⁰¹ This decision of the Labour Court in *Afrox* was subsequently approved by the Labour Appeal Court in *Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd* (1990) 20 ILJ 321 (LAC) and in *SACTWU v Free State and Northern Cape Clothing Manufacturers' Association* [2002] 1 BLLR 27 (LAC) and in *Early Bird Farm (Pty) Ltd v FAWU & others* [2004] BLLR 628 (LAC).

who wanted to join the strike after it had already commenced at the Pretoria West branch were not required to give notice before they could join the strike. There is no requirement in the Act for workers who are based in a location or branch other than the location or branch where the strike commenced to give notice to join the strike when it starts, or to join it later than when the employees directly involved in the dispute commenced the strike.

[206] Notwithstanding what has been said in the preceding two or three paragraphs, it must be accepted that, where an employer operates a number of branches and there is a dispute that directly affects only the employees in one branch, as was the case in *Afrox* above, and those employees go on strike, he may, depending on prior communications between the parties, be taken by surprise upon the commencement of the strike by the employees directly affected by the dispute when he finds out that employees in another branch, or in other branches, are part of the strike. If, for a week or more, the only employees participating in the strike were those directly affected by the dispute, and, therefore, those employed in a particular branch, for example a branch in Pretoria, the employer would be even more surprised if employees from another branch, for example in Cape Town, were to join the strike a week or more after the employees in the Pretoria branch have commenced striking.

[207] The employer might have had no inkling whatsoever that the Cape Town branch employees contemplated taking part in the strike. However, if they joined the strike, it would not be necessary to have a strike notice issued relating to their joining the strike if a

notice of the commencement of the strike had been given already. There is, however, one qualification that needs to be made to this proposition. That is that, since it is open to employees or a union giving notice of the commencement of a strike to identify in such notice the employees who will commence the strike on the day given in such notice, it is arguable that, where a limited number of employees has been identified in such notice, another notice would be required before other employees may join such a strike. It is argued that the fact that a limited number of employees is given in the notice as the employees who will commence a strike on a given date would be no basis for an argument that all other employees who would have acquired the right to strike will have waived their right to take part in that strike. There may be any number of reasons, including tactical or strategical reasons, for them not to embark upon the strike from the same day as the others.

When changing from one form of strike to another

[208] The definition of the word “**strike**” in s 213 of the Act is very wide. A strike is defined as meaning:

“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.”

It is clear from the definition of the word “**strike**” that a strike can take different forms. Different forms of a strike have already been given earlier on. It is, however, appropriate to mention these again. They include a complete withdrawal of labour, a go-slow, an overtime ban, an intermittent strike and, for purposes of this discussion, a work-to-rule as well.

[209] In requiring a strike notice to be given, the Act does not require that the notice should specify what form the strike will take. In other words the Act does not require specification in the notice whether the strike will be a go-slow, an overtime ban or a complete withdrawal of labour, etcetera. Accordingly, a union giving notice of the commencement of a strike need not in such notice alert the employer as to the form that the strike will take. It is sufficient if what the notice says will commence or will happen on the given date or at the given time falls within the definition of the word “**strike**” in s 213 of the Act.

[210] If, however, a union were to inform the employer in its strike notice that on a specific date or at a specific time the workers will effectively embark upon an overtime ban, the workers could not, it is argued, then commence, on such given date or at such given time, a complete withdrawal of labour, nor could they commence a go-slow and vice versa. That is because in such a case the employer is entitled to rely on such a statement in the notice to prepare to deal with an overtime ban on the date concerned or with a go-slow, as the case may be, but not with something else. However, if in the notice the union simply uses the word “**strike**” without specifying the form of strike that the workers will embark

upon, the union and the workers will be free to commence any form of strike they choose without first notifying the employer in advance of such form.

[211] If the union and the workers specify in the strike notice which form the strike will take upon commencement and they later want to change from that form of a strike to another one, it is argued that in such a case they would have to give another notice of the commencement of either the strike in general or, if they want to be specific, of that form of strike. If the strike notice was to the effect that, on the given date or at the given time, the workers would commence an overtime ban, and they later want to embark upon a complete withdrawal of labour, they would, it is argued, have to give notice.

[212] If, however, the notice that they had given to the employer was to the effect that a strike would commence upon a given date or at a given time, the workers would not need to commence their strike with a complete withdrawal of labour. They could commence it with an overtime ban and later go on to a complete withdrawal of labour. No notice would be required in terms of the Act when the workers change from an overtime ban to a complete withdrawal of labour if the notice had used the word “**strike**”. Indeed, the union and the workers could arrange their strike in such a way that some workers only engage in an overtime ban, while others perform their normal duties and others work during both normal time and overtime, but engage in a go-slow, and others engage in a complete withdrawal of labour.

[213] Where the employer operates from a number of branches or divisions that are based in different localities, the union could arrange that each branch chooses the form which its strike will take and for the different branches to commence at different times or during different weeks. Once a strike notice has been given prior to the first branch or division commencing such strike, it would not be necessary to give other strike notices as each branch joins the strike in different weeks. The strike notice given before the first branch commenced with the strike would be sufficient for all branches, unless it was worded in such a way that it can be said that it did not contemplate the employees in the other branches participating in the strike, in which case more notices than one may be necessary if the purposes of a strike notice are not to be defeated.

[214] The reason why it is argued that, if a union has informed the employer in the strike notice that on a given date or at a given time the workers will commence an overtime ban, another strike notice would be required before the workers could embark upon a different form of a strike is that, if a further notice were not to be given, the purposes of a strike notice as dealt with in general elsewhere herein and as articulated in the judgment of the Labour Appeal Court in *Ceramic Industries*, would be defeated. This is because the employer may have to make different contingency plans for different forms of strike.

[215] If an employer is informed in a strike notice that the workers will engage in an overtime ban from a given date or time, the employer need not arrange for temporary replacement labour to work during

normal working hours. The employer need only arrange for workers who can work during the overtime period. If the workers, having given notice of an overtime ban, were to change and embark upon, for example, a complete withdrawal of labour, that would take the employer completely by surprise, because he may not have made contingency plans for a full-blown strike. It may be argued that, in such a case, to allow that to happen would be completely unfair to the employer and would undermine orderly collective bargaining, which is one of the primary objects of the Act.

15. Conclusion

[216] The justification that is advanced for the requirement of notice of industrial action is that it alerts the party that is about to be visited with industrial action that industrial action is about to be instituted, which then affords such party an opportunity to either avoid the industrial action by capitulating or settling the dispute or to take steps to mitigate the effects of industrial action as far as possible by, for example, in the case of an employer, employing temporary replacement labour for the duration of industrial action in the case of a strike. It is also said that the requirement of notice of industrial action promotes orderly collective bargaining.

[217] It is argued that there can be no criticism of the requirement of notice of industrial action in circumstances where the parties have agreed in their collective agreement to notice of industrial action being part of the pre-strike or pre-lock-out procedure. In such a case the notice can be of such duration as the parties may agree.

There can also be no difficulty with the requirement of notice where, as it appears to be the case in Israel,²⁰² the giving of notice is the only procedural requirement before the commencement of industrial action, or where its purpose is to trigger intervention, such as mediation by a third party, before the industrial action can commence. However, to make it a statutory requirement that notice be given before industrial action can be resorted to in a situation such as that which obtains in South Africa where there is a lengthy statutory process that precedes industrial action is, it is suggested, unwarranted. An elaboration on this is provided hereinafter.

[218] In South Africa the Act requires, for example, that a dismissal dispute be referred to the Commission for Conciliation, Mediation and Arbitration, or a bargaining council with jurisdiction, for conciliation. A conciliation meeting is then held where, with the assistance of a trained mediator, the parties attempt to resolve the dispute amicably. At that stage each party has the opportunity to obtain as much information as possible about the other's position or about the dispute to see whether it can agree to the other party's demands or whether it can persuade the other party to agree to its demands. The Act allows the parties to agree to extend the conciliation period should they wish to have more time to try to resolve the dispute by agreement. In that way they delay either party's time for the acquisition of the right to resort to industrial action, which delay would give them a further opportunity to try to resolve the dispute or to prepare themselves for the eventuality of industrial action.

²⁰² See Adler "The Right to Strike in Israel" who refers to s 5A of the Settlement of Labour Disputes Law in this regard.

[219] By the end of the conciliation process most parties have a good idea whether or not the dispute may lead to industrial action if no agreement is reached. The end of the conciliation process is marked by the issuing of the outcome certificate or the expiry of a period of 30 days from the date of the referral of the dispute to the CCMA or a bargaining council for conciliation. Usually, when a dispute is referred to conciliation, there would have been some prior meetings between the parties to discuss the dispute with a view to finding a resolution acceptable to both parties. It is argued that this lengthy process between the time when the dispute arises and the end of the conciliation process is sufficient to enable a party to capitulate and settle the dispute if it seeks to avoid the industrial action, or to take all the necessary steps to protect its interests and mitigate the effects of the industrial action.

[220] It is suggested that, even without a statutory requirement of notice of industrial action, each party would know by the end of the conciliation process that either party may resort to industrial action at any time thereafter. It is argued that parties would know long in advance when the conciliation process would come to an end, and, therefore, when the other party would acquire the right to resort to industrial action, and would thus have an opportunity of preparing itself for the eventuality of industrial action at the end of that period. It is true that neither party would know the exact date when the other would take industrial action.

[221] Currently the Act requires that in respect of a primary strike and a lock-out the notice should specify when the strike or lock-out, as

the case may be, will commence. However, it would be open to parties that seek notice of industrial action to agree to include in their collective agreement a provision prescribing that notice should be given before either party may resort to industrial action. It is argued that, in the current situation where notice is a statutory requirement, unions and workers are unduly and unnecessarily disadvantaged in the power play between them and employers, because this requirement deprives them of the opportunity of to some extent taking the employer by surprise. The notice requirement means that, in the case of a strike, the employer is given a full opportunity to obtain temporary replacement labour before the commencement of a strike. It is argued that this statutory requirement unduly blunts the weapon of a strike. When the strike commences, its effectiveness is less than it otherwise would have been. Under the old Act and its predecessors there was no such requirement and strikes were probably more effective at the time than they are now under the current dispensation.

[222] In conclusion it is thus argued that, in the light of the current statutory process of conciliation, the inclusion of the requirement of notice of industrial action in the Act is unjustified, and such requirement should not have been included as one of the statutory requirements for protected industrial action. It is finally argued that it should have been left to employers and trade unions to negotiate the inclusion of such a requirement in their collective agreements dealing with pre-industrial action procedures.

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