IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA19/2023

In the matter between:

NATIONAL EDUCATION, HEALTH AND ALLIED WORKERS UNION **Appellant**

and

MINISTER FOR THE PUBLIC SERVICE AND ADMINISTRATION **First Respondent**

DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION **Second Respondent**

MINISTER OF FINANCE **Third Respondent**

NATIONAL TREASURY **Fourth Respondent**

PUBLIC SERVICE COORDINATING BARGAINING COUNCIL **Fifth Respondent**

Heard: **10 March 2023**

Delivered: **13 March 2023**

Coram: **Waglay JP, Savage and Gqamana AJJA**

JUDGMENT

THE COURT

Introduction

[1] This appeal is against the judgment and order of the Labour Court (per Van Niekerk J) on 6 March 2023 in terms of which it was found that the respondents had established exceptional circumstances and irreparable harm such as to permit execution of the order granted by the Labour Court (per Tlhothlalemaje J) on 4 March 2023 interdicting a national strike in the public service called by the appellant, the National Education, Health and Allied Workers Union (NEHAWU) on behalf its members.

[2] On 5 March 2023, NEHAWU sought leave to appeal against the order of Tlhothlalemaje J. On 6 March 2023, the first respondent, the Minister for the Public Service and Administration (Minister) and the second respondent, the Department of Public Service and Administration (DPSA), applied for an urgent order under section 18 of the Superior Courts Act[1] (SCA) to execute the order of Tlhothlalemaje J pending determination of NEHAWU's appeal. The same day, the Labour Court granted the section 18 order sought. NEHAWU noted an appeal against that order, the right to appeal being automatic under section 18(4)(ii) of the SCA. This appeal was set down for hearing in this Court on an urgent basis.

[3] On 6 October 2022, the appellant, NEHAWU, together with three other trade unions, referred a mutual interest dispute to the fifth respondent, the Public Service Coordinating Bargaining Council (PSCBC), in respect of public sector wages for the 2022/2023 year. On 1 November 2022, wage negotiations deadlocked and on the same day, the PSCBC declared the dispute unresolved and issued a certificate to this effect, with picketing rules also agreed between the parties the same day. On 17 November 2022, acting under section 5(5)(b) of the Public Service Act,[2] the DPSA implemented its final offer of a 3% across-the-board wage increase to public service employees, backdated to 1 April 2022. On 17 February 2023, the DPSA invited unions to commence negotiations in the PSCBC before the start of the new financial year on 1 April

[1] Act 10 of 2013.
[2] Act 103 of 1994.

2023 in respect of wages for the upcoming financial year, tabling a wage offer for the period from 2023/2024 - 2025/2026.

[4] On 23 February 2023, NEHAWU issued a strike notice in terms of section 64(1)(d) of the Labour Relations Act[3] (LRA), which notice was given to "all Director Generals and Heads of Departments across all departments and provinces (including SASSA, SIU and SANBI)" stating that a strike would commence in seven days, at 06h00 on 6 March 2023 "in all workplaces in the public service, including those of SASSA, SIU and SANBI". The notice set out demands including a 10% increment, R2500 housing allowance increase, the refusal to review PSCBC resolution 7 of 2015 which should be amended to record that resigned or dismissed employees would receive accumulated savings, and the introduction of pay progression "beyond the last notch".

[5] On 26 February 2023, the Director-General of the DPSA informed NEHAWU in a letter that the strike notice included essential services employees in the public service, employees who were prohibited from striking, as well as entities that fall outside of the public service and the scope of the PSCBC. The Director-General asked NEHAWU to confirm in writing that it "will actively ensure that members rendering essential services will not participate in the strike". On 28 February 2023, the DPSA's attorneys wrote to NEHAWU indicating that the union had not responded to the written request on 26 February 2023 that it confirms in writing that employees rendering essential services would not participate in the strike; and that an urgent application would therefore be launched in the Labour Court on 3 March 2023 to have the strike notice set aside on grounds that it was invalid "for reasons stated above".

[6] On 1 March 2023, NEHAWU's attorneys responded to the DPSA's attorneys, stating that –

> '3. To the extent that our client's members, employed by SASSA, SIU and SANBI, appear to intend to embark on a strike as a consequence of the dispute referred to the …PSCBC and our client's Strike Notice dated 23 February 2023, we record:

[3] Act 66 of 1995, as amended.

3.1 Out of an abundance of caution and to avoid any unnecessary debate, hereby confirm that the Strike Notice may be disregarded insofar as it concerns our client's members employed by SASSA, SIU and SANBI; and

3.2 Those members and our client, however, have the right to participate in or conduct a secondary strike, as contemplated by Section 66 of the Labour Relations Act 66 of 1995 ("the LRA"), obviously subject to compliance with the applicable statutory provisions. To this extent, we confirm that you may anticipate that the aforementioned entities will be served with notices as contemplated by Section 66(2)(b) of the LRA.

4. Our client is alive to the limitations on the right to strike, with specific reference to Section 65(1)(d) of the LRA. Our client is equally alive to its other obligations under Chapter IV of the LRA, read with the Picketing Rules issued under auspices of the PSCBC and has no intention to advocate or promote unlawful conduct or conduct beyond the scope as contemplated by the relevant provisions of the LRA or the applicable Picketing Rules. To this extent our client's officials have and will not only be instructed accordingly but also to implement all possible measures to ensure that our client's members comply with the law and Picketing Rules.'

Strike interdict application

[7] The Minister and the DPSA thereafter launched an urgent application in the Labour Court on 3 March 2023 seeking that the strike notice be set aside; that NEHAWU and its members and officials be interdicted and restrained from embarking on the strike, picket or other industrial action planned for 6 March 2023; and that NEHAWU be ordered to inform its members, by whatever means reasonably available to it, that the strike notice has been set aside, that the strike may not proceed as it has been interdicted and that its members may not embark on such strike.

[8] In her founding affidavit filed in support of the interdict application, the Director-General of the DPSA stated that the grounds on which it was sought that the strike notice be set aside were that:

8.1 the notice is "stale" as NEHAWU delayed unreasonably from 1 November 2022 when the dispute was unresolved to 23 February 2023 when it gave notice of its intention to strike;

8.2 the notice is irregular and illegitimate because it includes notice of a strike by employees who are not in the bargaining unit, being SASSA, SIU and SANBI, and by essential services employees who are in the bargaining unit but were prohibited from striking; and

8.3 the strike demands cannot in law be met.

[9] The Director-General stated that the fact that the strike demands, which total R36 billion, are incapable of being met makes the strike –

> …illegitimate, unlawful and unprotected. Government cannot and will not give in to the demands. No budget was approved or voted on to fund the demands. There is no funding to pay for the demands. National Treasury (as is required by law) will not approve the demands if there are no funds to pay for them….'

[10] It was contended that the strike is also illegitimate and unlawful in that it does not serve a legitimate collective bargaining purpose and is "an abuse of the right to strike under section 64 of the LRA" since NEHAWU knew that the government had implemented its final offer, there was no time, budget or funds left for meaningful engagement, the strike is "destructive of the negotiations and collective bargaining over the 2023/24 period" and is "not conducive to speedy resolution of disputes and orderly collective bargaining". No alternative adequate remedy was stated to exist other than an interdict. The injury reasonably apprehended is that the strike is across the public service, is threatened to go on indefinitely, will affect service delivery and is impermissible insofar as it extends to essential services and SASSA, SIU and SANBI. Consequently, the Minister and the DPSA sought the grant of a final interdict.

[11] In opposing the application, it was stated for NEHAWU that there is no support in law for the contention that the strike notice is stale. NEHAWU stated that it had responded that SASSA, SANBI and SIU could be excluded from the ambit of the strike notice and the strike notice disregarded to the extent that it mentions such entities. The union stated that its members at such entities "have been and will be advised that their participation in the strike may be regarded as unlawful, should they participate… in [it]". As to essential workers, NEHAWU contended that the strike notice did not refer to essential services employees and that the DPSA's concerns ought to have been "laid to rest" by paragraph 4 of NEHAWU's response on 1 March 2023 to the letter of 26 February 2023.

[12] As to its demands, NEHAWU contended that it had not been pleaded by the Minister and the DPSA that the demands made are unlawful but only that the demands cannot be met. In this regard, NEHAWU was of the view that the Minister and the DPSA were seeking a determination of the reasonableness of the demands, effectively seeking to impose parameters for any further negotiations in this regard which would defeat the objects of section 23 of the Constitution.

Judgment of the Labour Court

[13] Having heard the application on an urgent basis, the Labour Court granted an order on 4 March 2023 in terms of which:

> 'i. The strike notice issued by NEHAWU on 23 February 2023 was set aside;
>
> ii. The strike action, picket, or any other form of industrial action that is planned by NEHAWU to commence at 06h00 on Monday, 6 March 2023 is interdicted;
>
> iii. NEHAWU and its members employed by the [DPSA] are interdicted and restrained from commencing with or participating in a strike or strike action;
>
> iv. NEHAWU is ordered to inform its members and officials and all persons to whom it had given notice of the strike, of the order of this court, by

> whatever legal means are available to it, by no later than 18h00 on Sunday 5 March 2023.'

[14] The Labour Court considered the four grounds on which the Minister and DPSA sought to have the strike notice set aside and found that:

> 'With the clear knowledge of the limitations on the right to strike, NEHAWU for reasons that are not clear, chose to include employees and workplaces that ordinarily would not have been involved in its strike action. On that basis alone, the notice to strike was not only defective but also unlawful to the extent that it fell foul of the very limitations of section 65 of the LRA that NEHAWU had acknowledged.'

[15] The Court noted that "rather than withdrawing the strike notice and issuing a fresh one, it chose to address the defect through correspondence from its attorneys of record"; and that such correspondence could not be equated with a notice contemplated in section 64(1)(b) or (d) of the LRA. The Court found it to be "even worse" that this was done belatedly on 1 March 2023. The result is that, due to the ambiguity and uncertainty created by NEHAWU, members of NEHAWU in "all the workplaces in the public service", those rendering essential services and those employed in SASSA, SIU and SANBI, would be joining the strike. This was given that NEHAWU had not made any effort to rectify "the fatal notice by formally withdrawing it and re-issuing a lawful and unambiguous one" to allow the DPSA and other departments to readjust their alternative arrangements and ensure orderly collective bargaining. The Court took the view that –

> '…such fatal defects could not have been rectified by mere correspondence to the DPSA, with mere assurances that NEHAWU was aware of the limitations to strike. More was required, and there was nothing in the answering affidavit indicating that more was done to ensure that those ordinarily excluded from the strike action would duly report for duty.'

[16] Furthermore, NEHAWU, while stating that it had made concessions regarding the essential services and the three entities that did not fall within the bargaining unit, continued to oppose the application as a whole. It did not, as is the case in this appeal, indicate that it would not object to an order against the essential

services employees and those employed within SASSA, SIU and SANBI. Given the failure to exclude these categories of employees from the ambit of the strike notice, such notice was found to be defective, with the Court considering it unnecessary to consider whether the notice was stale or whether it contains demands that cannot be met.

[17] NEHAWU immediately applied for leave to appeal that judgment.

Section 18 application

[18] On 6 March 2023, the Minister and the DPSA brought an application in terms of section 18 of the SCA for leave to execute the order of the Labour Court on the basis that exceptional circumstances exist and that the government is likely to suffer irreparable harm, with 1 224 653 public servants in the bargaining unit, of which 582 000 are essential services employees and 642 653 are non-essential service employees, while NEHAWU and its members are not likely to suffer such harm if the Labour Court's order were to not to be brought into effect pending appeal. Excluding essential services employees, it was contended that all national and provincial departments will be affected by the strike and all public services, including education, health, police services, home affairs, social development, correctional services and the PSCBC, with an impact on the delivery of services to the public. This in circumstances in which the strike is "illegitimate" and, it was submitted, the appeal has no prospects of success. National Treasury has not budgeted for these increases, nor does it intend to do so because there is no budget and no funding for this. Since the strike demands require approval of additional funding for the 2022/23 financial year that ends on 31 March 2023 and will not be approved by National Treasury in the manner required by Regulations 78 and 79 of the Public Service Regulations, 2016, the collective agreement that NEHAWU seeks to compel the Minister and the DPSA to conclude would be unlawful.

[19] NEHAWU opposed the section 18 application *inter alia* on the basis that the harm alleged is of a general nature on the part of the public and the government as a whole and not beyond what occurs in industrial action. In contrast, NEHAWU claimed its members would suffer irreparable harm in that substantial

expenditure had been incurred in relation to "a national strike of this magnitude", costs which cannot be recovered. It was denied that there is any ulterior motive behind the strike.

[20] In reply, it was stated that having commenced the strike, NEHAWU and its members had barricaded the entrance to the DPSA's premises, with security officers reporting for work prevented from entering the premises and reports received of tyres burning at the education offices in Kimberley, and human excrement having been dropped at the entrance of Leratong Hospital on the West Rand, where barricades were in place with tyres burning. As a result, it was contended that the order sought is urgent.

Judgment of the Labour Court in section 18 application

[21] The Labour Court in its judgment in the section 18 application took account of the fact that section 18(3) places a substantial onus on the applicant and that sections 18(1) and (3) provide for a twofold enquiry, with it required that exceptional circumstances be shown to exist and proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not put into operation and that the other party will not. The Court found that if interim enforcement of the order is not granted, the respondents will be allowed to engage in unprotected industrial action, which, given NEHAWU's statement issued after service of the application for leave to appeal, indicates in no uncertain terms that this is precisely the union's intention. This statement was to the effect that the order setting aside the strike notice and interdicting the strike will automatically be suspended pending the outcome of the application for leave to appeal and that –

> '(w)e therefore confirm the strike continues as planned on 06 March 2023' (our emphasis).

[22] Van Niekerk J found that the union had illustrated no irreparable harm to exist and that the jurisdictional requirements for an order had been met. Consequently, the applicants were granted leave to execute the order issued by Tlhothlalemaje J on 4 March 2023.

Submissions on appeal

[23] It was submitted for NEHAWU that the granting of an order under section 18 to allow the interdict to be executed pending an appeal, when no exceptional circumstances had been demonstrated by the State, constituted an extraordinary deviation from the norm. The strike notice was not defective and the interdict ought not to have been granted in the first place, and the harm that the State stood to suffer was not proportionate to the relief granted by the Labour Court. At best, for the State, the strike was unprotected only to the extent that the strike notice was defective in that it did not exclude essential services and impermissibly included three organs of state not party to the dispute. In interdicting the entire strike, the employees' right to strike in the rest of the public service was impermissibly eroded. The strike interdict ought therefore only to have been executed in the impermissible areas of essential services, SASSA, SIU and SANBI. Further, that the order of the Labour Court in the section 18 application ought to have been an interim order pending the finalisation of the principal appeal.

[24] The Minister and the DPSA opposed this appeal on the basis that exceptional circumstances are to be found in the fact that the strike is unlawful, prohibited and illegitimate; that the scope of the strike impermissibly includes essential services and SASSA, SIU and SANBI; and that it impermissibly intrudes on the constitutional obligation to health care. Furthermore, the strike cannot be permitted when, if successful, it would lead to a collective agreement that would be in breach of Regulations 78 and 79 in respect of a financial year that ends in 25 days' time and the strike serves no sensible or lawful purpose. NEHAWU, it was submitted, made out no case that it will suffer irreparable harm and given that it was not possible for this Court to partially uphold the appeal so as to ensure that essential services were interdicted from striking, the entire strike should properly be interdicted.

[25] The Minister and the DPSA sought leave to have admitted a supplementary affidavit deposed to by the Chief Negotiator of the State at the DPSA, providing details of the shutdown of hospitals countrywide as a result of NEHAWU's inclusion of essential services employees in its strike notice and of reports of

essential services workers engaging in, alternatively being forced to engage in strike activity by other striking employees or NEHAWU office bearers in some instances. In particular, on 6 March 2023, the Chief Negotiator received a report of barricades and burning tyres near Leratong Hospital. On 7 March 2023, he received a report from the National Department of Health listing health facilities that have closed as a result of the strike, with essential services employees striking and patients being barred from entering health facilities. This is a grave situation and worsening, with the risk of a countrywide health crisis ensuing. Attached to the Chief Negotiator's affidavit was a report of incidents at various health facilities around the country, including of acts of violence and intimidation. The list of incidents reported includes the physical assault of staff attempting to work at hospitals, the forcible removal by striking workers of staff from their posts, preventing oxygen delivery to hospitals, failure to provide urgent and necessary medical services to patients which led to instances such as the deaths of at least two newborn babies, the failure to provide anti-venom to a snake bite victim and unquantifiable numbers of patients unable to access healthcare required, as well as the limited assistance provided by the South African Police Services (SAPS) in some instances despite being on the scene. A confirmatory affidavit of the Chief Director of Bargaining in the Health Sector confirmed the reports attached to the supplementary affidavit.

[26] NEHAWU denied, in a supplementary affidavit deposed to by the head of its legal department, that it had called essential services members or employees at SASSA, SIU or SANBI out on strike and stated that it had never been its intention for these workers to join the strike. It was noted that many of its members employed in the Department of Health are not classified as essential services and that NEHAWU had taken steps to not include essential services employees, or those of SASSA, the SIU or SANBI, in the strike. Although it claimed that it had sought that its members desist or refrain from violence and any other unlawful activity, NEHAWU acknowledged that it "remains alive thereto that some essential services employees (members or not), may of their own volition decide to participate in the strike, purely as a result of their frustrations and Government's persistent refusal to engage [in] negotiations in pursuit of a Minimum Service Level Agreement" in order "to alleviate any risks

should essential services employees involve themselves in the strike" and ensure service delivery. However, the union put up a letter from the Western Cape Government Department of Health in which it made clear that it is for the Essential Services Committee to facilitate the conclusion of collective agreements on minimum service levels for employees involved in essential services and that no such agreement had been entered into in the health sector. The union stated that it did not condone the fact that "several essential services employees joined the strike" and that on 8 March 2023, its General Secretary instructed its leadership "to discourage all members of NEHAWU, employed within essential services, from participating in the strike", an instruction reiterated in an email on 9 March 2023 in which it was stated:

> '…we kindly ask your provincial and regional leadership to dissuade all members in the essential service not to participate in the strike while other categories outside the definition of essential service continues with peaceful and intimidative free strike. We further request that those at the picket line should allow access to hospitals and clinics to communities for service.'

[27] It was recognised that the strike had been joined by non-union members and citizens who are not public servants who –

> 'have engaged in violent and disruptive behaviour or criminality. At the same time, this should not be construed as denying that there may have been members of NEHAWU that have engaged in violent behaviour, but it must be emphasised that NEHAWU most definitely does not condone such behaviour. NEHAWU intends to investigate any unlawful or violent behaviour of its members and will not hesitate to instill discipline on members who have made themselves guilty of such conduct, to the extent necessary.'

[28] NEHAWU recognised that, given the acts of criminality committed in relation to the strike, various interdicts had been obtained in Gauteng, Free State, KwaZulu-Natal, Northern Cape, Eastern Cape and the Western Cape, which applications the union had not opposed. It stated that letters were sent requesting branch general membership meetings to update members about the court orders and interdicts granted and to record that NEHAWU does not "advocate for any unlawfulness and only members that are lawfully permitted

to strike should continue to do so". The union recorded its willingness to participate in a facilitation called for by the PSCBC.

Evaluation

[29] This Court in *Road Traffic Management Corporation v Tasima (Pty) Ltd*,[4] accepted that section 18 applies to the Labour Court. The provision states that:

> '(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
>
> (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
>
> (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
>
> (4) If a court orders otherwise, as contemplated in subsection (1) –
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> (i) the court must immediately record its reasons for doing so;
>
> (ii) the aggrieved party has an automatic right of appeal to the next highest court;
>
> (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

[4] (2019) 40 ILJ 1785 (LAC).

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.'

[30] To obtain relief under section 18 in this matter, three requirements must therefore be present: (i) exceptional circumstances, in terms of section 18(2), to justify reversing the ordinary rule of suspension of the order pending an appeal; (ii) proof on a balance of probabilities, in terms of section 18(3), that the Minister and the DPSA will suffer irreparable harm if the operation and execution of the order is not given interim effect; and (iii) in terms of section 18(3), that NEHAWU and its members will not suffer irreparable harm if the order is immediately put into operation.

[31] In *Incubeta Holdings (Pty) Ltd and another v Ellis and another*[5] (*Incubeta*), it was recognised that "exceptionality must be fact-specific"[6] and that section 18(3) does not entail a determination of "a balance of convenience or of hardship" but a different approach, namely –

> 'that if the loser, who seeks leave to appeal, will suffer irreparable harm the order must remained stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself.'[7]

[32] The Court stated that a "hierarchy of entitlement has been created" which requires –

> '(t)wo distinct findings of fact… rather than a weighing up to discern a 'preponderance of equities'. The discretion is indeed absent, in the sense articulated in *South Cape*. What remains intriguing however, is the extent to which even a finding of fact as to irreparable harm, is a qualitative decision

[5] 2014 (3) SA 189 (GJ).
[6] Id at para 22.
[7] Ibid at para 24.

admitting of some scope for reasonable people to disagree about the presence of the so called "fact' of 'irreparability'."[8]

[33] The Supreme Court of Appeal (SCA) in *University of the Free State v Afriforum and another*[9] approved of the decision in *Incubeta*, recognising that section 18(3) "has introduced a higher threshold, namely proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted and conversely that the respondent will not, if the order is granted".[10] As to prospects of success, the SCA noted the contrasting views expressed in *Incubeta*, where it was considered that prospects of success play no role at all, and in *Minister of Social Development, Western Cape and others v Justice Alliance of South Africa and another,*[11] in which prospects of success in the appeal were found to remain a relevant factor, and found that a consideration of "prospects of success in the appeal are relevant in deciding whether or not to grant the exceptional relief"[12] of an order under section 18.

[34] In *Incubeta,* the Court took the view that finding whether "exceptional circumstances" exist or not is a fact-specific enquiry, with "circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves" and that no "true novelty has been invented by section 18 by the use of the phrase".[13] In arriving at this view the Court had regard to the decision in *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas and another,*[14] in which the words "exceptional circumstances" were considered in a different context, namely section 5(a)(iv) the Admiralty Regulation Act.[15] There, it was found that the words contemplate something out of the ordinary and of an unusual nature, in the sense that the general rule does not apply to it, with the determination of whether exceptional

[8] Ibid.
[9] 2018 (3) SA 428 (SCA).
[10] Id at para 10.
[11] [2016] ZAWCHC 34.
[12] Supra n 11 at para 15.
[13] Id at para 22.
[14] 2002 (6) SA 150 (C) at 156I – 157C, referred to at para 17 of *Incubeta*.
[15] Act 105 of 1983.

circumstances exist not being a matter of judicial discretion, but a matter of fact.[16]

[35] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and another*,[17] also in a different context, namely an exceptional circumstances enquiry under section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act,[18] it was made clear that "(i)n our constitutional framework, a court considering what constitutes exceptional circumstances must be guided by an approach that is consonant with the Constitution".[19] The Court emphasised that "the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances".[20]

[36] At the outset and relevant to an enquiry as to exceptional circumstances is the approach taken in our law to the right to strike. Section 23(2) of the Constitution provides that:

> '(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.'

[37] No similar constitutional protection exists in respect of a lockout. In *NUMSA and others v Bader Bop (Pty) Ltd and Another,*[21] it was emphasised that:

> 'In section 23, the Constitution recognises the importance of ensuring fair labour relations. The entrenchment of the right of workers to form and join trade unions and to engage in strike action, as well as the right of trade unions, employers and employer organisations to engage in collective bargaining, illustrates that the Constitution contemplates that collective bargaining between

[16] Ibid at 156I – 157C.
[17] 2015 (10) BCLR 1199 (CC).
[18] Act 3 of 2000.
[19] Supra at n 19 at para 43.
[20] Ibid at para 47.
[21] [2003] 2 BLLR 103 (CC) at para 13.

employers and workers is key to a fair industrial relations environment. This case concerns the right to strike. That right is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in section 23, therefore, the importance of those rights in promoting a fair working environment must be understood. It is also important to comprehend the dynamic nature of the wage-work bargain and the context within which it takes place. Care must be taken to avoid setting in constitutional concrete, principles governing that bargain which may become obsolete or inappropriate as social and economic conditions change.'

[38] The purpose of the LRA, as set out in section 1, is "to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are –

'(a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996;

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation;

(c) to provide a framework within which employees and their trade unions, employers and employers' organisations can –

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and

(ii) formulate industrial policy; and

(d) to promote –

(i) orderly collective bargaining;

(ii) collective bargaining at sectoral level;

(iii) employee participation in decision-making in the workplace; and

(iv) the effective resolution of labour disputes.'

[39] Section 3 of the LRA requires that:

'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.'

[40] Section 64 provides that:

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

(a) The issue in dispute has been referred to a council or to the Commission as required by this Act, and –

(i) a certificate stating that the *dispute* remains unresolved has been issued; or
(ii) a period of 30 days, or any extension of that period agreed to between the parties to the *dispute*, has elapsed since the referral was received by the *council* or the Commission; and after that –

(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

…

(*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).

[41] Section 65(1)(d)(i) expressly states that:

> '(1) No person may take part in a *strike* or a *lock-out* or in any conduct in contemplation or furtherance of a *strike* or a *lock-out* if –
>
> …
>
> (d) that person is engaged in –
>
> (i) An essential service…'

[42] There can be no doubt that the strike notice given by NEHAWU in this matter was intentionally broad and recklessly so. It gave notice of the strike "across all departments and provinces (including SASSA, SIU and SANBI)" and "in all workplaces in the public service, including those of SASSA, SIU and SANBI". NEHAWU issued this notice with the knowledge that hundreds of thousands of its members were employed in essential services and that it was impermissible in terms of section 65(1(d)(i) for them to strike, as it was for the union's members at SASSA, SIU and SANBI since these entities did not fall within the public service as defined. When called upon on 26 February 2023 to confirm that it "will actively ensure that members rendering essential services will not participate in the strike", no response was received from NEHAWU in what was clearly a matter of importance and urgency. Similarly, when NEHAWU was informed on 28 February 2023 by the DPSA's attorneys that the union had not responded to the request of 26 February 2023 that it confirms that employees rendering essential services would not participate in the strike, the union responded on 1 March 2023 to confirm that the strike notice "may be disregarded insofar as it concerns our client's members employed by SASSA, SIU and SANBI". To that extent, it follows on NEHAWU's own version that it accepted that a strike by its members in such entities was impermissible. Yet inexplicably and for no clear reason the union opposed the application before the Labour Court to interdict its members in such entities from continuing to strike.

[43] A more deplorable approach, with the gravest and, in some instances it appears, deadly consequences, was the approach of NEHAWU to the strike by its members employed in essential services. In this regard, the union and its members illustrated a flagrant disregard for the law, the employer and the people of this country entitled to access essential public services. Despite being

called upon to confirm that the union "will actively ensure that members rendering essential services will not participate in the strike", NEHAWU failed expressly to confirm as much and stated only that it was "alive to the limitations of the right to strike, with specific reference to section 65(1)(d)" and that its "officials have and will … be instructed…to implement all possible measures to ensure that [the union's] members comply with the law and Picketing Rules". Having been aware that it had issued a strike notice which, in breach of the law, did not exclude essential service workers, NEHAWU's response was patently deficient given the seriousness of the risk that its members employed in essential services would strike on the basis of the wide scope of the notice given by NEHAWU. The only conclusion which can be drawn from NEHAWU's conduct in this regard is that, well aware that the strike notice did not expressly exclude essential services and that a strike by such employees was in breach of the law, the union nevertheless was content simply to let the situation unfold and make limited efforts, if at all, to prevent this. Had it sought to halt a strike by essential services workers it would have taken immediate, drastic and unequivocal action to do so. It did not and for this, the union and its members in such essential services must ultimately bear responsibility which is found to lie at their doorstep. There can be little doubt that this breach of the law, one acknowledged by the union, provided the exceptional circumstances and the irreparable harm to the employer (and none to the union) as contemplated in section 18. It follows that in such circumstances, the decision of the Labour Court, to find the existence of exceptional circumstances and irreparable harm to be sustained by the employer and not the union and its members such as to permit the enforcement of the interdict against those employees on strike who are employed in essential services and at SASSA, SIU and SANBI, was warranted.

[44] This Court was inclined for such reasons at the hearing of the matter to grant an *ex tempore* order to ensure the implementation of the interdict against the above categories of employees, more so given the urgency of the matter and reports of serious acts of criminality, misconduct and intimidation by such striking workers around the country, many of whom appear to be health care workers employed in hospitals, clinics and other essential services workers.

However, in argument, it was contended by counsel for the Minister and the DPSA that it would be impermissible for this Court to dismiss the appeal only in part, with a partial order inapposite, and that it was incumbent on the Court to dismiss the appeal in its entirety. In support of this contention, it was argued that given the inclusion of essential service workers and those employed at SASSA, SIU and SANBI in the strike notice, such notice was unlawful and that it was a consequence of such unlawfulness that the entire strike was interdicted. For this reason, it was contended, a section 18 order was warranted against the entire strike given that the irregular nature and unlawfulness of the strike notice which provided the exceptional circumstances to justify such an order.

[45] Yet, the Constitutional Court has found against reading implied limitations into section 64(1)(b) given the constitutional protection given to the right to strike. In *South African Transport and Allied Workers Union (SATAWU) and others v Moloto NO and another,*[22] the majority of the Court emphasised the fundamental importance of the strike right, the objectives of the LRA, and the purpose of the strike notice requirement all of which were found to weigh against reading implied limitations into a provision which requires no more than the employer must generally be given 48 hours' notice in writing (or seven days in the case of the State) of the commencement of a strike, with no requirement that a strike notice must indicate who will take part. Further that:

> 'The point of departure in interpreting section 64(1)(a) is that we should not restrict the right to strike more than is expressly required by the language of the provision, unless the purposes of the Act and the section on "a proper interpretation of the statute ... imports them". The relevance of a restrictive approach is to raise a cautionary flag against restricting the right more than is expressly provided for. Intrusion into the right should only be as much as is necessary to achieve the purpose of the provision and this requires sensitivity to the constraints of the language used.'[23]

[22] [2012] 12 BLLR 1193 (CC).
[23] Ibid at para 54.

[46] The Constitutional Court for these reasons found that non-SATAWU members were not required to refer a fresh dispute to the CCMA when the employer could hardly have interpreted the notice to mean that it included only SATAWU members. In the current matter, in which a notice of the strike was given, albeit in respect of some categories of employees who were not entitled to strike, exceptional circumstances and irreparable harm to the employer do not appear to exist to such as to warrant the imposition of a section 18 order against the order interdicting the strike by non-essential service workers. Support for this conclusion is to be found in the decision of this Court in *Imperial Cargo (Pty) Ltd v Democratised Transport Logistics and Allied Workers Union and others,*[24] in which a defective strike notice led to the grant of a narrow interdict which targeted the impermissible parts of the notice, with workers free to strike over the demands which were permissible. The Court stated:

> 'The respondents are correct in their contention that the right to strike in pursuit of a permissible demand did not evaporate upon the addition of the three impermissible demands. If the second demand is a permissible demand, the respondents may embark on a protected strike over it. But it does not follow that the appellant was not entitled to orders prohibiting a strike over the impermissible demands. The Labour Court erred in not making such orders.'[25]

[47] Further support for such a finding is to be found in the decision of the Constitutional Court in *SA Police Service v Police and Prisons Civil Rights Union and Another*,[26] in which the principle was reiterated that the right to strike should not be eroded by reading in undue limitations:

> 'There are other considerations which further highlight the difficulty with the applicant's interpretation. Section 38(1) of the SAPS Act implies a distinction between members and "other employee[s] of the Service". Section 41(1) of the SAPS Act is significant. Consistently with section 65(1)(d)(i) of the LRA that limits the right to strike by those engaged in an essential service, section 41(1) provides that "[n]o member shall strike, induce any other member to strike or conspire with another person to strike". Sections 41(1) and 65(1)(d)(i) imply

[24] (2019) 40 ILJ 2499 (LAC).
[25] Ibid at para 13.
[26] 2011 (9) BCLR 992 (CC) at para 36.

> that non-members and those not "engaged in an essential service", respectively, are not statutorily prohibited from striking. It is inconceivable that the non-member employees, who have not been designated and deemed to be members in terms of section 29 of the SAPS Act, can perform duties and functions contemplated in section 13 of the SAPS Act and section 205(3) of the Constitution, which, strictly speaking, are generally "assigned to a police official", as contemplated in section 13(1).'

[48] Although it will be dealt with on appeal, this Court is entitled to have regard to the prospects of success on the merits of the order of Tlhothlalemaje J in deciding this appeal.[27] It is somewhat difficult to understand the contention advanced for the Minister and the DPSA that the demands contained in the strike notice are unlawful and in breach of Regulations 78 and 79 of the Public Service Regulations, 2016 because "National Treasury has not and will not approve" the cost of the additional wage increase sought due to budgetary constraints and that any collective agreement concluded would be in breach of the Regulations and that the strike is on this basis unlawful. Similarly, that the strike is unlawful because the strike notice is "stale" given the period of time that has lapsed between the certificate of non-resolution being issued following conciliation and the issue of the strike notice; and that the demand for the increase sought is for a financial period about to end on 31 March 2023.

[49] A strike uses collective action and the withdrawal of labour as an exercise of power in an attempt to press an employer to meet certain employee demands. An employer's claim that it will not accede to such demands or that it has not budgeted for or obtained the required approvals to accede to such demands does not necessarily make either the demands or the strike itself unlawful. None of the contentions advanced for the Minister and DPSA provide exceptional circumstances which would warrant the entire strike being interdicted pending appeal. What these submissions indicate is an approach to collective bargaining in the public service which appears to fail to understand the inherent nature of the power play between the parties and the right of unions and employees to exercise collective power in support of workplace demands,

[27] Supra fn 11.

recognising the applicability of Regulations 78 and 79 as confirmed by the Constitutional Court in *National Education Health and Allied Workers Union v Minister of Public Service and Administration and Others and related matters*.[28] What the current strike appears to evidence is the consequence of a breakdown of trust between parties in the collective bargaining process resulting from the events which transpired in that matter. Whether in a public or private sector context, events such as those undoubtedly require an active and concerted effort to rebuild that trust in the collective bargaining process, however as stated earlier, we leave this for the court hearing the appeal on the interdict, to finally resolve.

[50] In *Commercial Stevedoring Agricultural and Allied Workers' Union and others v Oak Valley Estates (Pty) Ltd and another*,[29] the Constitutional Court held that:

> 'Where a person lawfully exercises their right to protest, strike or assemble, but is nonetheless placed under interdict, that person's constitutionally protected rights are impermissibly denuded…'[30]

[51] As was recognised in *SALGA v SAMWU,*[31] the harm that flows from a protected strike is not exceptional, with –

> '…the convenience of third parties, the disruption of services and economic loss are not factors that rank highly when considering the legitimacy of industrial action. Rather, these are inevitable consequences which underpin the purpose of industrial action in any democratic society.'[32]

[52] The shocking reports of widespread strike misconduct and intimidation, which appear to characterise the current strike and which have resulted in unopposed interdictory relief being granted against NEHAWU and its members in most provinces, are not disputed by NEHAWU. Such conduct is not only illegal but wholly unjustified and unwarranted. By doing so, NEHAWU and its members display a total disrespect for the law. Yet, even in spite of this, as was stated by

[28] 2022 (6) BCLR 673 (CC).
[29] [2022] 6 BLLR 487 (CC).
[30] Id at para 41.
[31] [2008] 1 BLLR 66 (LC).
[32] Id at para 17.

the Constitutional Court in *South African Transport and Allied Workers Union and another v Garvas and others (City of Cape Town as Intervening Party and Freedom of Expression Institute as Amicus Curiae)*[33]–

> '[A]n individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour.'[34]

[53] This is so even where overwhelming public opinion may appear hostile to a particular strike, its public impact and the unlawful (and even lawful) conduct of strikers. Within the context of our deeply troubled and divided history and the continued violence of South African life to which so many people are continually exposed, there remain serious and continued challenges in how to address criminal and violent misconduct, such as that commonly witnessed during strike action and which too often characterises industrial relations in this country. The Labour Court is inundated with applications to interdict unlawful conduct, violence and intimidation in the course of protected strikes, such as those granted against NEHAWU and its members in relation to the current strike, with the SAPS directed to enforce such orders in the face of repeated instances of apparent police inaction. It is perhaps appropriate to note that the inaction of the SAPS in the face of criminal behaviour is extraordinary. It has become commonplace for the SAPS to walk away from scenes of criminal behaviour in a strike context, calling it a private or civil matter. Criminal conduct is neither private nor a civil matter. The SAPS are obliged to maintain law and order. It is their duty to act to enforce the law and not to await a court to order them do so.

[54] Enforcing the boundaries of permissible lawful industrial action, within the context of the constitutional right to fair labour practices, the right of workers to organise, bargain collectively and strike, requires diligently ensuring continued adherence to due process and upholding the rule of law. The order made in this matter reflects that effort.

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[33] 2012 (8) BCLR 840 (CC).
[34] Id at para 53 and the cases referred therein .

[55] The order we make carries with it a duty upon NEHAWU to publicise this order widely, including to its members, at the pain of being found guilty of contempt. In the event that the union's members are found to have flouted this order or deny any knowledge of it, it will fall to NEHAWU to explain this failure.

[56] Having regard to considerations of law and fairness, and given that the appeal is in part successful, no order of costs is warranted in this matter.

[57] For all of these reasons, it is ordered that:

Order

1. The appeal succeeds in part with no order as to costs.

2. The order of Van Niekerk J in case number J2281/23 on 6 March 2023 is substituted with the following order:

> "Pending the final determination of the application for leave to appeal and any ensuing appeal, the order of Tlhothlalemaje J on 4 March 2023 is, in terms of section 18 of the Superior Courts Act 10 of 2013, to be executed immediately in the following respects:
>
> 1. The strike action, picket, or any other form of industrial action by NEHAWU, its members and employees who are employed in an essential service, as defined in section 61(1)(d) of the Labour Relations Act 66 of 1995, which commenced on 6 March 2023 is interdicted with immediate effect and NEHAWU and all such essential service employees are restrained and prevented from continuing with or participating in any such strike, picket or any other form of industrial action;
>
> 2. The strike action, picket, or any other form of industrial action by NEHAWU, its members and employees employed at SASSA, SIU and SANBI which commenced on 6 March 2023 is interdicted with immediate effect and NEHAWU and all such employees are restrained and prevented from continuing with or participating in any such strike, picket or any other form of industrial action.

3. NEHAWU is ordered to inform its members and officials and all persons to whom it had given notice of the strike in every province, including but not limited to every hospital and clinic in South Africa at which it has members within the essential services, of the order of this Court, through publication on social media, by email and by all other appropriate means available to it, by no later than 13h00 on Monday 13 March 2023.

4. This order remains in force until the final determination of the appeal against the order of Tlhothlalemaje J above."

THE COURT

Per Waglay JP, Savage and Gqamana AJJA

APPEARANCES:

FOR APPELLENT:	F Boda SC Instructed by Scholtz Attorneys
FOR FIRST AND SECOND RESPONDENTS:	T J Bruinders SC, N Lewis and J Thobela-Mkhulisi Instructed by CN Phukubje Inc. Attorneys