



**CONSTITUTIONAL COURT TO HEAR LEAVE TO APPEAL APPLICATION INVOLVING
NUMSA VS TRENSTAR
2 February 2023
Press Alert**

The constitutional court will be hearing an application brought by the National Union of Metalworkers of South Africa (NUMSA) for leave to appeal against judgments of the Labour Court and the Labour Appeals Court (LAC). NUMSA seeks clarification on the interpretation of section 76(1)(b) of the Labour relations Act.

The matter is involving Trenstar which deals with internal logistics of parts within the Durban plant of Toyota South Africa.

Details of the court hearing below:

Date : 2 February 2023

Time : 10 am

Address : Constitutional Court of South Africa, Constitution Hill, 1 Hospital St, Braamfontein, 2017

Below is a media summary of the case as provided for by the Constitutional Court:

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court. On 2 February 2023, at 10h00, the Constitutional Court will hear an application for leave to appeal against judgments of the Labour Court and Labour Appeal Court. The applicant is the National Union of Metalworkers of South Africa (NUMSA), a trade union acting on behalf of its members who are employed by the respondent. The respondent is Trenstar (Pty) Limited (Trenstar).

Trenstar undertakes all the internal logistics of parts within the Durban plant of Toyota South Africa Manufacturing (TSAM). Trenstar's operation and employees are housed within the TSAM plant. For the past ten years, the parties have annually negotiated on whether to implement the salary increase captured in the collective agreement reached at the National Bargaining Forum (NBF agreement) between the original equipment manufacturers of South Africa and NUMSA. The NBF agreement governs the terms and conditions in the automotive manufacturing industry. In March 2020, the parties accordingly agreed to a 9% wage increase that would be effective from 1 April 2020 to 30 March 2021.

In addition to the wage increase, NUMSA, on behalf of its members, later requested a once-off taxable gratuity of R7,500 per employee (the demand). The parties were unable to reach an agreement in respect of the demand and so NUMSA referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) for conciliation on 28 July 2020. On 26 October 2020, NUMSA's members embarked on a strike in support of the demand. On 20 November 2020, NUMSA notified Trenstar that the strike action would be suspended with effect from close of business on that day, Friday, 20 November 2020 and that its members would return to work at 07h00 on Monday, 23 November 2020.

Shortly afterwards, on the same day, Trenstar notified NUMSA that it would lock out its members from 07h00 on Monday, 23 November 2020. The lock-out notice demanded that NUMSA's members drop and waive their demand for payment of the once-off taxable gratuity of R7500. The lock-out notice further recorded that section 76(1)(b) of the Labour Relations Act (LRA) was applicable as the lock-out was in response to NUMSA's strike action. Section 76(1)(b) permits the use of replacement labour during a lock-out when the lock-out is "in response to a strike". NUMSA contended that the use of replacement labour was impermissible as the strike had been suspended, thus the lock-out was not in response to a strike. Trenstar disagreed, contending that the lock-out was indeed in response to the strike.

NUMSA approached the Labour Court for an order interdicting Trenstar from using replacement labour. It contended that there was no longer a strike, as defined in section 213 of the LRA, as its members had suspended the strike and communicated their intention to return to work. The Labour Court dismissed NUMSA's application. It reasoned that the underlying dispute had not been resolved as NUMSA had not accepted Trenstar's demand nor had it abandoned the demand that informed the original strike action. NUMSA had suspended, not abandoned, the strike. The lock-out was, according to the Labour Court, in response to a strike and therefore the use of replacement labour was lawful under section 76(1)(b). Following this judgment, NUMSA accepted Trenstar's lock-out demands and the lock-out ended. NUMSA nevertheless appealed to the Labour Appeal Court (LAC), since it regarded the legal question as being of ongoing importance. The LAC found that the matter was moot. It further held that it was not in the interests of justice for it to determine the matter as its interpretation of section 76(1)(b) would amount to no more than "an advisory opinion". The LAC accordingly dismissed the appeal.

Before this Court, NUMSA seeks clarification on the interpretation of section 76(1)(b). NUMSA concedes that the relief it sought in the Labour Court and Labour Appeal Court has become moot. However, it submits that the matter engages this Court's jurisdiction because the meaning of "in response to a strike" under section 76(1)(b) has been interpreted in conflicting ways by judgments of the Labour Court and that it is of general public importance that the legal position be clarified by this Court.

On the merits, NUMSA submits that the following two judgments demonstrate the conflicting interpretations of section 76(1)(b). In *National Association of South African Workers obo Members v Kings Hire CC 2020 3 BLLR 312 (LC)* (Kings Hire) the Labour Court held that once a lock-out is categorised as defensive, its nature does not change to being offensive if the employees decide to end their strike. The exemption to the prohibition to use replacement labour accordingly continues to apply for so long as the employer persists in the lock-out or until the employees capitulate to the employer's demand.

On the other hand, in *South African Commercial Catering and Allied Workers Union v Sun International 2016 (1) BLLR 97 (LC)* (Sun International) it was held that the exception to the prohibition against using replacement labour ceases to apply once the employees tender to return to work and are no longer on strike. NUMSA aligns itself with the latter case. On this interpretation, as soon as the strike ends, a lock-out that persists will be categorised as offensive and the use of replacement labour will accordingly be unlawful.

Trenstar opposes the application and submits that the application should be dismissed as the issue is moot. It argues that an order by this Court will have no practical effect as the law is clear, and the issue has no importance for the parties or the industrial relations community at large. Trenstar further submits that there is no merit to NUMSA's argument regarding the existence of conflicting judgments. Trenstar contends that there is no need for clarification as there is a factual distinction between the cases. The distinction being that in *Sun International*, the strike had terminated, whereas in *Kings Hire*, the strike was merely suspended before the

commencement of the strike action and the union had reserved the right to resume the strike. The present case is similar to Kings Hire, in Trenstar's submission.

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